

SOUTH AFRICA / JUDGMENT

Mda v Law Society of the Cape of Good Hope (534/10) [2011] ZASCA 145; 2012 (1) SA 15 (SCA) (26 September 2011)

[2011] ZASCA 145

COURT

Supreme Court of Appeal

BEFORE

Brand, Cachalia, Malan, Majiedt, Seriti

CASE / FILE NUMBER

534/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 534/10

In the matter between:

MATOLWANDILE BONGA MDAAppellant

and

THE LAW SOCIETY OF THE CAPE OF GOOD HOPERespondent

Neutral citation: Mda v The Law Society of the Cape of Good Hope (534/2010) [2011] ZASCA 145 (26 September 2011).

Coram: Brand, Cachalia, Malan, Majiedt and Seriti JJA

Heard: 15 September 2011

Delivered: 26 September 2011

Summary: The authority of council of the Law Society to inspect, under s 70(1) of the Attorneys Act 53 of 1979, 'any book, document, record or thing' pertaining to a practice, or to inspect the 'accounting records' under s 78(6) framed widely – not limited only to documentary material pertaining to specific complaint against practitioner.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Petse ADJP and Miller J sitting as full bench):

(1) The appeal is dismissed with costs.

CACHALIA JA (Brand, Malan, Majiedt and Seriti JJA concurring):

- [1] This is an appeal against an order of a full bench of the Eastern Cape High Court sitting at Mthatha (Petse ADJP, Miller J concurring) ordering the appellant, Mr Matolwandile Bonga Mda, to make the accounting records of his attorney's practice available for inspection by the Law Society of the Cape of Good Hope. The appeal comes before us with leave of the high court. The circumstances under which the Law Society asserts a right to inspect Mr Mda's records are these.
- [2] Mr Mda has not had a happy relationship with the Law Society. He has, on fifteen occasions, been found guilty of unprofessional conduct pursuant to internal disciplinary proceedings conducted in terms Rule 15 of the Rules of the Law Society of the Cape of Good Hope. The Law Society is considering instituting disciplinary proceedings against him for five other matters. One of these relates to a complaint arising from a claim that Mr Mda was instructed to pursue on behalf of Mr Dlokweni against the Road Accident Fund (the RAF) in about 1996. In 2005, Mr Dlokweni lodged a complaint with the Law Society against Mr Mda regarding his claim. This was after Mr Dlokweni had learnt that the RAF had paid his claim to Mr Mda three years earlier, in 2002, and Mr Mda could not account for the money. At Mr Dlokweni's instance the Law Society wrote to Mr Mda to establish what had happened, but received no satisfactory response.
- [3] Early in April 2006 Mr Mda informed the Law Society that he could not locate Mr Dlokweni's file. He promised to respond by 21 April 2006, but failed to do so. He then gave another undertaking to answer the query by 14 July 2006. Again, no response was forthcoming. The Law Society wrote further letters – the last on 4 January 2007 – but elicited no response. When he did finally answer, on 24 August 2007, the Law Society was still not satisfied with his explanation.
- [4] On 11 July 2007 the Law Society addressed a letter to Mr Mda to inform him that a 'forensic audit' of his practice was to be conducted as envisaged in s 70(1), and s 78(5) of the Act, and that PDP Pretorius Dondashe (the auditors) had been authorised to do this. It explained that this was required to satisfy itself that the practice was keeping proper accounting records in compliance with s 78(4), and to decide whether or not disciplinary proceedings under s 70(1) were warranted. Mr Mda requested information on the ambit of the investigation. On 15 August 2007 the Law Society answered by letter informing him that four other complaints by his clients against him were being considered, in addition to Mr Dlokweni's. The first two complaints concerned an alleged failure on his part to respond to requests for information from his clients to provide progress reports to them about their matters; the third was that he had allegedly not paid arrear rates and taxes to a municipality in respect of a property despite having promised to do so; and the last complaint concerned a matter involving the

transfer of a property for which he had received an instruction ten years earlier, but had allegedly not reported on its progress, and then resisted attempts by the complainant to have the file removed from him.

- [5] Mr Mda avers that he attended to all these complaints and that there is no basis for a wide-ranging investigation into the affairs of his practice. Despite adopting this stance he initially appeared willing to assist the auditors with their investigation, but then demurred. The Law Society demanded his co-operation, threatening to institute proceedings to compel him to co-operate if necessary. With no adequate response forthcoming from him, the Law Society launched the proceedings that are the subject of this appeal.
- [6] The essential dispute before the high court, as before us, concerns the ambit of the investigation that the Law Society may undertake. Mr Mda accepts that the five complaints in issue, if proved, could amount to ‘unprofessional, dishonourable or unworthy conduct’ as the Act envisages. But, he contends, the Law Society may only demand information concerning the five complaints mentioned above: it may not conduct a general forensic audit of his practice for the purpose of enquiring into allegations of misconduct on his part. In support of his contention he submits that ss 70(1) and 78(5), upon which the Law Society purports to rely to conduct a wide-ranging investigation into the affairs of his practice, do not authorise this. Instead, so the submission goes, s 70(1) permits the Law Society only to inspect material pertaining to specific complaints against him, and s 78(5), only to inspect accounting records concerning his trust account – nothing else. It is therefore necessary to consider the ambit of these provisions.
- [7] Law Societies have, among their objects, the responsibility to uphold the integrity of practitioners¹ and ensure that the standards and control of their professional conduct² are maintained. This task falls to a council, which runs the affairs and exercises the powers of a society.³ Among the powers given to a council to achieve these objects is s 71, which sanctions an enquiry into allegations of ‘unprofessional or dishonourable or unworthy conduct’ on the part of a practitioner. To decide whether or not an enquiry should be held a council may use s 70(1)⁴ to inspect ‘any book, document, record, or thing’ pertaining to a practice. There is no limit to the ambit of the inspection.
- [8] A council may also, under s 78(5)⁵, satisfy itself that a practitioner’s trust accounts are in order by inspecting the ‘accounting records’ of the

practice. In this regard it must be noted that s 78(6)(d)⁶ makes clear that ‘accounting records’ is of wide import and includes ‘any record or document’ under the custody and control of a practitioner relating to the practice. So whether a council is considering a possible professional misconduct enquiry under s 70(1), or the supervision of a practitioner’s trust accounts under s 78(5), both provisions expressly permit the council to inspect all the records and documents concerning the practice. It is on this basis that the high court found that the Law Society was entitled to conduct the envisaged inspection.

- [9] In my view the high court was correct in its conclusion. Concerning Mr Mda's submission that s 70(1) permits a council to inspect documentary material pertaining only to specific allegations of misconduct, this cannot be so. As I have indicated above, the section does not limit a council's authority when it is deciding whether or not to hold a misconduct enquiry. However, once the council has decided to hold an enquiry, ss 71(2)(a)(i) and (ii) require any person who is summoned to testify to produce any documentary material that has a bearing on the subject matter of the enquiry.⁷ Section 71(2) is concerned only with documentary material that may be relevant to an enquiry. Section 70(1), on the other hand, has a specific purpose, which is to place a council in a position to decide whether or not to hold an enquiry. This is why the legislature permitted a broader inspection under s 70(1) than it did under s 71(2).
- [10] There is also no merit in Mr Mda's objection to the Law Society relying on s 78(5), which he maintains may be used only to police trust accounts, and not to investigate misconduct. If this contention were correct it would mean that a council may not request documentary material regarding any allegation of misconduct when it concerns a practitioner's failure to keep proper accounting records, which is absurd. This is why s 78(6) in terms authorises inspection of more than merely the 'accounting records' of a practice.
- [11] Moreover, the facts of this case demonstrate why Mr Mda's objection to the Law Society's use of the relevant provisions is untenable. One of the allegations against Mr Mda is that he may have misappropriated monies that were due to Mr Dlokweni. On the face of it this allegation, if proved, would amount to a failure to keep proper accounts under s 78, and also misconduct as envisaged in s 71. It would also be a criminal offence. In addition, as I have mentioned, Mr Mda has four other complaints pending against him and a dubious disciplinary record. There are therefore clear grounds for the Law Society to invoke both ss 78(6) and 70(1), so that a thorough inspection of his practice may be conducted.
- [12] For all these reasons the appeal must fail. The appeal is therefore dismissed with costs.

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant: T M Ntsaluba

Instructed by:

Jolwana Mgidlana Inc, Mthatha

Nonxuba Inc, Bloemfontein

For Respondent: A A Brink (Attorney)

J F Heunis & Associates, Mthatha

Webbers Attorneys, Bloemfontein

1Section 58(e).

2Sections 58(f) and (g).

3Section 60.

4‘Council's power of inspection

- (1) A council may for the purposes of an enquiry under section 71 or in order to enable it to decide whether or not such an enquiry should be held, direct any practitioner to produce for inspection, either by the council itself or by any person authorized thereto by the council, any book, document, record or thing which is in the possession or custody or under the control of such practitioner and which relates to his practice or former practice.’

4‘Council's power of inspection

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5‘Trust accounts . . . (5) The council of the society of the province in which a practitioner practises may by itself or through its nominee, and at its own cost, inspect the accounting records of any practitioner in order to satisfy itself that the provisions of subsections (1), (2), (2A),

- (3) and (4) are being observed, and, if on such inspection it is found that such practitioner has not complied with such provisions, the council may write up the accounting records of such practitioner and recover the costs of the inspection or of such writing up, as the case may be, from that practitioner.’

5‘Trust accounts . . .

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- (3) and (4) are being observed, and, if on such inspection it is found that such practitioner has not complied with such provisions, the council may write up the accounting records of such practitioner and recover the costs of the inspection or of such writing up, as the case may be, from that practitioner.’

6‘(6) For the purposes of subsections (4) and (5), 'accounting records' includes any record or document kept by or in the custody or under the control of any practitioner which relates to –

(a) ... (b) ...

(c) ...

(d) his practice.'

6'(6) For the purposes of subsections (4) and (5), 'accounting records' includes any record or document kept by or in the custody or under the control of any practitioner which relates to –

(a) ...

(b) ...

(c) ...

(d) his practice.'

7Section 71(2)(a)(i) reads: 'Enquiry by council into alleged cases of unprofessional or dishonourable or unworthy conduct ...

(2) (a) For the purposes of an enquiry under subsection (1), a council may –

(i) under the hand of the president or the secretary of its society, summon any person who in the opinion of the council may be able to give material information concerning the subject matter of the enquiry or who is believed by the council to have in his possession or custody or under his control any book, document, record or thing which has any bearing on the subject matter of the enquiry, to appear before it at a time and place specified in the summons, to be interrogated or to produce that book, document, record or thing, and may retain for inspection any book, document, record or thing so produced; ...'

7Section 71(2)(a)(i) reads: 'Enquiry by council into alleged cases of unprofessional or dishonourable or unworthy conduct ...

(2) (a) For the purposes of an enquiry under subsection (1), a council may –

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Prepared on 9 October 2026 · Esheria