

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO.: 978/03

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES APPLICANT

Incorporated as
THE LAW SOCIETY OF THE TRANSVAAL

AND

JACOBUS TAPEDI MASEKA FIRST RESPONDENT

BOPHUTHATSWANA LAW SOCIETY SECOND
RESPONDENT

JUDGMENT

LANDMAN J:

The applicant, the Law Society of the Northern Provinces (NP Law Society) incorporated as the Law Society of the Transvaal, seeks a mandamus against the first respondent, Mr J P Maseka, an attorney practicing within the jurisdiction of this Court, compelling him to produce various records for inspection. The first respondent and the second respondent, the Bophuthatswana Law Society, oppose the application.

Points in *limine*

The first respondent raised several points in *limine*, i.e. non-joinder of the Bophuthatswana Law Society, the absence of the NP Law Society's jurisdiction and the absence of *locus standi* on the part of the NP Law Society. But misjoinder has been cured and the *locus standi* point has been abandoned.

Jurisdiction of the NP Law Society

I turn to deal with the point that the NP Law Society has no jurisdiction in respect of the first respondent. The NP Law Society is the new name for the Transvaal Law Society. As its name suggests the Society had jurisdiction in the Transvaal Province. The territory of the Transvaal Province was eroded when the Republics of Bophuthatswana and Venda were carved out of this province. The Society's name change coincides with the division of the province of the Transvaal into the Provinces of Gauteng, North West, Limpopo and Mpumalanga. The NP Law Society has jurisdiction in these areas (except for the territory of the former Republics).

Two sections of the Attorneys Act 53 of 1979 are particularly relevant to the issue of jurisdiction. The NP Law Society contends that these sections create two independent grounds of jurisdiction.

71. Enquiry by council into alleged cases of unprofessional or dishonourable or unworthy conduct.— (1) A council may in the prescribed manner inquire 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 the province of its society, whether or not he is a member of such society, or of any person serving articles of clerkship or a contract of service with a member of its society, or of any former candidate attorney referred to in section 8 (4). (My emphasis.)

84A. Law Society of Transvaal may exercise certain powers in respect of practitioners practicing in areas of former Republics of Bophuthatswana and Venda. —

Notwithstanding any other law, the Law Society of the Transvaal and its council, president and secretary, may in

respect of practitioners practicing in the areas of the former Republics 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) (a) or (e), (2), 67 (2), 69 (a), (e) or (m), 70, 71, 72, 73, 74(1) (a), (e) and (l), 78, 81 (1) (e) and (l), (2) (a), (a), (e), or (5) or 83 (9), (13) or (15).

(a) Jurisdiction by virtue of enrolment in TPD

Mr Pistor, who appeared for the first respondent, made certain submissions. These submissions were adopted by Mr Mmolawa, who appeared for the Bophuthatswana Law Society, as his own.

- (a) Mr Pistor pointed out that it is common cause that the name of the respondent is on the roll of the High Court in the Transvaal Provincial Division.
- (b) He submitted that if section 71 is intended to mean that, if the name of an attorney is on a roll of a court in one province, the law society of that province could conduct an inquiry in respect of such attorney where that attorney is

practicing in another province where a Law Society exists, then the section would be in conflict with the spirit and express provisions elsewhere in the Act and would render such unreasonable results that one can safely say that such an interpretation results in an absurdity.

- (c) The "golden thread" that runs through several sections of the Act shows that the legislature intended that the jurisdiction in respect of any practicing attorney lies with the law society of the province where that attorney is practicing. He referred to sections 5, 10, 14, 16 and 22.
- (d) It would be absurd to say that a law society in one province (where the name of the attorney is on the roll) would have the right to conduct an enquiry in terms of section 71 but that the law society in the province where he practices should file an application for the removal of his name.
- (e) Consequently he submitted the provision in section 71 respect of an attorney whose name is on the roll in that province but who is not a member of that law society must have been intended to refer to an attorney who is not

practicing within another province where a law society exists. Therefore the applicant does not derive any jurisdiction in respect of the first respondent in the present case from section 71.

I agree with Mr Pistor that the thread running through the Attorneys Act of 1979 is that a law society has jurisdiction over attorneys practicing within its area of jurisdiction. But the legislature is entitled to confer extra territorial jurisdiction on a law society. Prima facie this is what section 71 does. The thrust of Mr Pistor's argument is that where the attorney, who is on the roll in one province but does not practice there. But instead practices in another province, the law society where he or she practices will have jurisdiction to the exclusion of the law society at the place of enrolment. Mr Pistor submits that if this were not so section 71 leads to an absurdity.

If an attorney has committed unprofessional conduct in another province it would not, in my view, be unreasonable for the law society having jurisdiction where he or she is enrolled to seek to investigate the matter. If the investigation warrants further steps that law society could take steps alone or in conjunction with

another law society also having jurisdiction to address the situation.

(b) concurrent jurisdiction on some issues

Mr Pistor submitted with regard to section 84A that:

- (a) The powers conferred on the NP Law Society by virtue of the section under discussion only relates to fidelity fund matters.
- (b) The basis of this submission is that the section was inserted by the provisions of section 5 of Act 115 of 1998 (the 1998 Act) which repealed Chapter 2 of the Attorneys, Notaries and Conveyancers Act 29 of 1984 of the erstwhile Republic of Bophuthatswana (the Attorneys Act of 1984 (B)). See s 6(4). Chapter 2 of the Attorneys Act of 1984 (B) contained provisions that related to fidelity fund matters. At the same time the 1998 Act extended the jurisdiction of the fidelity fund in “South Africa” to attorneys practicing in Bophuthatswana.
- (c) Consequently attorneys in Bophuthatswana were, after the 1998 Act came into operation to consider the South Africa

fidelity fund as their fidelity fund.

(d) It was therefore necessary to extend the powers of the NP Law Society in respect of fidelity fund matters to attorneys in the erstwhile Bophuthatswana. This was done by inserting section 84A.

(e) To read into section 84A any other or wider powers, such as that the NP Law Society was given general powers to inquire into matters other than fidelity fund matters would be an incorrect interpretation and would render the continued existence of the Attorneys Act of 1984 (B) unnecessary. If the legislature intended to entrust (by virtue of section 84A) such wide powers to the NP Law Society, then it could easily have said so and in such event it would have repealed the Act.

(f) The facts of the present case will have to be examined in order to establish whether, by virtue of the nature of the complaint against the respondent it can reasonably be said that the complaint is a fidelity fund matter. If not, then the applicant did not have jurisdiction to enquire into the matter. In such event the applicant has acted *ultra vires* its powers and is not entitled to an interdict.

(g) But he submitted that it is not for the applicant to decide whether a matter is a fidelity fund matter. Such decision will have to be taken by the fidelity fund which is an entity entirely separate from the Law Society. See **Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A)** at 751 F.

The legal regulation of an attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and not altogether satisfactory.

Prior to the enactment of the Attorneys Amendment Act 115 of 1998, which came into effect on 15 January 1999, such an attorney fell within the jurisdiction of the Bophuthatswana Law Society by virtue of the Attorneys of 1984 (B). This Act made provision for the establishment of a Fidelity Fund. See chapter 2 of the Act. Regrettably no such fund was brought into existence. Only in 1998 did this problem receive the attention of the South African Legislature.

In addition the different requirements for admission as an attorney prevailing in the former TBVC countries and the rest of the country created a great deal of hardship and inconvenience to aspirant attorneys from those areas. See "Minister urges Law Societies to speed up its drafting of new Act" March 1999 **De Rebus** 12.

Lastly there seems to have been another problem which probably related to the capacity of the Bophuthatswana and Venda Law Societies to fulfil their statutory functions.

In essence section 84A provides that notwithstanding any other law, the NP Law Society may in respect of practitioners practicing in the area of the former Republic of Bophuthatswana perform any

function “which is similar to a function assigned to that Law Society” by section 22 (1) (a) or (e), (2), 67 (2), 69 (a), (e) or (m), 70, 71, 72, 73, 74(1) (a), (e) and (l), 78, 81 (1) (e) and (l), (2) (a), (a), (e), or (5) or 83 (9), (13) or (15) of the Attorneys Act of 1979.

The reference in section 84A to “that Law Society” seems to be intended to refer to another law society i.e. the Bophuthatswana Law Society or the Venda Law Society. But the meaning of the section is clear. The NP Law Society may exercise similar powers. This means either that the NP Law Society will do that ie exercise similar powers to those encompassed in the sections mentioned in s 84A or exercise the equivalent powers of the Bophuthatswana Law Society. It is unnecessary to choose between them. Section 70 of the Attorneys Act of 1979 and section 65 of the Attorneys Act of 1984 (B) are similar.

There can be no doubt that the concurrent jurisdiction of the NP Law Society and that of the Bophuthatswana Law Society is not confined to fidelity fund issues. None of the sections mentioned in section 84A refer to the sections encompassed in chapter 2, which deals with fidelity fund matters, although sections 81(1) and 81(5) 83(9), (13) and 15) relate to conduct as regards trust funds.

Section 22 deals with the obligation of the law society to apply for the removal of an attorney from the roll. Section 69(e) and (m) deal with the power to prescribe information and procedures regarding inquiries into alleged unprofessional conduct. Sections 71 and 78 are also concerned with unprofessional conduct. Section 70 provides for an inspection of records as a preliminary step.

Summary

The position at present seems to be the following:

- (a) An attorney practicing in the former Bophuthatswana is obliged to belong to the Bophuthatswana Law Society.
- (b) The attorney is also regarded for the purpose of chapter 2 of the Attorneys of 1979 to be a member of the NP Law Society. See s 55 (b) (ii) of the Act.
- (c) The provisions of chapter 2 of the Attorneys Act of 1979 apply to attorneys (“legal practitioners”) including the Attorneys practicing in the area of the former Bophuthatswana. See sections 55 (a) and s 55 (2) as regards theft of trust money or property.

- (d) The Bophuthatswana Law Society does not exercise jurisdiction as regards fidelity fund matters. Chapter 2 of the Attorneys Act of 1984 (B) has been repealed.
- (e) The NP Law Society and the Bophuthatswana Law Society exercises concurrent jurisdictions over a an attorney practicing in the territory of the former Bophuthatswana as regards the matters listed in section 84A of the Attorneys Act of 1979.
- (f) Some attorneys would be on the roll of another law society so that the provisions of section 71 would apply to them.

The point in *limine* is dismissed.

The right of inspection

The right to inspect an attorney's records is found in section 70 of the Attorneys Act of 1979. This section reads:

70. Council's power of inspection — (1) A council may for the purposes of an enquiry under section 71 of or in order to enable it to decide whether or not such an enquiry should be held, direct any practitioner to produce for inspection, either by the council itself or by any person authorized thereto by

the council, any book, document, record or thing which is in the possession or custody or under the control of such practitioner and which relates to his practice or former practice.

(2) The refusal or failure by a practitioner to comply with a direction in terms of subsection (1) shall constitute unprofessional conduct.

The equivalent of section 70 is section 65 of the Attorneys Act of 1984 (B) which reads:

(1) The Council may, for the purposes of an enquiry under section 66, or in order to enable it to decide whether an enquiry should be held, direct any practitioner to produce for inspection, either by the Council or by any person authorised thereto by the Council, any book, document, record or thing which is in the possession or custody or under the control of such practitioner and which relates to his practice or term of practice.

(2) Any refusal or failure by any practitioner to comply with a direction in terms of subsection (1) shall constitute unprofessional conduct.

Application of PAJA

The next point which Mr Pistor raises is that the NP Law Society has not complied with its obligation to afford the first respondent a fair hearing before deciding to hold an inspection.

At this juncture it will be convenient to set out why the NP Law Society believes that an inspection is indicated and the first respondent's answer. It is common cause that the first respondent has declined to allow his records to be inspected by a chartered accountant appointed by the NP Law Society for this purpose.

The NP Law Society offers the following reasons for wanting to inspect the first respondent's records:

On 19 March 2003 the NP Law Society received a complaint from Mrs Johanna Mekingwe in the form of an affidavit dated 18 March 2003. She complained about the professional conduct of first respondent. She said that her son was involved in a motor vehicle accident in June 1999 and sustained physical injuries. She

instructed the first respondent to act on her and her son's behalf and to institute action against the road accident fund (the RAF) for compensation for injuries sustained by her son in the accident. She alleges that the first respondent failed to keep her advised as to the progress of the matter. Ultimately, enquiries were made directly at the RAF. It was ascertained that on 3 July 2000 (more than three years ago) the RAF paid an amount of R6 605.21 to first respondent on behalf of his client. This amount is made up of:

- medical expenses	R2 750.00
- medico legal expenses	R2 055.21
- attorney's fees	<u>R1 800.00</u>
	R6 605.21

The deponent to the NP Law Society's affidavit says that: "It is not clear what was the amount in respect of compensation for injuries sustained by Mekgwe's son which was paid to respondent."

The NP Law Society submits that the facts of this complaint provide evidence that the first respondent has contravened the following provisions of the Attorneys Act of 1984 (B) and the rules

promulgated under the Act, namely;

- Section 73(1) (section 78(1) of Attorneys Act of 1979) which provides that any practitioner who practises (in the former Bophuthatswana) shall open and maintain a separate account to be known as a trust account at a banking institution in Bophuthatswana and shall deposit therein all moneys held or received by it on account of any person.
- There is evidence that respondent has failed to account to Mrs Mekingwe for moneys received by him from the RAF on behalf of Mrs Mekingwe's son because he either failed to deposit such moneys into his trust account or he withdrew such moneys from his trust account and has stolen or misappropriated them.
- Rule 49(1) which provides, inter alia, that a firm shall, within a reasonable time after the performance of its mandate submit to the client concerned a statement in which he sets out with reasonable clarity and with appropriate and adequate explanatory narrative, full details of all amounts received by it in connection with the matter in question; full

particulars of all disbursements or payments made by it in connection with such matter; the fees and other charges charged to or raised against such client and, where any fee specified, represents a fee agreed upon by such firm and such client, a statement to the effect that the fee so specified had been so agreed upon; and the amount owing to or by such client, and shall, in the former case and except where otherwise instructed by such client, pay to such client, within a reasonable time, the amount so owing.

- There is evidence that respondent has contravened this rule in that he has failed to account to his client, within a reasonable time, for the trust moneys collected by him on his client's behalf from the RAF, and to pay to his client the amount owing from his trust account.
- The corresponding rule in terms of the Attorneys Act of 1979 is rule 68.7 which has wording similar to rule 49(1) promulgated under the Attorneys Act of 1984 (B).
- Rule 51(2) which provides that moneys received by a firm on account or on behalf of any person (ie trust moneys) shall

promptly when due be paid over to such person.

- There is evidence that respondent has for a period in excess of three years failed to pay over to his client trust moneys due to her.
- The corresponding rule in terms of the Attorneys Act of 1979 is rule 68.8 which provides that a firm, unless otherwise instructed, shall pay any amount due to a client within a reasonable time.

The first respondent has answered these allegations. He contends that the application is vexatious. He says that the NP Law Society has not referred this complaint to the Bophuthatswana Law Society. He advised his client on regular basis during her consultation and attaches copies of some of the letters. He also says letters to Dr Lukhele were personally delivered by the client.

The first respondent alleges that the NP Law Society maliciously launched this application after it was furnished with all details of this matter as well as the account of the R 6 605.21. See his letter

dated 30 July 2003 together with letters and a statement of account to the client. The first respondent also attached a discharge form to his papers.

The first respondent concludes his answer to the complaints of Mrs Mekingwe by saying regarding para 11.3.1.1 and 11.3.1.2:

“This statement that it is evidence that I the respondent has failed to account to Mekingwe for monies received by me from RAF on behalf of Mekingwe's son because I failed to deposit such monies into my trust account or withdrew such monies from my trust account and has stolen or misappropriated them is unfounded and I deny same and put the Applicant to the proof thereto.

Save to say the statement that I contravened the rules in that I failed to account to the client within a reasonable time for the trust moneys collected by me and to pay client are nonsensical as there are no basis for these statement and the Applicant is put to the proof thereto.”

Mr Pistor contended that the first respondent is entitled to the basic human rights provided for in chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 and that any unjustified inspection of the books of the first respondent would constitute an improper interference with his basic human rights.

Mr Pistor submitted that the actions taken by the NP Law Society against the first respondent to obtain the right to inspect his books, amount to administrative action as contemplated in section 1(1) of PAJA and that the Society was therefore duty bound to comply with requirements of natural justice and in particular with the requirements set out in section 3(2) of PAJA unless the applicant could rely on the provisions of section 3(4) of PAJA. This subsection provides that "If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2)."

He pointed out that the NP Law Society has not claimed reliance on these exceptions. Therefore its case must be examined in order to establish whether the applicant complied with the provisions of section 3(2) of PAJA.

For convenience I reproduce the sections mentioned above. Section 1(b) of PAJA defines "Administrative action" as meaning inter alia:

"Any decision taken, or any failure to take a decision,
by ...

(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....."

The term "Administrator", means "an organ of state or any natural or juristic person taking administrative action". See section 1 of PAJA.

Section 3(1) of PAJA provides inter alia:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

Section 3(2)(b) further provides:

"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

- (i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;"

Initially, the NP Law Society took the stance that it is not an organ of State and does not exercise public power in performing its function, and therefore that it was not obliged to observe the principles of natural justice. However, Mr L Lever commenced his address by conceding that the applicant does exercise public powers. This concession was, in my view, well made (see section 1(b) of PAJA). But Mr Lever submitted that the applicant was not performing an administrative action and, therefore, that it was not obliged to observe the principles of natural justice. He further submitted that for the principles of natural justice to apply, a person's rights or legitimate expectations must be materially and adversely affected. In the instant case, he argued, the first respondent's rights or legitimate expectations were not materially and adversely affected.

It is necessary to set out the relevant principles relating to the applicability of the principles of natural justice in order to determine the instant issue.

For a decision or conduct to be classified as administrative action and for a person to be entitled to the application of the principles of natural justice or to procedurally fair administrative action, the

decision or conduct must at least be materially and adversely affect that person's rights. See section 3(1) of the PAJA and **The Master v Deedat and Others** 2000 (3) SA 1076 (N) and **Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others** 2003 (1) SA 373 (SCA). Where the decision does not materially and adversely affect a person's rights it is not a decision in the administrative justice sense. See **Deedat's** case supra at 1083G. Where a functionary merely performs an investigative function, which does not materially and adversely affect a person's rights, he or she need not, unless a statute provides otherwise, observe the principles of natural justice. See **Van der Merwe and Others v Slabbert NO and Others** 1998 (3) SA 613 (N) at 624 D – E.

I am satisfied that the NP Law Society was not obliged to afford the first applicant a hearing before deciding to inspect the first respondent's books. But to the extent that it might have been necessary, the NP Law Society has complied with the basic requirements of the audi alteram partem principle.

Conclusion

In my opinion the NP Law Society has made out a prima facie case to hold an inspection as contemplated by section 70 of the Attorneys Act of 1979 or the equivalent in the Attorneys Act of 1984 (B).

Costs

All parties seek costs orders. I intend therefore to let costs follow the result although in principle I would be disinclined to order costs against one law society in favour of another.

I have been urged to award costs on a special scale. I am of the view that such an order should not be made.

Other complaint

In coming to my decision I have not relied upon the affidavit of the first respondent's professional assistant who has laid a complaint with the NP Law Society. I assume that the Bophuthatswana Law Society, which is cognisant of it, will give it whatever attention it deserves.

The order

In the premise I make the following order:

1. Jacob Tapedi Maseka, who practices as an attorney for his own account under the style of Attorney Jake Maseka at 5049 Zone 4, Molathlwa Street, Ga-Rankuwa, Rosslyn, within the jurisdiction of the High Court of Bophuthatswana, is hereby ordered to produce for inspection, either by applicant itself or by a person authorised thereto by applicant, his accounting records which relate to his practice as an attorney, and which contain particulars and information of any money received, held or paid by him for or on account of any person, which accounting records shall include any books, records, documents or things kept by or in the custody or under his control which relate to –
 - 1.1 money invested in a trust savings or other interest bearing account referred to in section 78(2) or section 78(2A) of the Attorneys Act of 1979;
 - 1.2 interest on money so invested;
 - 1.3 money belonging to any estate of a deceased person or any

insolvent estate or any estate placed under curatorship, in respect of which respondents is the executor, trustee or curator or which he administers on behalf of the executor, trustee or curator as envisaged in section 78(6) of the Act;

1.4 his practice.

2. Failing compliance by respondent with paragraph 1 of the order within seven days, the sheriff is hereby authorised to take into possession any item mentioned in paragraph 1.
3. The first and second respondents are ordered to pay the applicant's costs.

AA LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING: 16 FEBRUARY 2005
DATE OF JUDGMENT: 08 MARCH 2005

COUNSEL FOR APPLICANT: ADV. L. LEVER

COUNSEL FOR 1ST RESPONDENT: ADV. PISTOR
COUNSEL FOR 2ND RESPONDENT: ADV. MMOLAWA

ATTORNEY FOR APPLICANT: MINCHIN & KELLY INC.

ATTORNEY FOR 1ST RESPONDENTS: MOTLHABANI
ATTORNEYS

ATTORNEY FOR 2ND RESPONDENTS: KGOMO, MOKHETLE
AND TLOU ATTORNEYS