

REPORTABLE

CASE NO: SA 98/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between

SLYSKEN SEKISO MAKANDO

Appellant

and

**DISCIPLINARY COMMITTEE FOR LEGAL
PRACTITIONERS
MINISTER OF JUSTICE
ATTORNEY-GENERAL
LAW SOCIETY OF NAMIBIA**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

Coram: CHOMBA AJA, O'REGAN AJA and MOKGORO AJA

Heard: 7 April 2016

Delivered: 6 October 2016

APPEAL JUDGMENT

O'REGAN AJA (CHOMBA AJA and MOKGORO AJA concurring):

[1] This appeal is brought by Mr S S Makando, a legal practitioner, and arises from two applications launched in the High Court. The first application was brought by first respondent, the Disciplinary Committee for Legal Practitioners (the

Disciplinary Committee), a body established in terms of s 34 of the Legal Practitioners Act 15 of 1995 (the Act). In April 2008, the Disciplinary Committee found Mr Makando to be guilty of unprofessional, dishonourable or unworthy conduct and was of the opinion that his conduct justified his being struck from the roll of legal practitioners. Given that in terms of s 32 of the Act, the High Court of Namibia has the jurisdiction to strike legal practitioners from the roll, the Disciplinary Committee made an application to the High Court for the appellant to be struck from the roll of legal practitioners (striking off application), which the appellant opposed.

[2] The second application was launched by the appellant in response to the first application. In it the appellant challenged the constitutionality of s 35(1), (2), (3) and (4) of the Act, (the constitutional challenge). The Disciplinary Committee opposed this application. The striking off application and the constitutional challenge were heard jointly by the High Court, which dismissed, in effect, both the constitutional challenge and the striking off application. In relation to the latter, the High Court upheld a preliminary point taken by the appellant concerning the composition of the Disciplinary Committee and it referred the matter back to the Disciplinary Committee 'as presently constituted', stating that the Disciplinary Committee 'may decide to ratify the decision' of the Committee as previously constituted, and thereafter take a decision on the appropriate sanction in terms of the Act.

Scope of appeal

[3] Appellant then launched an appeal in this court, which is opposed by the Disciplinary Committee. The scope of the appeal is not entirely clear from the notice of appeal, which commences by stating that the appeal is against the part of the judgment of the High Court which referred the matter back 'to the current members of the Disciplinary Committee to decide whether to ratify the finding of guilty against the appellant by the previous members of the Disciplinary Committee and thereafter to decide on an appropriate sanction'. However, the notice goes on to state that the High Court erred in failing to uphold the constitutional challenge to s 35 of the Act, and so the question of the constitutional challenge also appears to form part of the appeal. Both the appellant and the first respondent made written and oral submissions to this court in relation to the constitutional challenge, and this court shall therefore consider the appeal on the basis that both the dismissal by the High Court of the constitutional challenge, and the High Court order referring the matter back to the Disciplinary Committee fall within the scope of the appeal.

Facts

[4] Many of the facts are common cause. The parties agree that during April 2008, the appellant was called upon by the Disciplinary Committee to answer a range of charges of unprofessional, dishonourable or unworthy conduct and that he was found guilty on 22 April 2008 of fourteen of these charges. Six of the charges of which the appellant was found guilty related to the alleged misappropriation of trust monies by the appellant, and the remaining eight related to breaches of the Rules of the Law Society that regulate the management of trust accounts by legal

practitioners. Appellant pleaded guilty to seven of the charges, which were, by and large, those based on his breach of the rules relating to the management of trust funds. Appellant did not plead guilty to the charges relating to the misappropriation of trust monies, although he was found guilty on all six of those charges.

[5] All the charges related to events that arose when the appellant was conducting a practice for his own account in northern Namibia. At the time the High Court application was brought by first respondent, that practice had been closed and appellant was then employed as a professional assistant by a firm of legal practitioners in Windhoek, Murorua and Associates.

[6] It is also common cause that the charges brought against appellant were based on a report prepared by a firm of auditors that had investigated the manner in which the appellant had conducted his trust account. Appellant was furnished with a copy of the report by the Disciplinary Committee. Although appellant lodged a statement explaining his response to the charges, he chose not to testify before the Disciplinary Committee. Once the Disciplinary Committee had found the appellant guilty of fourteen charges, appellant was provided an opportunity to make submissions regarding the appropriate sanction. Appellant did so on 30 June 2008, suggesting that he should be suspended from practice for a period of time, and that that suspension itself, should also be suspended. The term of office of one of the members of the Disciplinary Committee, Mr T Frank SC expired on that date. The Disciplinary Committee did not meet to discuss the appropriate sanction to be imposed on appellant until July 2008, at which stage Mr Frank's term of office had ended. After consideration of the matter in July 2008, the Disciplinary Committee

resolved to bring an application to have appellant removed from the roll of legal practitioners: hence its application to the High Court in this matter.

Relevant legal provisions

[7] The key legal provision at issue in this case is s 35 of the Act. It is the provision that regulates the proceedings of the Disciplinary Committee in relation to allegations of unprofessional or dishonourable or unworthy conduct by legal practitioners. It provides as follows:

- '(1) An application by the Council, or of a person affected by the conduct of a legal practitioner, to require a legal practitioner to answer allegations of alleged unprofessional or dishonourable or unworthy conduct, shall be made to and be heard by the Disciplinary Committee in accordance with the rules made under s 39.
- (2) Where in the opinion of the Disciplinary Committee an application made in terms of subsec (1) does not disclose a *prima facie* case of unprofessional or dishonourable or unworthy conduct on the part of the legal practitioner concerned, the Disciplinary Committee may summarily dismiss such application without requiring the legal practitioners to answer the allegations and without hearing the application.
- (3) An applicant who is aggrieved by the decision of the Disciplinary Committee under subsec (2) may appeal to the court against that decision, and the court may either confirm the decision of the Disciplinary Committee or order the Disciplinary Committee to hear the application and deal with it in accordance with subsec (4).
- (4) Where in the opinion of the Disciplinary Committee an application made in terms of subsec (1) discloses a *prima facie* case of unprofessional or dishonourable or unworthy conduct on the part of a legal practitioner, or

where an order contemplated in subsec (3) has been made by the court, the Disciplinary Committee shall –

- (a) fix a date and place for the hearing of the application and notify the applicant and the legal practitioner concerned thereof; and
 - (b) not later than 14 days before the date fixed for the hearing of the application, furnish the legal practitioner concerned with a copy of any affidavit made in support of the application and shall give him or her an opportunity to inspect any document lodged with the Disciplinary Committee in relation to the application.
- (5) The Disciplinary Committee may appoint a legal practitioner to lead evidence at the hearing of the application and to cross-examine the legal practitioner to whom the application relates and witnesses called by him or her and to present argument.
- (6) A legal practitioner shall be entitled to legal representation at the hearing of an application of the Disciplinary Committee.
- (7) At the conclusion of the hearing of an application by the Disciplinary Committee –
 - (a) if it is satisfied that a case of unprofessional or dishonourable or unworthy conduct has not been made out against the legal practitioners, shall dismiss the application;
 - (b) if it is satisfied that the legal practitioner is guilty of the unprofessional or dishonourable or unworthy conduct alleged in the application or in respects other than those so alleged, shall act in accordance with the provisions of either subsec (8) or (9).
- (8) If the Disciplinary Committee is of the opinion that the unprofessional or dishonourable or unworthy conduct of which the legal practitioner is guilty does not justify an application to the Court for an order to strike the legal

practitioner's name from the Roll or to suspend him or her from practice, and that the case may be adequately dealt with by itself, it may –

- (a) reprimand the practitioner; or
 - (b) reprimand him or her and impose upon him or her a penalty not exceeding N\$10 000.
- (9) If the Disciplinary Committee is of the opinion that the unprofessional or dishonourable or unworthy conduct of which the legal practitioner is guilty justifies an application to the court for an order to strike the legal practitioner's name from the Roll or to suspend him or her from practice, it shall proceed to make such application to the court in terms of s 32.
- (10) A legal practitioner upon whom a penalty has been imposed by the Disciplinary Committee under subsec (8)(b), may within 30 days of the notification to him or her of the decision of the Disciplinary Committee, appeal to the Court against that decision.
- (11) The Disciplinary Committee, when acting in accordance with the provisions of subsec (8), may make such order as to the reimbursement of costs incurred by the Disciplinary Committee in connection with the application, including witness expenses, as it may think fit.
- (12) Any penalty imposed under subsec (8)(b) and any costs payable in accordance with subsec (11) shall –
- (a) be moneys owing to the State Revenue Fund; and
 - (b) be recoverable by legal process in the magistrate's court.'

Preliminary matters

[8] There is a host of preliminary matters for decision. The first raises the question whether appellant was entitled to appeal against the decision of the High

Court without seeking leave to appeal from the High Court. Secondly, there is a range of procedural challenges to the manner in which appellant prosecuted his appeal: his notice of appeal was lodged with the Registrar of this court fourteen days late; appellant has not furnished security for the costs of the appeal as contemplated in rule 8 of the Rules of this court; and appellant lodged the appeal record out of time. Thirdly, the Disciplinary Committee also seeks condonation for its failure to lodge its heads of argument timeously. And finally, there is the question whether a costs order should be made against fourth respondent for seeking to intervene in the appeal at a late stage, including by lodging a comprehensive set of heads of argument only days before the day on which the appeal was to be heard. Each of these will be dealt with separately before turning to the merits of the appeal.

Was leave to appeal required?

[9] The Disciplinary Committee argues that appellant ought to have sought leave to appeal the High Court decision because the decision of the High Court was not final in effect, but interlocutory. Section 18 of the High Court Act 16 of 1990, provides that interlocutory orders may only be appealed to this court with leave of the court that has made the order. The Disciplinary Committee points to the nature of the order made by the High Court in this case, which referred the matter back to the Disciplinary Committee for it to decide whether it will ratify the decision of the Disciplinary Committee as previously constituted, and if it does decide to ratify the decision to decide on an appropriate sanction. The Disciplinary Committee asserts that the order was therefore not finally dispositive of any portion of the relief claimed in the applications before it and was therefore an interlocutory order, and not appealable to this court as of right.

[10] The question whether an order is interlocutory or final requires a consideration of the nature and effect of the order. This court has previously held that there are three attributes that characterise an order that will be appealable to this court as of right: the order appealed against 'must be final in effect and not susceptible to alteration by the court of first instance'; it must be 'definitive of the rights of the parties' and it must have 'the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.¹ Are these three attributes present here?

[11] The order made by the High Court had the effect of terminating the application brought by the Disciplinary Committee. The High Court upheld appellant's argument that the Disciplinary Committee had not been properly constituted at the time the decision concerning appellant had been taken, and it referred the matter back to the Disciplinary Committee for it, properly constituted, to decide whether to ratify the decision that had been previously taken and to decide should the decision be ratified what sanction should be imposed upon appellant. The effect of this order was to bring to an end the application then pending before the High Court. For if the Disciplinary Committee were to decide that appellant's conduct warrants striking off the roll, it would have to launch a fresh application to the High Court to seek an order striking off appellant from the roll of legal practitioners. Accordingly, the order made by the High Court in these proceedings terminated the proceedings before it. Any new application to strike appellant from

¹ See *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy* 2005 NR 21 (SC) at 29BC (per Strydom CJ) citing with approval *Erasmus Superior Court Practice* para A1-43 and the South African Appellate decision *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536A–C.

the roll will be new proceedings in the light of any decision taken by the Disciplinary Committee properly constituted.

[12] It is true that the High Court order did not finally determine the question whether appellant should be struck from the roll. That matter has not yet been decided, but it is not a matter that may be decided in these proceedings on these papers. It is a matter that may only be considered after the Disciplinary Committee reconsiders the disciplinary complaint against appellant. The fact that that issue remains undetermined, does not mean that the High Court order was not final in effect. The High Court order did finally determine a key issue between the parties, the question whether the Disciplinary Committee had been properly constituted at the time of the disciplinary proceedings against appellant. It is not necessary for an order to determine all disputes between the parties for it to be final in effect. It is sufficient that it determines the right of the parties in some respect. The High Court order in this case is final in effect and is not susceptible to alteration by the Court of first instance. It is definitive in part of the rights of the parties and it has the effect disposing of a substantial portion of the relief claimed in the application. Accordingly, it is an order against which an appeal may lie as of right and the Disciplinary Committee's argument to the contrary must be rejected.

Appellant's procedural missteps

[13] Appellant made three procedural missteps that require condonation. First, the appellant lodged his notice of appeal late. The High Court judgment was handed down on 18 October 2011. In terms of the rules, appellant was required to lodge his notice of appeal with the Registrar of this court, as well as the Registrar of the

High Court, and serve it on the respondents, within 21 court days of the date the judgment was handed down.² Appellant's notice of appeal was served on the respondents and the Registrar of the High Court on 14 November 2011, which is within the stipulated period, but it was only lodged with the Registrar of this court on 6 December 2011, which was out of time.

[14] Despite the fact that the Disciplinary Committee drew attention to appellant's failure to comply with the Rules, appellant did not lodge an application for condonation of this procedural misstep until 30 March 2016, shortly before the hearing of the appeal on 7 April. The explanation provided in the founding affidavit by a messenger employed by the appellant's attorneys of record was that although he attempted to serve the notice of appeal on the Registrar of this court on 14 November 2011, he could not do so because he did not have sufficient copies of the papers with him. The messenger then states that he was called away that evening because of a family bereavement and that he only returned to the office some weeks later when he discovered that the appeal documents had still not been served on this court. No explanation was furnished by appellant's legal practitioner as to why he did not check that the appeal papers had been properly served by the messenger on the Supreme Court. The responsibility to ensure proper service lies with the legal practitioner not with the messenger. An explanation given by a messenger as to why he or she did not serve court documents will not constitute a satisfactory explanation unless that explanation is supported by an explanation furnished by the relevant legal practitioner as to why the legal practitioner did not

² Rule 5(1) of the Rules of the Supreme Court.

follow up to ensure service had been properly effected. Moreover, the general principle applied by this court is that condonation must be timeously sought. Appellant provided no explanation as to why the application for condonation in this respect was not launched until several weeks before the hearing. Again this is not satisfactory.

[15] Secondly, appellant failed to lodge the record of appeal timeously. The rules require the record of appeal to be lodged within three months of the date of the judgment of the court below.³ In this case, therefore, the record should have been filed before 18 January 2012. However, the appeal record was only lodged some eighteen months later on 23 July 2013. Appellant launched an application for condonation for his late filing of the record of appeal and the reinstatement of the appeal on the same date that the record was finally lodged. In his affidavit, appellant explains the delay as follows. He states that he enquired of the transcribers several times in early 2012 as to how the preparation of the record was proceeding. Finally, in April 2012 the transcribers provided him with a transcribed record but appellant found that it was the wrong record. Appellant then approached the Registrar of the High Court to obtain the correct record. And the new record was provided to the transcribers.

[16] Once the correct record had been transcribed in July 2012, appellant reports that an unsuccessful attempt was made by the parties to agree the quantum of security that should be furnished before lodging the appeal record. As agreement

³ Rule 5(5)(b) of the Rules.

could not be reached on the question of security, the matter was referred to the High Court Registrar for determination. Nearly a year elapsed. A date in June 2013 was determined for the application to be heard by the Registrar, when the application was postponed by agreement between the parties to a later date. On that later date, the legal practitioners for the Disciplinary Committee did not appear. Thereafter appellant received a letter from the High Court Registrar dated 20 June 2013 stating that the Registrar considered that the non-appearance by the legal representatives of the Disciplinary Committee constituted 'a waiver of the claim' on their part and that 'to fix security for costs in this matter will deny (appellant) his right to prosecute his appeal'. Appellant then presumed that he was not required to furnish security and he lodged the record of appeal on 23 July 2013.

[17] It is clear that the initial delay was caused at least in part by the fact that the incorrect record was transcribed, but once the correct record had been transcribed, there was a further delay of nearly a year while the question of security was addressed. No explanation was provided by appellant as to why the issue of security was not addressed during the period that the record was being prepared. There is little in appellant's affidavit that suggests a sense of urgency infected his attempts to finalise the preparation of the appeal record, or to resolve the question of security. The delay was a substantial one, which would require a convincing explanation, which the explanation provided by applicant is not.

[18] Appellant's third procedural misstep related to his failure to lodge security for the costs of the appeal as required by rule 8. Rule 8(2) provides that:

'If the execution of a judgment is suspended pending appeal, the appellant shall, before lodging with the registrar copies of the record enter into good and sufficient security for the respondent's costs of appeal, unless –

(a) the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal; or

(b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal, or such longer period as that court on good cause shown may allow, release the appellant wholly or partially from that obligation.'

[19] Appellant points to the fact that the Registrar of the High Court when asked to determine a suitable amount of security ruled that no security need be paid. However, a reading of rule 8 makes plain that it does not confer jurisdiction upon the Registrar of the High Court to dispense with payment of security altogether. It is clear from a reading of rule 8(2)(b) that only the court that made the order against which an appeal is brought may release the appellant from the obligation of paying security, and then only upon an application brought within a stipulated time by the appellant. No such application was brought in this case.

[20] It is clear from what is set out above that appellant prosecuted his appeal before this court in a manner that showed material non-compliance with the rules of this court. Appellant lodged an application for condonation and reinstatement of the appeal timeously in relation to the late filing of the appeal record, but his application for condonation of the late lodging of the notice of appeal was filed only five years after the relevant events, despite his attention being drawn to his procedural non-

compliance early in the proceedings by the Disciplinary Committee. Appellant has also lodged no application for condonation for not filing security.

[21] The question of prospects of success is relevant to the question whether condonation should be granted. In a case such as this where there is a series of procedural flaws in the manner in which an appeal has been prosecuted, coupled with, at least in some respects, inadequate explanations for the procedural non-compliance, the question of prospects of success will often be of determining importance. Accordingly, I shall return to the question of condonation once the merits of the appeal have been addressed.

The Disciplinary Committee's late filing of heads of argument on two occasions

[22] The Disciplinary Committee seeks condonation too. The appeal in this matter was initially set down for argument on 14 October 2014 but the Committee failed to file heads at all in advance of that date. On the date of the hearing, the Disciplinary Committee lodged an application for condonation for its failure to file heads. When the matter was called, the court was informed that the parties had agreed that the hearing of the appeal be postponed *sine die* on the basis that the Disciplinary Committee would pay appellant's costs on an attorney and client basis. Thereafter, the appeal was re-enrolled for hearing on 7 April 2016. Again, the Disciplinary Committee failed to file its heads timeously. Its heads were only filed on 29 March 2016, eleven days late, as the heads had been due on 18 March 2016.

[23] Two days before the hearing, the Disciplinary Committee brought an application for condonation for the late filing of its heads of argument. In the affidavit

attached to the application, instructed counsel for the Disciplinary Committee explained that he had underestimated the time that the preparation of his heads of argument would take, and that once the time he had allocated for preparation of the heads had elapsed without his completing the heads, pressure of work had meant that he had been unable to continue working on the heads. Accordingly, the heads were filed late. Appellant opposes the application for condonation. Appellant argued that the Disciplinary Committee has treated this court with disdain, both in its failure to file heads at all before the hearing of 14 October 2014, and in its late filing of heads for the hearing on 7 April 2016. Appellant is correct that the manner in which the Disciplinary Committee has conducted its opposition to the appeal is woeful. Moreover, this is not the first time that the Disciplinary Committee has been criticised by this court for its conduct of litigation.⁴ Once again this court must chide the Disciplinary Committee for its failure to comply with the time limits stipulated in the rules of this court. It is not acceptable for an institution charged with the responsibility of regulating the conduct of legal practitioners itself to fail to observe the rules.

[24] Nevertheless, although the Disciplinary Committee has not provided a fully satisfactory explanation for the late filing of its heads, appellant did not ask that the matter be postponed on the basis that he had been prejudiced or unable to prepare adequately for oral argument. In the circumstances, the court will grant the Disciplinary Committee's application for condonation. The question of costs in relation to that application will be considered at the end of this judgment.

⁴ See *Disciplinary Committee for Legal Practitioners v Murorua & another* SA 43-2012 [2015] (20 November 2015) a matter that was heard on 16 October 2014, two days after this appeal was originally enrolled for hearing.

Fourth respondent's late filing of heads

[25] The fourth respondent, the Law Society of Namibia, originally lodged a notice of opposition to appellant's constitutional challenge in the High Court, but then withdrew its notice of opposition and did not file answering affidavits or appear in the court below. Nothing further was heard from the Law Society in relation to this matter until 11 March 2016, when it lodged a notice of opposition in the appeal. Thereafter it filed a full set of heads of argument on 18 March 2016. Appellant opposed the Law Society's belated opposition to the appeal and argued that it had waived its right to participate in the proceedings and that it was not entitled, without leave of the court, to lodge a notice of opposition and heads of argument so late in the proceedings.

[26] Instructed counsel appeared for the Law Society at the hearing of the appeal, and informed the court that the Law Society had withdrawn its notice of opposition to the appeal. Accordingly, counsel did not seek to make any submissions to the court, indicating only that it would be available to answer any questions posed by the court.

[27] There is no doubt that as the professional body responsible for regulating legal practitioners and representing their interests, the Law Society has an interest in these proceedings. Indeed, if it had complied with the rules of this court, there is no doubt that the court would have paid close attention to the views of the Law Society. No explanation was provided by it for its last minute decision to oppose the appeal and to lodge heads of argument. Given its institutional nature and role, the

Law Society should act zealously to ensure, when it is a litigant before the courts, that it diligently observes the rules of the court, and where it fails to comply with a rule, its explanation to the court should be prompt and complete. The manner in which the Law Society conducted itself in these proceedings fell far short of these standards. In the circumstances, it was appropriate for the Law Society to withdraw its notice of opposition and heads of argument. The question of costs occasioned by its notice of opposition and heads shall be dealt with at the end of this judgment.

Merits: Issues for determination

[28] It is now necessary to turn to the question of the merits of the appeal. There are two issues: First, did the High Court err in dismissing appellant's constitutional challenge to s 35? And secondly, did the High Court err in referring the matter back to the Disciplinary Committee as currently constituted? Each of these will be dealt with separately.

I Constitutional Challenge to s 35(1), (2), (3) and (4) of the Act

[29] Appellant's challenge to s 35(1), (2), (3) and (4) of the Act is based on Art 12(1) and Art 18 of the Constitution. Article 12(1), in its relevant part, provides that:

'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law. . . .'

[30] And Art 18 of the Constitution provides that:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[31] Appellant's complaint is that the challenged provisions in s 35 do not provide for a fair process in breach of both Arts 12 and 18. It is important when considering a constitutional challenge to a statutory provision that a court considers whether upon a proper interpretation of the provision in question its application would infringe constitutional rights. Accordingly, in determining a constitutional challenge to a statutory provision, a court commences by considering the proper interpretation of that section.

[32] In determining the proper interpretation of the section, a court should where possible adopt an interpretation of the section that is consistent with the Constitution rather than an interpretation that is inconsistent with the Constitution, as long as the consistent interpretation is one that the text of the provision can reasonably bear. The starting point in the case of a constitutional challenge will thus be the interpretation of the challenged provision itself. If the provision is found not to be reasonably capable of constitutional construction, then the section will be found unconstitutional.

[33] If the court finds that the provision is capable of a constitutional construction, then a separate question may arise, and that is whether the application of the provision on the facts of the case before the court has been consistent with the

proper interpretation of the provision, and therefore in accordance with the Constitution. The question of whether a statutory provision is consistent with the Constitution is therefore a separate question to the question of whether the application of that provision in the circumstances of a particular case has been in accordance with the proper construction of the provision.

[34] It is necessary now to consider the procedure for the handling of complaints against legal practitioners that is provided for in s 35. Although appellant's challenge was confined to s 35(1), (2), (3) and (4) of the Act, it is important to understand the procedure as a whole in considering appellant's contentions.

Section 35 – the procedure

[35] Section 35(1) provides that a complaint alleging unprofessional, dishonourable or unworthy conduct against a legal practitioner may be brought to the Disciplinary Committee either by the Council of the Law Society or an individual affected by the conduct of the legal practitioner.⁵ If, upon receipt of a complaint, the Disciplinary Committee is of the view that it does not disclose a *prima facie* case of unprofessional, dishonourable or unworthy conduct, the Committee may summarily dismiss the complaint without requiring the legal practitioner to answer the allegations at all.⁶ A complainant aggrieved by the summary dismissal of his or her complaint may appeal to court against that decision.⁷

⁵ Section 35(1) of the Act. The terms of the section are set out para [7] above.

⁶ Section 35(2) of the Act.

⁷ Section 35(3) of the Act.

[36] Where the Committee is of the view that a complaint discloses a *prima facie* case of unprofessional, dishonourable or unworthy conduct, the Committee must set a date for a hearing of the complaint and notify both the complainant and the legal practitioner. The legal practitioner must be given a copy of the complaint at least fourteen days before the hearing and be given an opportunity to inspect any documents in the possession of the Committee relating to the complaint.⁸ The Committee may appoint a legal practitioner to lead evidence at the hearing, to cross-examine the legal practitioner and any witnesses called by him or her, as well as to present argument.⁹ The legal practitioner is also entitled to legal representation at the hearing.¹⁰

[37] After the hearing, the Committee may either dismiss the complaint, or conclude that the legal practitioner has been guilty of unprofessional, dishonourable or unworthy conduct.¹¹ If it does the latter, the Committee must decide whether the conduct warrants an application to court for the name of the legal practitioner to be struck from the roll, or for the practitioner to be suspended from practice. If such sanctions are not warranted, then the Committee may reprimand the practitioner and/or impose a penalty up to N\$10 000 on the practitioner.¹² A legal practitioner may appeal to court against a monetary penalty imposed upon him or her.¹³ If the Committee considers that the conduct does warrant either striking off or suspension from practice, the Committee must apply to court for such an order.¹⁴

⁸ Section 35(4) of the Act.

⁹ Section 35(5) of the Act.

¹⁰ Section 35(6) of the Act.

¹¹ Section 35(7) of the Act.

¹² Section 35(8) of the Act.

¹³ Section 35(10) of the Act.

¹⁴ Section 35(9) of the Act.

[38] Appellant's complaint about this process is twofold: first he argues that the section provides that the Disciplinary Committee serves as investigator, prosecutor and judge in its own cause; and secondly, he argues that the procedure is unfair because if the Disciplinary Committee determines that there is a *prima facie* case to answer, the same Committee will then convene a hearing and determine the application. Appellant argues that this process is unfair because the Committee has already taken a preliminary view of the facts before hearing the complaint in full. This, appellant argues, evinces 'institutional bias' in the process.

[39] Appellant relies on both Art 12 and Art 18 of the Constitution. Both provisions impose an obligation of procedural fairness, but Art 12 applies to courts or tribunals that are empowered to determine civil rights and obligations, while Art 18 applies to 'administrative bodies and administrative officials'.

Is the Disciplinary Committee bound by the provisions of Art 12?

[40] Contrary to the argument made by counsel for the appellant, counsel for the Disciplinary Committee argues that the proceedings before the Disciplinary Committee conducted in terms of s 35 do not constitute proceedings within the meaning of Art 12, and that the Committee is therefore not bound by Art 12 in conducting its proceedings. This issue does not appear to have been addressed in detail by the High Court in its judgment, which assumed that Art 12 was applicable to the proceedings before the Committee.

[41] Counsel for the Disciplinary Committee relied for this submission on *Vaatz v Law Society of Namibia*,¹⁵ in which the High Court was concerned with a disciplinary enquiry into alleged unprofessional conduct by a legal practitioner held in terms of the forerunner to the Act, the Attorneys Act 53 of 1979 (RSA).

[42] In that case it was argued that the disciplinary proceedings were 'in the nature of' criminal proceedings and that Art 12 was therefore applicable to the disciplinary proceedings. Levy J held that disciplinary proceedings were not criminal proceedings, and held that Art 12 did not apply to disciplinary proceedings under the Attorneys Act.¹⁶ Levy J was undoubtedly correct in concluding that properly construed disciplinary proceedings are not criminal proceedings as contemplated in Art 12. Article 12 entrenches the presumption of innocence,¹⁷ requires judgments in criminal cases to be given in public,¹⁸ and requires the 'release' of an accused if a trial does not take place within a reasonable time.¹⁹ These provisions make plain that when Art 12 speaks of criminal proceedings it is speaking of cases where a person is charged with a criminal offence and subject, if convicted, to a criminal sanction. Disciplinary proceedings are different.

[43] It does not appear to have been argued in *Vaatz v Law Society of Namibia* that the disciplinary proceedings in question determined civil rights and obligations and therefore fell within the ambit of Art 12. Counsel for the Disciplinary Committee argued in this case that the proceedings before the Disciplinary Committee are not

¹⁵ 1990 NR 332 (HC).

¹⁶ *Id.* at 340A–41C.

¹⁷ See Art 12(1)(d).

¹⁸ Article 12(1)(c).

¹⁹ Article 12(1)(b).

proceedings that determine civil rights and obligations. For this argument, he relied upon the South African Appellate Division decision of *Solomon v Law Society of the Cape of Good Hope*.²⁰ In that case, the Court was concerned with the question whether an application to the Court by the Law Society for striking off a legal practitioner constituted 'a civil suit or action', for if it did, an appeal would lie as of right to the Appellate Division. Wessels CJ held that the Law Society's application to the Provincial Division of the Supreme Court was not a 'civil suit or action' because, properly construed, the Law Society 'merely submits to the court facts which it contends constitute unprofessional conduct and then leaves the court to determine how it will deal with this matter'.²¹

[44] This decision does not assist this court in determining whether the proceedings before the Disciplinary Committee itself are proceedings that determine civil rights and obligations for two reasons. First, the proceedings at issue here are different from those under consideration in *Solomon's* case. Here we are concerned with the proceedings before the Disciplinary Committee itself, not the proceedings brought before the court. Secondly, the rule that governed the question before the Appellate Division is different from the rule in question here. There the court was concerned with the application of a rule regulating appeals as of right to the Appellate Division, whereas here we are concerned with the interpretation of a constitutional provision conferring rights. The difference in the purpose and language of the underlying rule thus renders the reasoning in *Solomon's* case of

²⁰ 1934 AD 401.

²¹ *Id.* at 409.

little value in deciding whether the Disciplinary Committee conducting proceedings in terms of s 35 is bound by the provisions of Art 12.

[45] There is guidance to be found elsewhere, however. In *Vaatz*, Levy J correctly pointed out that Art 12 is drafted in language similar to Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.²² Given the textual similarity of the two provisions, the jurisprudence on the meaning of Art 6 of the European Convention may be of assistance. The jurisprudence on Art 6 makes plain that the phrase 'in the determination of his civil rights and obligations' covers all proceedings that are 'decisive' of civil rights and obligations.²³ The Court of Appeal for England and Wales has held that disciplinary proceedings that impose a reprimand on a legal practitioner does not amount to a determination of his civil rights or obligations within Art 6(1) of the Convention.²⁴ The court held that whereas an order that barred a legal practitioner from practice would constitute a determination of the civil rights or obligations of the practitioner, a mere reprimand, even a severe reprimand, did not.

[46] What is clear from the jurisprudence under Art 6 is that it governs proceedings that have a decisive effect on civil rights and obligations. This approach derives, it would seem, from the employment of the noun 'determination' in the provision. This word also appears in Art 12. And the approach adopted by the

²² Article 6(1) of the European Convention provides as follows: 'In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

²³ See the helpful discussion in Lord Lester of Herne Hill QC, Lord Pannick QC and Javan Herberg *Human Rights Law and Practice* 3 ed (2009, Lexis Nexis) para 4.6.6. See also *Fayed v United Kingdom* (1994) 18 EHRR 393 (ECTHR).

²⁴ See *R (Thompson) v The Law Society* [2004] 1 WLR 2522 (CA) para 88.

European Court, and by courts in the United Kingdom in interpreting the Convention, is a sound approach that should perhaps be adopted in Namibia.

[47] However, this is not a question that needs to be finally determined in this case, for Appellant relies also on Art 18 of the Constitution, which also imposes a duty to act fairly on certain bodies and officials. If the Disciplinary Committee is bound by the terms of Art 18, then the question whether it is also bound by the terms of Art 12 will have no material effect on the determination of the case before this court, given that Appellant relies on both constitutional provisions to assert a duty of fairness. I shall turn therefore to consider whether Art 18 is of application to the Disciplinary Committee in relation to its proceedings under s 35.

Is the Disciplinary Committee bound by Art 18?

[48] The High Court held that Art 18 was not applicable to the Disciplinary Committee. It held that Art 18 applies only to administrative bodies and officials, which, according to the High Court are institutions that form part of the state bureaucracy. The High Court held that the Disciplinary Committee is not such a body, but is instead a specialised tribunal that is bound to act fairly and reasonably and in compliance with the rules of natural justice and the Act. In effect, the High Court seemed to suggest that the Committee was obliged to act consonantly with the obligations imposed by Art 18 even though not bound by it.

[49] The High Court is correct to state that Art 18 binds 'administrative bodies and administrative officials' but determining what will constitute an administrative body or an administrative official within the meaning of Art 18 is not as straightforward as

the reasoning of the High Court appears to suggest. It has long been recognised by courts in the Commonwealth that at times private bodies may exercise powers that are in effect, public, and the exercise of power by such bodies has been subject to review.²⁵ It has also been recognised that private bodies exercising statutory powers may be subject to judicial review.²⁶ Moreover, in both South Africa and Namibia, it has long been recognised that the proceedings of private bodies that exercise disciplinary functions, even if they are not part of the administrative bureaucracy of the state, must be in accordance with the principles of natural justice.²⁷ The common-law rules of administrative law have thus applied more widely than to officials and bodies that fall within the civil service or bureaucracy. In part this is in recognition of the fact that the modern state often confers the power to perform administrative functions on bodies that do not fall within the civil service. The exercise of those functions affects the rights and interests of members of the public just as they would if members of the civil service had exercised them.

[50] In construing Art 18 it is necessary to start by understanding its constitutional purpose. Article 18 imposes a duty on those it binds to act fairly, reasonably and in accordance with common law and legislative requirements. It also ensures that those aggrieved by the exercise of such acts have the right to seek recourse before a court of law. Its purpose is therefore to provide protection to members of the public in their dealings with those engaged in administrative tasks, to ensure that those

²⁵ See *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 1 ALL ER 564 (CA) and *Coetzee v Comitis* 2001 (1) SA 1254 (C).

²⁶ See, for example, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2004 (6) SA 557 (CC).

²⁷ See, for example, *Jockey Club of South Africa & others v Feldman* 1942 AD 340 at 350–351; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646F–G; and *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A).

tasks are lawfully, reasonably and fairly performed and to ensure that any person aggrieved by the manner in which the tasks have been performed has recourse to a court.

[51] Although the provision expressly refers to 'administrative bodies' and 'administrative officials', those terms are not defined. They are, clearly, bodies and officials engaged in 'administration'. As mentioned above, although government officials and bodies often carry out administration, there are times when administrative tasks are carried out by non-governmental officials and bodies. If Art 18 were to be limited only to those bodies and officials that form part of the government bureaucracy, as the High Court suggests, when bodies or officials who do not form part of government carry out administration, then the protections of Art 18 would be lost. The High Court gave no reason for this narrow construction of Art 18. This consequence could be avoided if the starting point for determining whether Article 18 binds a body or official is a consideration of the nature of the function performed by that body or agency. On this approach, where a body or official performs a task that is administrative, Art 18 will bind that body or official.

[52] It will not always be easy to determine when a task performed by a body or official is administrative in character.²⁸ It will be a question that will have to be determined on a case-by-case basis but there are several characteristics that will assist in making this determination. The following is a list of some of those characteristics, but it is not exhaustive. First, the source of the power to perform the

²⁸ See the discussion in this regard in *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) para 143.

task will be an important pointer. For administration is primarily concerned with the implementation of legislation and the tasks and functions of administrative bodies and officials are in most cases provided in statutes. Accordingly, where the source of a task is statutory, it is more likely that the task will be administrative in nature. Secondly, the nature of the task will be important. If the task is one performed in the interest of the public or a section of the public, as opposed to a private interest, it again is more likely that the task will be administrative in character. Some public tasks are not administrative in character. For example, adjudicative tasks carried out by judicial officers in their capacity as such, cannot be administrative tasks, although there may be occasions when judicial officers are empowered to carry out administrative tasks. Furthermore if in performing the task, the relevant agency or body may coerce or compel compliance with its rules by members of the public, then again, the task may be administrative if it is not judicial). A further consideration will be whether the body or agency is funded by public funds to perform the relevant task.

[53] The High Court seemed to consider that a specialist tribunal established by statute could not constitute an 'administrative body' because such a body is a statutory body and not an administrative body. However, the dichotomy between 'statutory bodies' and 'administrative bodies' adopted by the High Court is an unhelpful and misleading one. As discussed above, one of the key determinants of whether a task is administrative is whether the task is imposed by statute. In most cases, bodies that are empowered to implement the provisions of a statute will have been established by statute and they will accordingly be administrative bodies. There seems no reason of principle or logic to conclude that because a statute has

established a body, it is not an administrative body within the meaning of Art 18. The reasoning of the High Court in this regard would produce the result that many bodies carrying out administrative tasks would be found not to fall within the ambit of Art 18. This perverse result would be in conflict with the constitutional purpose sought by Art 18.

[54] It is necessary now to turn to consider in the light of the characteristics mentioned above whether the Disciplinary Committee constitutes an administrative body within the meaning of Art 18. The Committee is established in terms of s 34 of the Act. Four of its members are appointed by the fourth respondent and the fifth by the Minister of Justice. The Committee's establishment is therefore based in statute, and its hybrid composition makes plain that it is not a private body established for purely private purposes. Both these considerations point to the Committee's being an administrative body within the meaning of Art 18. Furthermore, the statutory functions performed by the Committee are functions that are performed in the public interest to ensure that there is a fair and transparent process for investigating and determining complaints against legal practitioners. Finally, the functions of the Committee are disciplinary in nature, and as such quite appropriately attract a duty to act fairly, reasonably and lawfully (as the High Court itself concluded). All of these considerations point to the Committee being an administrative body within the meaning of Art 18.

[55] There is one last consideration. Can it be said that because the task of a tribunal may bring it within the scope of Art 12, something not decided in this judgment, it cannot therefore be an administrative body within the meaning of Art

18? There seems no reason in principle why a tribunal may not be bound both by the provisions of Art 12 and Art 18 of the Constitution. There is nothing inconsistent in the duties imposed by the two provisions. Both impose duties to act fairly. Art 12 and Art 18, therefore, are not necessarily mutually exclusive. It should be noted that there will be some tribunals whose tasks are purely judicial in character and not administrative and so will fall outside the scope of Art 18,²⁹ but there will be specialist tribunals that cannot be said to be purely judicial in character that will fall within the scope of Art 18, and may also fall within the scope of Art 12. In each case the question will be whether, upon a consideration of the relevant characteristics, the body is an administrative body within the meaning of Art 18. If it is, the fact that it may also be bound by Art 12 will not affect that conclusion.

[56] In the light of the above reasoning, it is clear that the Disciplinary Committee is an administrative body within the meaning of Art 18 and is therefore constitutionally bound to act fairly, reasonably and in accordance with the law. Given that conclusion it is not necessary for the purposes of this case to decide whether the Disciplinary Committee is also bound by the provisions of Art 12. That question can stand over for another day.

[57] Appellant argues that the process provided in s 35 is not a fair process and therefore that s 35 is in conflict with Art 18. That is the next question that arises for determination.

²⁹ See, for example, the South African case of *Nel v Le Roux* NO 1996 (3) SA 562 (CC).

Does s 35 provide for a process that is not fair in breach of Art 18?

[58] Appellant argues that s 35 provides for an unfair process because it requires the Committee to act as investigator, prosecutor and judge in its own cause. However, it is clear from the description of the process provided above, that complaints against legal practitioners are initiated either by the Council of the Law Society or by individual members of the public,³⁰ not by the Disciplinary Committee. The Disciplinary Committee is not a committee of the Law Society. It is a statutory body with a clear statutory mandate that must function in terms of the legislation that establishes it. The Committee may not instigate complaints of its own accord but must wait for complaints to be raised either by members of the public or by the Council of the Law Society. Appellant is not correct therefore to suggest that the Committee when dealing with complaints against legal practitioners acts as 'a judge in its own cause'.

[59] Appellant argues that the procedure provided for in s 35 is unfair because it evinces institutional bias. In making this submission, appellant relies on a decision of the Canadian Supreme Court, *Attorney General, Quebec v Quebec Inc.*³¹ In that case, the court was concerned with a challenge based on s 23 of the Canadian Charter of Rights and Freedom to an administrative agency involved in the grant and revocation of liquor permits. It was argued in that case that the liquor permit agency was institutionally biased. The court held that institutional bias would be established where –

³⁰ See s 35(1) of the Act.

³¹ [1996] 3 SCR 919 (SCC).

'... a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias in a substantial number of cases.'³²

[60] This test, Gonthier J emphasised, must be applied in the light of the circumstances of each case.³³ Those circumstances include the nature of the dispute to be decided by the agency, the other duties of the agency, and the operational context as a whole. He also emphasised that the rules of natural justice do not have a fixed content, but depend on the nature of a tribunal and its institutional constraints.³⁴ The focus of the challenge in that case was the process whereby liquor permits were cancelled or revoked. The evidence before the court demonstrated that lawyers employed by the agency participated in the filing and investigation of complaints, as well as in the presentation of the case to the directors of the agency, and in the drafting of the decision by the agency. Gonthier J reasoned that although a 'plurality of functions' is not of itself a cause for concern, where functions overlap within an agency, the result should not be 'excessively close relations among employees involved in different stages of the process'.³⁵ After a consideration of the operation of the agency, Gonthier J concluded that the role performed by the lawyers employed by the agency gave rise to a reasonable apprehension of bias, because of the excessively close relations amongst employees engaged in different stages of the process. In particular, he noted that there was a possibility that prosecuting counsel could be in a position to participate

³² Id para 44.

³³ Id para 45.

³⁴ Id

³⁵ Id para 48.

in the adjudication process, something which he thought would never be permissible.³⁶

[61] It is clear that the procedure under scrutiny in the *Quebec* case differs from s 35. In terms of s 35, complaints are initiated not by the Disciplinary Committee but by members of the public and by the Council of the Law Society. The Committee may in terms of its regulations, call for further documents from the complaining party or the legal practitioner.³⁷ Moreover, although s 35(5) permits the Committee to appoint a legal practitioner to lead evidence at the hearing, and to cross-examine and present argument, it does not provide that that person should participate in the deliberations of the Committee or be involved in the drafting of its decision.

[62] In making his argument, appellant appears to have conflated the role of the Council of the Law Society with the role of the Disciplinary Committee but as pointed out above, even though four members of the Committee are appointed by the Council of the Law Society, the Committee is not a committee of the Council, and it must perform its statutory functions independently of the Council.

[63] In this regard, another case relied upon by Appellant, *Meerabux v Attorney General of Belize*,³⁸ is of assistance. In that case, the appellant, a former justice of the Supreme Court of Belize, had been the subject of complaints brought by the Bar Association of Belize and another person. The Governor General referred the

³⁶ Id para 56.

³⁷ See s 2.3 of the Rules Governing the Disciplinary Committee: Legal Practitioners Act, 1995 published in GN 54, *Government Gazette* 1270 dated 1 March 1996.

³⁸ [2005] 2 AC 513 (PC).

complaints to the Belize Advisory Council in terms of the Belize Constitution. The chairperson of the Advisory Council was a member of the Bar Association. The appellant objected unsuccessfully to the chairperson's participation in the hearing. When the hearing was concluded, the appellant then filed a constitutional complaint stating that his constitutional rights had been infringed. One of the grounds for his complaint was the participation by a member of the Bar Association as chairperson of the enquiry, given that the Bar Association had originally lodged the complaint against him. The Privy Council noted that the chairperson had not been a member of the Bar Association committee upon whose initiative the complaints against the appellant had been brought, nor did the chairperson have any personal or pecuniary interest in the proceedings. Accordingly the Privy Council concluded that given that the chairperson had not been actively involved in the institution of the proceedings, he was not automatically disqualified from participating, nor would a 'fair-minded and informed observer' have concluded that he was biased.³⁹

[64] It follows from the reasoning in *Meerabux*, that the fact that a complaint is laid before the Disciplinary Committee by the Council of the Law Society does not automatically disqualify members of the Disciplinary Committee who are members of the Law Society from participating in the proceedings. It also follows that members of the Disciplinary Committee should not participate in disciplinary proceedings if they have been involved in a different capacity in the initiation of the complaint. Section 35 of course does not provide otherwise.

³⁹ Id paras 24–25.

[65] Appellant made one further argument concerning institutional bias. He pointed to the fact that the Disciplinary Committee is required in terms of s 35(2) to decide whether a complaint discloses a *prima facie* case of unprofessional, or dishonourable or unworthy conduct. If it considers that there is no *prima facie* case, the matter is summarily dismissed, although a dissatisfied complainant may appeal that summary dismissal to the court. If the Committee decides that the complaint does disclose a *prima facie* case, then the Committee must hold a hearing and provide the legal practitioner with a copy of the complaint and any documents in the possession of the Committee in relation to the complaint. Appellant argues that because the Committee makes an initial decision as to whether there is a *prima facie* case, it is unfair for the Committee then to hear the substantive complaint at a hearing.

[66] This argument overlooks the fact that the purpose of s 35(2) is to avoid legal practitioners being burdened with responding to complaints that lack merit. In determining whether a complaint discloses a *prima facie* case, the approach of the Committee will be to decide whether the facts, as alleged in the complaint, if established in a hearing before it, would establish that the legal practitioner is guilty of unprofessional, or dishonourable or unworthy conduct. It is similar to the test applied by courts in the granting of interim interdicts.⁴⁰ A court may well grant an interim interdict together with a *rule nisi* but discharge the interdict on the return day of the rule once the respondent has set out his or her defence. It has never been

⁴⁰ See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

suggested that it is unfair for the judge who granted the interim interdict on the first occasion to preside on the return day of the rule.

[67] The question is whether appellant has established that a well-informed person who considered the process established in terms of s 35 would have a reasonable apprehension of bias on the part of the Disciplinary Committee. In my view, appellant has not established that case. A reading of its provisions makes clear that s 35 is an important provision aimed at enhancing public confidence in the legal profession by providing a fair procedure for the handling of complaints against legal practitioners. The procedure takes care to protect the interests of both the public and legal practitioners.

[68] In the interest of legal practitioners, it provides a sifting mechanism to prevent them from being called upon to respond to meritless complaints. In their interest too, it provides that when they are called upon to respond to a complaint they are given full and timely access to all the relevant materials in the possession of the Committee and the right to be legally represented, as well as an opportunity to lead evidence to rebut the disciplinary complaints.

[69] The section further provides that if a legal practitioner is aggrieved by a decision of the Committee in relation to the imposition of a financial penalty, the legal practitioner may appeal to the court against the decision. Moreover, the Committee only makes the preliminary decision whether the conduct of the legal practitioner 'justifies an application to court' for an order to suspend the legal practitioner from practice, or to strike his or her name from the roll. The decision as

to whether a legal practitioner should be barred or suspended from practice is a decision that is taken by a court on application by the Disciplinary Committee.

[70] The Committee, as an administrative body within the ambit of Art 18 of the Constitution, must act reasonably and fairly and in accordance with the law. The jurisprudence referred to by the appellant gives salutary guidance as to what those obligations require. For example, members of the Disciplinary Committee must not permit the legal practitioner whom it appoints in terms of s 35(5) of the Act to participate in its deliberations, or in the preparation of its decision. Moreover, members of the Disciplinary Committee must not participate in any disciplinary proceedings where they have been involved in the institution or investigation of a complaint. Should the Committee flout these principles of fairness in any individual case, its conduct will be subject to judicial review on the basis that it has not followed a fair procedure.

[71] In the circumstances, appellant's argument that s 35 of the Act inscribes institutional bias in the procedures followed by the Disciplinary Committee cannot succeed. An informed observer, viewing the matter realistically and practically, would not entertain a reasonable apprehension of bias in relation to the proceedings of the Disciplinary Committee in a substantial number of cases. The appeal must in this respect fail.

II Did the High Court err in referring the matter back to the Disciplinary Committee?

[72] Appellant's second contention is that once the High Court had concluded that the Disciplinary Committee had not been properly constituted at the time it took the

decision to make an application to the High Court in terms of s 35(9) of the Act, it was not competent for the court to refer the matter back to the Disciplinary Committee. The High Court reasoned that it had a 'residual inherent power to supervise the legal profession in the public interest', which enabled it to refer the matter back to the Disciplinary Committee so that its current members could decide whether 'to ratify the decision as to the guilt of the first respondent and thereafter decide what appropriate sanction to impose'.

[73] Both the High Court and this court have an inherent supervisory jurisdiction to supervise the legal profession in the public interest. This jurisdiction arises from the common law and is not limited by legislation that regulates the legal profession, unless the legislation expressly so provides.⁴¹ Neither party suggested that there was any provision in the Act that seeks to restrict the scope of this jurisdiction. The High Court held that the Disciplinary Committee was not properly constituted at the time that the decision to approach the court in terms of s 35(9) was taken and was, according to the High Court, therefore not lawfully able to take that decision. This conclusion was not the subject of cross-appeal to this court and therefore we express no opinion on it. Nevertheless, the fact that the Disciplinary Committee was not properly constituted at the time it took the decision to make an application to the High Court would not have affected the inherent jurisdiction of the High Court. The

⁴¹ See, for example, the following South African decisions: *Pesskin v Incorporated Law Society* 1966 (3) SA 719 (T) at 723G–H, where the court held that a court could admit a well-qualified applicant to the legal profession even if his circumstances were not covered by the existing legislation; *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 639C, where the court held that its inherent jurisdiction to suspend an attorney from practice had not been abolished by legislation; and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E–F, where the court held that it had the inherent jurisdiction to decide on the fitness of legal practitioners, notwithstanding the relevant legislative provisions.

court's authority to make an appropriate order in the case in terms of its inherent jurisdiction was not dependent on the standing of the applicant.

[74] Indeed, it may well be, although it is not necessary to decide this question now, that the High Court could, in the exercise of its inherent jurisdiction, if it had considered that both the facts and the interests of the public warranted it, have determined whether appellant's name should have been struck from the roll of attorneys or he should have been suspended from practice, even once the High Court had concluded that the Disciplinary Committee had not been properly constituted at the time it decided to make an application to the High Court.

[75] Be that as it may, the High Court chose to refer the matter back to the Disciplinary Committee. The High Court did so because it thought it would be 'just and reasonable', 'in the interest of the public', as well as in the interest of 'the effective supervision of the profession and the proper administration of justice' to do so. The decision to refer the matter back to the Disciplinary Committee was taken by the High Court in the public interest given the seriousness of the appellant's disciplinary violations. Given the important role of the High Court in supervising the legal profession in the interests of the public, this decision by the High Court cannot be assailed. One of the purposes of the referral, no doubt, was to avoid any suggestion that the Disciplinary Committee would be prevented from a reconsideration of the disciplinary infractions of appellant. For these reasons, therefore, appellant's argument that the High Court erred in deciding to refer the matter back to the Disciplinary Committee cannot be sustained.

[76] For the reasons given above, the appeal has no prospects of success. It is now necessary, given this conclusion on the merits of the case, to return to the applications for condonation considered above.

Determination of appellant's applications for condonation

[77] Given the fact that appellant failed to comply with the rules of this court in relation to the prosecution of his appeal in several respects, and given that his explanation for his failures were in some respects not satisfactory, the question whether condonation should be granted for the non-compliance turns on whether he has prospects of success upon appeal. This judgment has explained why appellant does not have prospects of success upon appeal and it follows that his applications for condonation cannot be granted. It follows that the appeal will be struck from the roll.

Costs

[78] One last issue requires consideration. The ordinary rule is that costs should follow the result of the appeal, and that is the order this court will make. However, that order needs to be qualified in this case. First, the Disciplinary Committee failed to lodge heads of argument before the hearing date in October 2014. That lapse resulted in the matter being postponed *sine die* by agreement between the parties on the basis that the Disciplinary Committee would pay appellant's costs of the aborted hearing on an attorney and client basis. Nothing further need be said about that. However, the Disciplinary Committee again failed to lodge its heads timeously in respect of the hearing in April 2016. It made an application for condonation, which appellant opposed. That application did not provide a fully satisfactory explanation

for the delay, as discussed above. Accordingly, it is appropriate that the Disciplinary Committee be ordered to pay appellant's costs consequent upon its opposition to the Disciplinary Committee's application for condonation for the late filing of its heads.

[79] Secondly, the Law Society at the last minute sought to oppose the appeal and lodge a full set of heads of argument in this regard. Appellant opposed the Law Society's belated attempt to oppose the appeal. At the hearing the Law Society withdrew its opposition. In the circumstances, the Law Society should be obliged to pay appellant's costs on appeal that resulted from the Law Society's belated – and subsequently withdrawn -- opposition to the appeal.

Order

[80] The following order is made:

1. The two applications for condonation brought by appellant are dismissed.
2. The matter is struck from the roll.
3. Subject to para 4 of this order, appellant is ordered to pay the costs of first respondent in this court on the basis of one instructed and one instructing counsel.

4. (a) First respondent is ordered to pay the costs of appellant occasioned by its opposition to first respondent's application for condonation for the late filing of its heads of argument dated 5 April 2016, such costs to include the costs of one instructed and one instructing counsel.

(b) Fourth respondent is ordered to pay the costs of appellant occasioned by fourth respondent's belated opposition to the appeal, such costs to include the costs of one instructed and one instructing counsel.

O'REGAN AJA

CHOMBA AJA

MOKGORO AJA

APPEARANCES

APPELLANT:

M Khoza (with him O S Sibeya)

Instructed by Sibeya & Partners Legal
PractitionersFIRST, SECOND and THIRD
RESPONDENTS:

J A N Strydom

Instructed by Government Attorney