Case No: 220/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

GARETH ANVER PRINCE **Appellant**

and

THE PRESIDENT OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **1st Respondent**

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **2nd Respondent**

THE SECRETARY OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **3rd Respondent**

THE MINISTER OF JUSTICE **4th Respondent**

THE ATTORNEY GENERAL OF THE CAPE OF GOOD HOPE **5th Respondent**

CORAM: **HEFER, VIVIER, OLIVIER, ZULMAN JJA and MTHIYANE AJA**

DATE OF HEARING: **17 FEBRUARY 2000**
DELIVERY DATE: **25 MAY 2000**

JUDGMENT

. . . MTHIYANE AJA

MTHIYANE AJA:

[1] I have had the benefit of reading the judgment of Hefer JA and respectfully agree with the reasons given and the conclusions to which he has come. I however wish to add the following in relation to the 'fit and proper' requirement referred to in s 4A(b)(i) of the Attorneys Act 53 of 1979 ('the Attorneys Act') and the argument advanced on the appellant's behalf in that regard. Counsel for the appellant submitted that the Law Society failed to take into account that the appellant's previous convictions and his stated intention to use cannabis in the future did not adversely reflect on his honesty, integrity and reliability, and therefore on his fitness to be a member of the attorneys' profession. He urged us to adopt, as the correct test to be applied, the remarks of Ramsbottom J in *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 108 C-H ('the *Mandela* case'), where the learned judge said the following:

> 'The sole question that the Court has to decide is whether the facts which have been put before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession. To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has

> done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But this offence was not of a "personally disgraceful character", and there is nothing in his conduct which, in my judgement, renders him unfit to be an attorney.
> Mr *O'Hagan* contended that the test of whether the Court should take disciplinary action against the respondent is whether the conduct is "a matter of indifference to the Court". As the authorities I have quoted show, that is not the test. The respondent's conduct is not a matter of indifference to the Court; he has been tried, convicted and punished. He must not be punished again by being struck off the roll or suspended. That action will only be taken if what he had done shows that he is unworthy to remain in the ranks of an honourable profession.'

I also agree that the above remarks do not assist the appellant.

[2] I do not have a problem with due weight being given to the said remarks provided that sight is not lost of the context in which they were made. On a proper reading of the judgment as a whole I do not think that Ramsbottom J is to be understood as saying that 'character' is the sole criterion to be considered when making the 'fit and proper'

determination. To place such a construction on what was said, as the appellant seeks to do, is with respect, fallacious. There are indeed passages in the rest of the judgment which indicate that other criteria are just as important. For example, when dealing with the taking of the oath of office, the learned judge says the following:

> 'Every attorney in the Union must take an oath of allegiance when he is admitted to practice. It is an implied condition of his right to continue in practice that he shall continue to give true allegiance. If he repudiates his allegiance he breaches a condition of his right to practice. In addition, the violation of an oath, solemnly taken, by an attorney undoubtedly reflects upon his fitness to remain in the profession.' (See p. 109 A).

[3] The *Mandela* case is distinguishable on the facts from the present matter. What was before Ramsbottom J was the case of a person who it was sought to strike off the roll on the basis of a previous conviction and not because of an avowed intention to continue to break the law. But, what is perhaps of importance, and relevant to the present matter, is what the learned judge says concerning the oath of allegiance. He describes it as an implied condition of an attorney's right to continue in practice and says that a violation of that oath reflects upon an attorney's fitness to remain in

the profession. In the present matter one is of course dealing with an appellant who is not an admitted attorney, but who, if he wishes ultimately to enter the attorneys' profession, would be required to take such an oath of office. The current form of oath taken by persons who wish to become advocates, attorneys, notaries and conveyancers reads as follows:

> '**ADMISSIONS**
> Your full names and surname please
> Do you have any objections to taking the oath?
> Do you consider the oath to be binding on your conscience?
> Do you swear (**do you affirm and/or declare**) that you will truly & honestly demean yourself in the practice of
> *Advocate, Attorney, Notary, Conveyancer*
> according to the best of your knowledge and liability and further that you will be faithful to the Republic of South Africa?
> Say then: 'So help me God' (**I do**)'

[4] Like any other candidate attorney the appellant would at his admission be required to take what is referred to in the *Mandela* case as a solemn oath of allegiance. He would be required to swear or affirm and/or declare that he will truly and honestly demean himself in the practice of an attorney and that he will be faithful to the Republic of South Africa.

[5] In The Concise Oxford Dictionary, 8th ed at p. 421, the word 'faithful' is given, *inter alia*, the following meanings: 'showing faith, loyal, trustworthy, constant'. In s 1(c) of the Constitution the 'Republic of South Africa' is described as a sovereign, democratic state whose foundational values are the constitution and the rule of law.

[6] In this context the Republic of South Africa is, in my view, not to be seen as a lifeless or immutable institution divorced from its system of laws and legal principles operating within the constitution. The Drugs and Drug Trafficking Act 140 of 1992 ('the Drugs Act') and the Medicines and Related Substances Control Act 101 of 1965 ('the Medicines Act') form part of those laws of the Republic whose foundational values are the constitution and the rule of law. It therefore seems to me that any person who wishes to be a member of the attorneys' profession and takes the oath or makes an affirmation in the manner described above, also swears or affirms loyalty to the laws of the Republic of which the Drugs Act and the Medicines Act are a part. If the appellant declares that he will defy any of the laws of the

Republic, it is difficult to see how he can be considered to be a fit and proper person as is envisaged in the Attorneys Act. His conduct seems to me to amount to a repudiation of the oath or affirmation of allegiance even before he takes it.

K K MTHIYANE
ACTING JUDGE OF APPEAL

ZULMAN JA) agrees

HEFER JA

HEFER JA

[1] Section 4A of the Attorneys Act 53 of 1979 ("the Attorneys Act") requires a candidate attorney who intends to perform community service as part of his training, to submit his contract of service to the secretary of the relevant Law Society and to prove to the satisfaction of the Society that he is "a fit and proper person." If the council of the Society has no objection and all the other requirements have been met, the secretary registers the contract and the candidate may begin his service.

[2] On 15 February 1997 the appellant submitted his contract of community service to the secretary of the Law Society of the Cape of Good Hope together with an affidavit to prove his fitness. It appeared from the affidavit that he had twice been convicted under s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act") for the unlawful possession of cannabis sativa (cannabis).
The affidavit made it clear moreover that the appellant intended to continue using the drug. His explanation that he is a Rastafarian and that he uses cannabis in the observance of his religion failed to persuade the council of his fitness. The council objected to the registration of the contract and the secretary refused to register it.

[3] The appellant then applied in the Cape Provincial Division for an order reviewing and setting aside the council's decision and directing the secretary of the Society to register the contract.
Friedman JP (with Brand and Hlophe JJ concurring) dismissed the application but granted the appellant leave to appeal to this Court.

[4] At the outset it is necessary to record the following:

(a) Initially the sole ground of review was that the refusal to register his contract violated the appellant's constitutional freedom of religion and other constitutionally protected rights. The Law Society and its president were cited as the only respondents and its secretary was joined later. (In this judgment the Law Society, the president and

the secretary will be referred to collectively as the Society unless it becomes necessary to refer to any one of them separately.) Still later, when it emerged from the appellant's heads of argument that it would be argued that s 4(b) of the Drugs Act was unconstitutional, the application was served on the Minister of Justice, the Minister of Health and the Attorney-General of the Cape of Good Hope. The Minister of Justice and the Attorney-General applied for and were granted leave to intervene in the proceedings and both of them opposed a declaration that s 4(b) is unconstitutional.

(b) In his papers the Attorney-General drew attention to s 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 ("the Medicines Act") which also contains a prohibition against the possession and use of cannabis.

(c) The appellant did not complain in his application or in the court *a quo* or in his heads of argument in this court about the way in which the council's decision was reached. But shortly before the hearing of the appeal, and after he had engaged a new legal team, we received additional written submissions in which it was contended for the first time that the council had not properly exercised its discretion. This was an entirely new ground of review not covered by the allegations in the appellant's founding affidavit but, since counsel for the Society consented to its introduction, we agreed to consider it. It is obvious

however that, in the absence of suitable factual averments, we can only deal with points which emerge with sufficient clarity from all the papers.

(d) To formalize the attack on the Drugs Act and the Medicines Act we granted an application for the amendment of the Notice of Motion by the insertion of the following prayer:

. "4 (a) Declaring section 4(b) of the Drugs and Drug Trafficking Act, No 140 of 1992 (as amended) ("the Drugs Act") and section 22A(10) of the Medicines and Related Substances Control Act, No 101 of 1965 ("the Medicines Act") to be inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") and accordingly invalid.

ALTERNATIVELY, declaring section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act to be inconsistent with the Constitution, to the extent that they fail to provide an exemption applicable to the use, possession and transportation of cannabis sativa by a Rastafarian for a *bona fide* religious purpose, and accordingly invalid.

(b) Suspending the aforesaid declarations of invalidity for a period of twelve (12) months from the date of confirmation of this order by the Constitutional Court to enable Parliament to correct the inconsistencies which have resulted in the declarations of invalidity."

(e) After the amendment appellant's counsel proceeded to argue the appeal on the grounds that the application for the registration of the contract was not properly considered, and that s 4(b) of the Drugs Act

and s 22A(10) of the Medicines Act are inconsistent with the Constitution and accordingly invalid. They declined to address us on the constitutionality of the council's decision (although the point was raised in the original heads of argument). Counsel for the Society in turn declined to address us on the constitutionality of the prohibitions. His clients, we were told, do not wish to become involved in what they regard to be a dispute between the appellant and the State.

(f) After the noting of the appeal the Minister of Justice informed the registrar that he would not oppose it and would abide the decision of the court. The Attorney-General however persists in his opposition.

The facts

[5] The appellant was informed of the council's decision on 25 February 1997. On 27 February 1997 he met with two members of the council, Messrs Pauw and Ntsebeza. He reaffirmed his intention to continue using cannabis in practising his religion and sought to justify this by claiming that the criminalisation of the use and possession of the drug violated his freedom of religion. Although Mr Ntsebeza

observed at the meeting that the council "may very well be wrong in its decision," but "was of the view that it should rather err on the side of caution" the appellant's case was reconsidered on 24 March 1997. The council confirmed its previous decision and, by letter dated 25 March 1997, the secretary informed the appellant in the following terms of the reasons:

> "The Council's reasons for this decision, as outlined to you by Messrs Pauw and Ntsebeza may be confirmed as follows:
>
> 1. It is common cause that the possession and use of cannabis sativa are presently prohibited by law and that you have breached the law as it stands. It was noted that you stated in your affidavit that the burning of cannabis is a fundamental tenet of your religion and that you gave no indication that you were intending to depart from this practice.
> 2. Although the Council has noted your contentions that the law is incorrect and that it impedes your constitutional right to practise your religion, it has not by reason thereof been persuaded that it should reverse its decision.
> 3. It is the view of the Council that a person who states his intention to break the law, and actually continues to do so, cannot be regarded as a fit and proper person to have his contract of service registered because his conduct may bring the profession into disrepute.
> 4. The Council wishes to place on record that in reaching this decision it is not seeking in any way to discriminate against you on racial, moral or religious grounds. Its view is based purely on legal principles."

[6] The Society's stance is explained as follows in the answering affidavit deposed to by its secretary:

> "10. At its meeting of 24 February 1997 the ... council concluded that it was

clear from the said 'affidavit' that the applicant 'would continue, as part of his religion, to use cannabis' ... and consequently that 'he could not be viewed as a fit and proper person, until such time as the use of cannabis was decriminalised'.

11. During a meeting held on 27 February 1997 ... the applicant confirmed that he would continue to use and possess cannabis in the future. ...

16. The [Law Society] is aware that there is currently a debate about the decriminalisation of the use of cannabis and its possession for personal use ... It is by no means clear, however, that Parliament intends to decriminalise the use of cannabis and its possession for personal use. In South Africa the matter is controversial ...

18. The [council's] rejection of the applicant's application for the registration of his contract of service was informed by the following considerations:

    18.1 the question whether the use of cannabis and its possession for personal use should be a criminal offence is a matter to be decided by Parliament and, if needs be, by the Constitutional Court;

    18.2 the criminal prohibition represents Parliament's judgment that the use and possession of cannabis is inherently harmful and dangerous;

    18.3 the criminal prohibition is not obviously unconstitutional; and

    18.4 the [Law Society's] duty to act in a manner which advances respect for and compliance with the law.

19. Accordingly, unless and until Parliament repeals the criminal prohibition, or the Constitutional Court declares it to be unconstitutional and invalid, the [Law Society] considers itself to be duty bound to adopt the attitude that an applicant who has stated and repeated in unequivocal terms that he or she intends contravening the provisions of the Drugs and Drug Trafficking Act relating to the possession and use of cannabis, does not meet the 'fit and proper' requirement imposed by section 4A(b)(i) of the Attorneys Act. In the [Law Society's] view, conduct of that sort reflects adversely upon an applicant's character, is inconsistent with the duties and obligations of members of the profession and is contrary to the standards of behaviour expected of officers of the Court."

30 Paragraph 4 of the letter [of 25 March 1997] was intended to convey nothing more than that the [council's] decision to object to the registration of the applicant's contract of service was based solely on his previous convictions for possession of cannabis and his stated intention to continue the use of cannabis in spite of the fact that it is a criminal offence to do so."

The Constitutional validity of the legislation

[7] Cannabis is classified in the Drugs Act as an undesirable dependence-producing substance which, in terms of s 4(b), no person shall use or have in his possession. In the Medicines Act it is classified as a Schedule 8 substance which, in terms of s 22A(10), no person shall acquire, use, have in his possession, manufacture or import. Both prohibitions are subject to certain exceptions not presently relevant save to the extent mentioned in paragraph [11] *infra*.

[8] In the court *a quo* the appellant relied for his attack on ss 4(b) and 22A(10) on violations of his freedom to practise his religion, his right to choose his profession, his right to human dignity, and the proscription of unfair discrimination in the Constitution. The court found that the prohibitions do indeed limit Rastafarians' freedom to practise their religion and presumably also discriminate unfairly

against them and impair their choice of a profession, but that all this is justified under s 36(1) of the Constitution.

[9] It is not necessary to deal with all the submissions in this court because, as the argument developed, it became clear that the appellant does not seek a declaration of total invalidity of the prohibitions and that his exclusive aim is an order in terms of the alternative prayer 4(a) in the amended Notice of Motion. The question whether there should be an exemption for the use of cannabis by Rastafarians for *bona fide* religious observance eventually became the only issue.

[10] Briefly stated the appellant's argument is as follows: In terms of s 36(1)(e) of the Constitution account must be taken of less restrictive means to achieve the purpose of the prohibitions; a prohibition on the possession and use of cannabis advances the purpose of the legislation, but a *general* proscription is unnecessary; a limited number of persons who only use cannabis in the practice of their religion may and should be exempted because in that way society will remain adequately protected without the fundamental rights and freedoms of members of the group being affected.

[11] The first problem with this approach is that, although in form the alternative prayer 4(a) asks for the limitation of allegedly overbroad prohibitions, in effect it seeks to create an exemption through the application of s 36(1)(e) of the Constitution. The Drugs Act and the Medicines Act each has its own exemptions and what the appellant is trying to achieve, is the introduction of an additional one. In *S v Lawrence; S v Negal; S v Solberg* 1997(4) SA 1176 (CC) par [80] Chaskalson P had this to say about the powers of the courts:

> "[T]he appellant has approached the Court for an order that the scope of the exception made by ss 87 and 88 be enlarged. In effect what the appellant has asked this Court to do is amend the Liquor Act so as to make provision for a 'grocer's wine, beer and cider licence' as an exception to the prohibition imposed by s 40 of the Act. A Court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution, but what it cannot do is legislate."

I respectfully agree. The only difference between that case and the present one is that in this case the appellant has attacked the prohibitions; but his claim in the alternative prayer is for an order declaring the relevant provisions inconsistent with the Constitution "to the extent that they fail to provide an exemption applicable to the use,

possession and transportation of cannabis sativa by a Rastafarian for a *bona fide* religious purpose". This, it seems to me, is but another way of claiming an exemption not provided for in the legislation and which a court of law cannot provide. It may well be that on this ground alone the prayer cannot be granted but, in view of what follows, it is not necessary to come to a firm decision.

[12] The appellant's case turns entirely on the submission that a general ban on the use and possession of cannabis is unnecessary since the abuse of illegal drugs can be equally effectively suppressed without banning the use of cannabis by Rastafarians for the observance of their religion. This is plainly wrong. Legalizing the use of a forbidden substance by one section of the community *for a particular purpose* cannot possibly prevent its abuse within that section. On the evidence cannabis is harmful, particularly when used in large doses and, if its use is limited as to purpose only, Rastafarians will be at liberty to use it as often and in such doses as they like, provided only that they do so for the right purpose. This will leave the door wide open for abuse. Indeed, taking account of

* Dr Zabow's uncontested evidence that the use of cannabis has already caused the referral of Rastafarians to a mental institution for behavioral

problems;

* the likelihood of an influx of neophytes attracted to the Rastafarian faith by the prospect of the practically unfettered use of the prohibited drug, and
* the evidence that cannabis is often the stepping stone to the use, and ---eventually to the abuse of and dependence on other more harmful drugs,

one shudders at the thought of the consequences of lifting the ban to Rastafarians themselves and, more importantly, to society generally. We must not forget that drug abuse is a social problem. As Dr Zabow points out,

> "[t]he harm to society from the use of cannabis rests in the economic consequences of the impairment of the individual's social functioning and his enhanced proneness to asocial and antisocial behaviours."

And there are other socially harmful consequences, so notorious, that we need not dwell on them. The prevention of drug abuse is plainly a legitimate governmental aim and an effective prohibition thereof a pressing social purpose (*S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at 396B-C). It is beyond doubt that the ban on the use and possession of cannabis in both Acts was imposed to protect society as a whole. (Cf *Administrator, Cape* v *Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) at 254B quoted with approval in *Mistry v Interim National Medical and Dental Council of South Africa* 1998

(7) BCLR 880 (CC) par [10].) Lifting it partially to allow its uncontrolled use by one section of the community cannot leave society unaffected and adequately protected.

[13] This conclusion renders it unnecessary to consider all the other objections raised by the Attorney-General (eg that a partial ban will constitute unfair discrimination against other members of the community). One last point should however be made. The Attorney-General correctly submits that it will be impossible to police an order in terms of the alternative prayer 4(a). Consider the dilemma of a policeman who finds cannabis in the possession of a person who claims to be a Rastafarian. How can he be sure that the claim is valid? The appellant's suggestion that Rastafarians be issued with permits is manifestly impractical. Apart from other conceivable complications, how can a policeman who is presented with a permit be sure that the holder will use the cannabis in his possession for the right purpose? However, it is not merely a question of impossibility of enforcement, but a question about the feasibility of the order sought. The appellant tells us that Rastafarians use the drug for spiritual, inspirational, medicinal and culinary purposes. We do not know whether it forms part of their *religious* observance when it is used to cure or prevent disease or as an additive to food or for inspirational purposes (whatever the last term may denote). The alternative prayer

cannot be granted in its present form and the available evidence does not enable us to fashion a suitable order with adequate precision.

[14] It follows that the attack on the constitutional validity of the prohibitions must fail.

The alleged improper consideration of the application

[15] The appellant's case is that the council did not properly exercise its discretion in that it (1) erred in adopting an over-cautious approach, (2) was bound to consider the appellant's fitness by reference to his honesty, integrity and reliability but failed to do so, and (3) failed to consider the constitutionality of its decision.

[16] The first submission arises from Mr Ntsebeza's remark mentioned in paragraph [5] *supra*. It is to the effect that, when making a "threshold determination" in what appellant's counsel refer to as "hard" cases, the council should not adopt an over-cautious approach and should defer to the ultimate discretion of the admitting court rather than excluding the court from ever exercising its discretion. What this means in plain language is that the council should simply have registered the appellant's contract, leaving it to the court to decide on his fitness as an attorney when he eventually applied for his admission. This is not correct. Section 4A(b)(i) of the Attorneys Act requires a candidate attorney to prove *to the*

satisfaction of the Society that he is a fit and proper person; and in terms of s 5(1) *the council* has the right to object to the registration of his contract. It is *the council's* right, and indeed its duty, to determine his fitness to be permitted to perform community service.

[17] The submission that the council was bound to consider the appellant's fitness by reference exclusively to his honesty, integrity and reliability is also devoid of substance. We were referred to several cases in which the fitness of attorneys and advocates (to be admitted to or remain in the ranks of their professions) was discussed and I accept the relevance of the judgments in these cases. Unlike s 15 of the Attorneys Act which requires an applicant for admission as an attorney to be a "fit and proper person *to be so admitted and enrolled"*, s 4A(b)(i) requires proof to the satisfaction of the Law Society that a candidate attorney is "a fit and proper person." In context this can only mean that the council must be satisfied that the candidate is a fit and proper person to be permitted to perform that kind of service. But the purpose of the service is to instruct the candidate in the skills which an attorney requires and to prepare him

generally for eventual admission to an honourable profession. Bearing in mind further that s 8 allows candidate attorneys with the prescribed academic qualifications to appear in certain courts and before any board, tribunal or similar institution immediately upon the registration of their contracts, the determination of their fitness must proceed along lines broadly similar to those applicable to attorneys. For this very reason they ought to be, not only honest and reliable, but "fit and proper" persons in every respect. If there is a question about a candidate's honesty, integrity or reliability, the council will obviously object to the registration of his contract; but if there is not, it does not follow that he or she qualifies automatically. Indeed, if the council were to fail to raise a valid objection of any other kind of which it is aware, it would undoubtedly shirk its duty.

One of the cases to which we were referred is *In Re Chikweche* 1995(4) SA 284 (ZSC) in which (at 291H-J) Gubbay CJ said (in regard to the admission of an attorney in terms of comparable legislation):

> "Construed in context, the words 'a fit and proper person' allude, in my view, to the personal qualities of an applicant - that he is a person of honesty and reliability. See *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988(2) SA 868

(A) at 875D".

The judgment in *Mkhise's* case must not be misunderstood or applied out of context. One of the questions in that case was whether the skills and proficiency of the person who had never been admitted as an advocate played any part in determining whether his appearance for the accused constituted a fatal irregularity. It is in this context that it was said (at 875C-E) that

> "it would be wholly impracticable to attempt to determine *ex post facto* ... whether counsel concerned was 'a fit and proper person' in the sense that this term is applied and understood in the [Admission of Advocates Act], ie whether he is generally a person of integrity and reliability. (Cf *Kaplan v Incorporated Law Society, Transvaal* 1981(2) SA 762 (T) at 782H-783H.) "

In an earlier passage (874D-G) the requirement of "unquestionable honesty and integrity" on the part of an advocate was emphasized and this is probably the reason for the reference in the quotation to the same qualities. (In *Kaplan*'s case the reference is merely to an attorney's "personal qualities", not to his honesty or reliability.) Be that as it may, the judgment does not hold that other traits of character are to be ignored or may not in suitable cases override honesty, integrity and reliability; nor does any of the other cases to which we

were referred support that proposition.

Appellant's counsel also rely on the following passage in the judgment (in an application for the removal from an attorney's name from the roll) in *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 108D-F:

> "Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But this offence was not of a 'personally disgraceful character', and there is nothing in his conduct which, in my judgement, renders him unfit to be an attorney."

None of these remarks assist the appellant. What the council found objectionable in the present case was not merely his convictions in the past, but also (and particularly) his avowed intention of contravening the law in future. Its view, as stated in paragraph 3 of the letter of 25 March 1997, was that

> "a person who states his intention to break the law, and actually continues to do so, cannot be regarded as a fit and proper person to have his contract of service registered because his conduct may bring the profession into disrepute."

[18] I turn to the final submission. As mentioned earlier appellant's counsel did not address the point originally made in the founding affidavit that the decision was unconstitutional for violating the appellant's entrenched rights. Instead they submitted that the council did not take the constitutionality of its decision into account. I cannot understand their stance; for, if the decision is found to be unconstitutional, there is an end to the matter; if it is found to be constitutional, it can plainly not be disturbed merely because the council did not consider its constitutionality. Be that as it may, the simple fact of the matter is that the allegations in the appellant's founding affidavit (and even in his additional and replying affidavits) do not cover the point, and the opposing affidavit (particularly in paragraph 19) contains strong indications that the constitutional validity of the decision was indeed considered.

[19] For the sake of completeness it should be mentioned that the contention that the refusal to register the appellant's contract was invalid for breaching his constitutional rights is not properly before us.

Although it was initially the sole ground on which the review proceedings were brought, the point was not argued in the court *a quo*; it was not mentioned in the court's judgment or in the application for leave to appeal.

[20] The appeal can accordingly not succeed. The Attorney-General has not asked for an order of costs but the Society did, and I can find no reason for deviating from the ordinary rule that costs should follow the result.

The appeal is dismissed. The appellant is ordered to pay the first, second and third respondents' costs.

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JJF HEFER
JUDGE OF APPEAL

CONCURRED:
Vivier JA
Olivier JA
Zulman JA