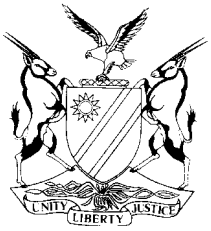

'Reportable'

SUMMARY

CASE NO.: A 216/2008
CASE NO.: A 370/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS v SLYSKEN SIKISO MAKANDO AND ANOTHER

SLYSKEN SIKISO MAKANDO v DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS AND 3 OTHERS

PARKER J

2011 October 18

Constitutional Law - Right to fair trial under Article 12(1)(a) of the Namibian Constitution – First respondent contending that inasmuch as s. 35 of the Legal Practitioners Act (Act No. 15 of 1995) (LPA) empowers the applicant to investigate a complaint and thereafter to form a prima facie view before calling the applicant to answer to the charges arising from the complaint at a hearing (if that becomes necessary) violates the applicant's right to fair trial guaranteed by Article 12(1)(a) – Court finding that such prima facie procedure is part of our rules of practice in civil and criminal proceedings and the procedure has not been struck down as being unconstitutional – Court finding further that the LPA prima facie procedure is fair and reasonable – Court concluding that the applicant has failed to prove violation of his constitutional fair trial right by s. 35 of Act No. 15 of 1995 – Court finding that s. 35 of Act No. 15 of 1995 is not inconsistent with the Constitution – Consequently, the Court rejecting the first respondent's constitutional challenge based on Article 12(1).

Constitutional Law - Right to administrative justice under Article 18 of the Namibian Constitution – Court confirming that institutional and individual targets that must comply with Article 18 are administrative bodies and administrative officials – Court finding that the applicant being a specialized tribunal is not an administrative body within the meaning of Article 18 and therefore the Article does not apply to the applicant – Consequently, the Court rejecting the first applicant's constitutional challenge based on Article 18.

Statute - Section 34 of Act No. 15 of 1995 – Interpretation and application of as respects 'a meeting' of the applicant – Court holding that the words '[a] question before the Disciplinary Committee (the applicant) shall be decided by a majority of votes of the members present …' means a binding decision of the applicant can be taken only at a meeting at which members who form the requisite quorum are assembled.

Statute - Section 34 of Act No. 15 of 1995 – Interpretation and application of as respects terms of office of members of the applicant – Court finding that members of the applicant whose terms of office had come to an end are not competent to act after expiration of their terms of office – In instant case, Court holding that the members whose term of office expired on 30 June 2008 had no power to act after that date in terms of Act No. 15 of 1995 – Consequently, Court finding that while the current members of the applicant can ratify the decision of the previous members of the applicant about the finding of guilt of the applicant taken before 30 June 2008, they cannot ratify the decision to apply to the Court to strike off the first respondent's name from the roll – However, the Court concluding that, on authority and acting on the Court's residual inherent power to supervise the legal profession in the public interest, the Court was entitled to accept the present application and deal with it and take any appropriate decision – Court deciding in the circumstances it is just and reasonable to refer the matter back to the current members of the applicant for them to decide whether to ratify the finding of guilt by the previous members of the applicant and thereafter decide what appropriate sanction to impose in terms of Act 15 of 1995.

Held, that in the absence of express provisions to the contrary, where the term of office of members of a statutory body has come to an end, that body has no power to finalize matters it was seized with before the expiration of its term.

Held, further that where a statutory provision is sought to be impugned on the basis that it is inconsistent with the Namibian Constitution, the Court must concern itself with only that statutory provision; the Court must not concern itself with what the statutory body did or did not do to implement the statutory provision.

Held, further that the institutional and individual targets that must comply with Article 18 of the Namibian Constitution are ‘administrative bodies’ and ‘administrative bodies’ which are State institutions forming the Bureaucratic Executive, which together with the Political Executive constitute the Executive organ of State.

Held, further that in terms of our law, given expression to in Article 18 of the Constitution, the word ‘statutory’ is not synonymous with the word ‘administrative’ as far as Article 18 is concerned; and the term ‘administrative tribunal’, may exist and may have meaning in other jurisdictions, but in Namibia under Article 18 of the Constitution such a term will be a contradiction in terms: it is alien to the law of Article 18 of the Namibian Constitution.

CASE NO.: A 216/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS	**Applicant**

and

SLYSKEN SIKISO MAKANDO	**First Respondent**
THE LAW SOCIETY OF NAMIBIA	**Second Respondent**

CASE NO.: A 370/2008

SLYSKEN SIKISO MAKANDO	**Applicant**

and

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS	**First Respondent**
MINISTER OF JUSTICE	**Second Respondent**
ATTORNEY GENERAL	**Third Respondent**
THE LAW SOCIETY OF NAMIBIA	**Fourth Respondent**

***CORAM*:** **PARKER J *et* SIBOLEKA J**

Heard on: 2011 July 27

Delivered on: 2011 October 18

JUDGMENT

PARKER J: [1] On 31July 2008 the applicant (the Disciplinary Committee, established in terms of s. 34 of the Legal Practitioners Act, 1995 (Act No. 15 of 1995) ('the LPA')), brought an application under Case No. A 216/08 by Notice of Motion, moving the Court to grant an order in terms appearing in the Notice of Motion.

[2] The applicant instituted the application in terms of s 35(9), read with s. 32, of the LPA; and was supported by a founding affidavit deposed to by Mr. Theo Jooste Frank, SC. The provenance of the applicant's application is the process in which, in terms of s. 35(1) of the LPA, the Council of the Law Society of Namibia (the second respondent) in its capacity as an applicant within the meaning of s. 35(1) of the LPA made an application to the applicant (in the present proceedings) for the applicant to require (the legal practitioner, Mr Makando) (the first respondent) to answer before the applicant allegations of alleged unprofessional or dishonourable or unworthy conduct. I shall continue to refer to the parties as such in these proceedings. The applicant, in terms of s. 35(4) of the LPA, concluded that, in its opinion, the application that had been made by the Council of the second respondent disclosed a *prima facie* case of unprofessional or dishonourable or unworthy conduct on the part of the first respondent. Consequently, the applicant called upon the first respondent to answer in a hearing conducted by it 16 charges of unprofessional or dishonourable or unworthy conduct under the LPA ('the LPA hearing'). After the conclusion of the LPA hearing, the applicant found the first respondent guilty of 14 of 16 charges.

[3] I note that at all material times, the first respondent practised on his own account as a legal practitioner based in the northern part of the country prior to the second respondent conducting investigations into the affairs of his practice.

Additionally, at the time of the LPA hearing the practice of the first respondent had been closed; and at present, the first respondent does not practise law on his own account.

[4] To return to the LPA hearing; the reasons for finding the first respondent guilty were set out in a written ruling, a copy of which is annexed to the applicant's founding affidavit (Annexure A). A copy of that ruling was made available to the first respondent. Thereafter, the applicant invited the first respondent to address the applicant on the issue of an appropriate sanction. The first respondent's written submission on the issue is dated 30 June 2008 ('the critical date'). I shall return to the critical date in due course; not least because the statutory term of office of the members of the applicant, including the deponent of the applicant's founding affidavit who at the material time was the applicant's chairperson (i.e Mr Frank), as aforesaid, expired on 30 June 2008.

[5] On 18 August 2008 the first respondent's legal representatives filed a Notice of Opposition to the applicant's application and on 9 October 2008 the first respondent's Opposing Affidavit. In his opposing affidavit, the first respondent states in para 4, 'Before dealing with the specific allegations in the founding affidavit of Frank, I wish to raise the following points *ad limine* (sic).' What follows before the title '**I NOW TURN TO DEAL WITH SPECIAL ALLEGATIONS IN THE FOUNDNG AFFIDAVIT OF THEO JOOSTE FRANK**' (bolded, capitalized and underlined, as herein indicated) (paras 56-61) are texts set out under the following titles, also bolded, capitalized and underlined, as indicated:

> '(1) **CONSTITUTIONALITY OF SECTION 35(1), 2, 3 ND 4 OF THE LEGAL PRACTITIONERS ACT** (paras 5-8);

(2) **EXPIRY OF APPLICANT'S ERSTWHILE MEMBERS TERM OF OFFICE** (para 9);

(3) **INVALIDITY OF MY SO-CALLED HEARING** (paras 10-16); and

(4) **THE SUBJECTIVE LACK OF IMPARTIALITY OF THE THEN COMMITTEE** (paras 17-21)

(5) **THE BACKGROUND** (paras 22-55).'

[6] In para 8.2 of his opposing affidavit, the first respondent states, 'It is therefore my intention to launch a separate application challenging the constitutionality of the section (i.e. s. 35 of the LPA). To that end, I submit that this matter be stayed pending the outcome of the aforementioned application'. That is the application which the first respondent instituted in that regard by Notice of Motion on 3 December 2008 under Case No.: A 370/08. In Case No.: A370/08, the first respondent has moved the Court to grant an order in terms contained in the Notice of Motion. And by agreement between the parties and by direction of the Judge President both matters (i.e. Case No.: A 216/08 and Case No.: A 370/08) were set down for hearing together, as this Court did in the present proceedings. It is the constitutional challenge that I now proceed to consider.

[7] The first respondent contends that s. 35 of the LPA is invalid because it violates Article 12(1)(a) and Article 18, read with Article 5, of the Namibian Constitution. Article 5 is the protection of fundamental rights and freedoms provision of the Namibian Constitution. Article 12(1)(a) is a part of the fair trial provisions of the Constitution. Lastly, Article 18 is the administrative justice provision of the Constitution.

[8] Article 5 is merely an enabling provision aimed at constitutionally confirming the power of this Court to enforce the human rights guaranteed to individuals by

Chapter 3 of the Namibian Constitution: it does not, therefore, *per se* guarantee or protect any particular human right.

[9] In considering the first respondent's constitutional challenge based on Article 12(1) and Article 18, I keep in my mental spectacle the following trite principles of our law concerning (1) constitutional challenge in general and (2) constitutional challenge of a provision of a statute in particular. Under item (1), it has been said that the person complaining that a human right guaranteed to him or her by Chapter 3 of the Constitution has been breached must prove such breach (*Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC). And before it can be held that an infringement has, indeed, taken place, it is necessary for the applicant to define the exact boundaries and content of the particular human right, and prove that the human right claimed to have been infringed falls within that definition (*S v Van den Berg* 1995 NR 23). Under item (2), the enquiry must be directed only at the words used in formulating the legislative provision that the applicant seeks to impugn and the correct interpretation thereof to see whether the legislative provision – in the instant case, Article 12(1) and Article 18 of the Namibian Constitution – has in truth been violated in relation to the applicant (*Jacob Alexander v Minister of Justice and Others* Case No. A 210/2007 (HC) (Unreported)). And by a parity of reasoning, to succeed as respects the rules made under s. 39 of the LPA; the applicant must establish that the rules so made are in conflict with s. 35 of the LPA. In other words; that in making the rules the applicant exceeded its statutory powers under the LPA (*Trustco Insurance Limited t/a Legal Shield Namibia and Another v The Deeds Registries Regulations Board and Others* Case No. A150/2008 (HC) (Unreported)). That is the manner in which I approach the determination of the Constitutional challenge.

[10] Keeping the aforegoing principles and conclusions in my mind's eye, I proceed to consider the first respondent's Constitutional challenge based on Article 12(1)(a) of the Constitution. To start with; I accept Mr Tötemeyer's submission that any conduct of the applicant in the carrying out of its tribunal function under s. 35 of Part IV of LPA is irrelevant; that is to say, this Court must not concern itself with what the applicant did or did not do when applying s. 35 of the LPA. The question is crisply this: on the true interpretation of s. 35(1), (2), (3) and (4) of the LPA, can it be said that those legislative provisions are offensive of the applicant's right to fair trial in terms of Article 12(1) of the Namibian Constitution? Thus, in my opinion, this Court must concern itself with only the conduct that can be attributed to the Legislature. And by the same token, it is the rules, that is, the subordinate legislation, made under the enabling Act, that is, the LPA, as aforesaid, that should concern this Court. And as respects the rules; the only enquiry is, therefore, whether the rule is in conflict with the LPA or that in making the rules the rule makers exceeded their statutory power, as I have said previously; and, of course, it goes without saying that if s. 35 of the enabling Act is found to be inconsistent with the Constitution, any rule made thereunder is accordingly unconstitutional.

[11] In this regard, the pleadings are clear and unambiguous that the first respondent seeks to impugn – on the basis of Article 12(1) of the Constitution – only s 35(1), (2), (3) and (4) of the LPA; and that is the case the applicant has been called upon to answer. In any event, the first respondent does not contend that the rule made under s. 35 of the LPA is in conflict with that section or that in making the rule the maker of the rule exceeded his or her statutory powers under the LPA of course. That being the case it is only the said statutory provision that should engage this Court's attention in these proceedings. Of course, as I have said previously, it goes

without saying that if s. 35 is found to be inconsistent with the Constitution; then any rule made thereunder is null and void and of no effect.

[12] Upon what grounds does the applicant say s. 35(1), (2), (3) and (4) have violated his Constitutional human right to fair trial within the meaning of Article 12(1), (2), (3) and (4) of the Namibian Constitution? In para 12.1 of his founding affidavit on the constitutional challenge (Case No.: A 370/08) the applicant states, 'The striking off application is founded *on the outcome of a process* authorized by and conducted in terms of section 35 of the Legal Practitioners Act No. 15 of 1995 … In terms of that section, the first respondent (i.e. applicant in these proceedings, as I have previously explained) is empowered to enquire whether or not the conduct of a legal practitioner was 'unprofessional, dishonourable or unworthy.'

[13] The applicant goes on to set out holus bolus in para 12.2 of his founding affidavit subsections (1), (2), (3) and (4) of s 35 of the LPA. Having done so, he makes concluding statements in para 12.3, of the affidavit. He then goes on to describe what he considers to be the general procedure followed by the applicant in terms of s. 35(1), (2), (3) and (4), and he concludes with a statement in para 12.7 thus:

> In my view, there is no better example of institutional bias than the process Section 35 obliged the First Respondent to follow. The First Respondent is simply reduced to be the investigator, prosecutor and judge of its own cause.

[14] Para 12.7 appears to capture the essence of the applicant's constitutional challenge based on Article 12(1) of the Constitution because after describing in paras 12.8-15 of his founding affidavit what, in his opinion, transpired at his hearing, the first respondent came to the following conclusion in para 16 thereof:

> Having regard to the above, it is obvious that the First Respondent was the investigator of the complaint against me, the prosecutor in formulating and vetting the charges against me and also the judge of the same complaint in sitting as it did on the 22 and 23 April 2008.

[15] As I see it, the basis on which the first respondent says s. 35(1), (2), (3) and (4) have violated his constitutional right under Article 12(1) of the Namibian Constitution is because, according to him, s. 35 'envisages a two pronged hearing': The first one, according to him, is investigative, that is, to determine whether or not there was a *prima facie* case against the legal practitioner. The other one, according to the first respondent, is a 'full' hearing, in the event of a finding that the legal practitioner 'had a case to answer'. From that contention, the first respondent avers that the applicant 'was the investigator of the complaint against me, the prosecutor in formulating and vetting the charges against me and also the judge of the same complaint in sitting as it did on 22 and 23 April 2008'.

[16] The first respondent's contention is – factually and as a matter of law – incorrect in material respects. To start with, according to s. 35(1) of the LPA, an application ('a s. 35(1) application') was made by the Council of the second respondent to the applicant for the applicant to require the first respondent to answer before the applicant allegations of unprofessional or dishonourable or unworthy conduct on the part of the first respondent. The applicant and the Council of the second respondent are not the one and the same entity: the Council is created by s. 45(1) of the LPA, and the applicant by s. 34 of the LPA. Furthermore, the powers and duties of the applicant are provided for in s. 34 of the LPA, while those of the Council in ss. 45, 47 and 48 of the LPA. Second, the purpose of the procedure under s. 35(2), (3) and (4) of the LPA ('the prima facie procedure') is, as Mr. Tötemeyer submitted, essentially to serve as a filter – I will add 'an efficacious and

reasonable filter' – to ensure that the legal practitioner concerned is not called upon unnecessarily to answer allegations that do not disclose a *prima facie* case against him or her. In my opinion the provision provides for a fair and reasonable procedure governing the process of disciplining legal practitioners whereby the applicant may decline to set in motion the hearing of a complaint which does not disclose a *prima facie* case against the legal practitioner in question. The second respondent, as the statutory and, therefore, official guardian of the profession's conscience (*Re A Solicitor* 1928 72 Sol. Jo. 368 (Court of Appeal), approved in *Re A Solicitor* [1945] 2 All ER 445 (Court of Appeal) [1945]), will receive all kinds of complaints against legal practitioners which the Council must transmit to the applicant; or the applicant may receive complaints from sources other than the Council, e.g. members of the public. It would be unfair and unreasonable for the applicant to conduct a hearing in each and every case without determining first whether an allegation raised in a complaint received from the Council or sources other than the Council discloses a *prima facie* case before calling on the legal practitioner concerned to answer before it such allegation. This procedure, *pace* the first respondent, ensures reasonableness and fairness to the legal practitioner concerned.

[17] In my opinion, if one characterizes the prima facie process as a hearing, as the first respondent does, one would be doing violence to the English language. Besides, the *prima facie* procedure is fair, reasonable and cost-effective as I have found previously; and it aims at preventing situations where legal practitioners are called upon to appear for hearing upon the basis of every wild and pedestrian allegation imaginable.

[18] Moreover, the nature of the *prima facie* procedure under s. 35 of the LPA is not unknown to our law. Take, for example, a decision taken in terms of s. 174 of the

Criminal Procedure Act, 1977 (Act No, 51 of 1977) (the CPA) whereby a court may return a verdict of not guilty when at the close of the State case the court finds that no prima facie case has been made out against the accused and in that event the accused is not called upon to defend himself or herself. If, on the other hand, the court finds that a *prima facie* case has been made out against the accused, the selfsame court proceeds to hear any evidence the accused may place before it and thereafter the same court decides whether the accused is guilty or not guilty at the conclusion of the trial. There is also the system of petitioning the Chief Justice for leave to appeal to the Supreme Court whereby a provisional (i.e. a *prima facie*) view of the case is formed which may be confirmed or displaced when the appeal is heard in due course. In this regard, this Court held in *Hamwaama and others v the Attorney General Case No. A 176/2007* (Unreported) that s 316 of the CPA which governs this procedure is not inconsistent with Article 12(1) (a) of the Namibian Constitution. Yet again; there is the absolution from the instance procedure in civil proceedings where after hearing the case for the plaintiff, the Court may grant absolution from the instance at the end of the plaintiff's case, or may refuse to grant it. If absolution from the instance is refused, the selfsame court proceeds to hear the defendant case and the selfsame Court may find for the defendant and grant judgment for the defendant.

[19] Accordingly, I do not think the first respondent has established that the conferral of investigative and adjudicative powers on the applicant by the LPA is inconsistent with the Constitution (see *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC)). I do not, therefore, with respect, on the facts of the present case see what countermanding proposition can be distilled from *R v Sussex Justices, ex parte McCarthy* (1924) 1 KB 256; and *Metropolitan Properties Co. (FGC) Ltd v Lennon* 1969 1 QB 577. From all the above, I hold that

there is nothing unconstitutional and thus impermissible in the s. 35 procedure, as claimed by the first respondent.

[20] It may be argued that the CPA's s 174 and s 316 *prima facie* procedures and the civil procedure are different from the LPA's prima facie procedure on the basis that the CPA procedures and the civil procedure are conducted by magistrates and judges, that is, judicial officers in court proceedings. Any such argument is untenable. If a procedure is inconsistent with the Constitution, in my opinion, it is of no moment who conducts such procedure and in what judicial or tribunal forum. Mr Tötemeyer's point is simply that the LPA's prima facie procedure is not unknown to our law; and as I say, I accept the submission; and what is more – I will add – those suchlike procedures have not been struck down as inconsistent with the Constitution; and, moreover, as I have said previously, the procedure is fair and reasonable on any account.

[21] Furthermore, and, *a fortiori*, the second respondent (represented by the Council) claims nothing for itself when it makes a section 35 (1) application; it asks for nothing from the legal practitioner in question (*Vaatz v Law Society of Namibia* 1990 NR 332 at 341B, approving *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408). Additionally, as Mr. Tötemeyer submitted, the applicant is an independent body established by the LPA to exercise disciplinary control over legal practitioners in accordance with the LPA. In hearing a matter involving a legal practitioner, the applicant is not deciding in its own cause; it is not acting *sua causa*; indeed, it has no *causa* of its own to promote and it has no interest of its own to protect. The cause the applicant seeks to promote and the interests the applicant seeks to protect are those of the public – the public in whose interest the relevant provisions of the LPA were passed; the public who are entitled to have legal practitioners respect the oath of their office and carry out their duty in a professional

and honourable and worthy manner. Moreover, it follows, as a matter of course, therefore, that the first respondent's reliance on the principle of institutional bias is also without merit. I do not think 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 (see *Islamic Unity Convention v Minister of Telecommunications* supra).

[22] From all the aforegoing conclusions and reasoning, I find that the first respondent has failed to establish that s. 35(1), (2), (3) and (4) are inconsistent with the Namibian Constitution. The first respondent's constitutional challenge based on Article 12(1) has, with respect, no merit. Accordingly, I hold that s. 35 of the LPA is not inconsistent with the Namibian Constitution.

[23] I now proceed to consider the constitutional challenge based on Article 18. In *Africa Personnel Services (Pty) Ltd v the Government of the Republic of Namibia and Others* Case No. A13/2008 (HC) the Court observed that the institutional and individual targets that must comply with the administrative justice requirements under Article 18 of the Namibian Constitution are *only* 'administrative bodies' and 'administrative officials'. (Italicized and underlined for emphasis) In my opinion, administrative bodies and administrative officials are State institutions who form the Bureaucratic Executive, which, together with the Political Executive, constitute the Executive organ of State in our system of constitutional governance based on the *trias politica* of the doctrine of separation of powers; and administrative officials are, as a matter of course, the personnel who man those institutions that fall within the Bureaucratic Executive.

[24] Bearing this conclusion in mind, I make the following crucial points. The applicant is not part of the Bureaucratic Executive, and *a priori*, the Executive. The applicant is a tribunal within the meaning of Article 12(1) of the Namibian Constitution, established by the LPA, consisting mainly of members of the second respondent. It is a specialized tribunal, created by the Parliament, to deal with questions of professional duty peculiarly within the knowledge of the profession itself, and for that reason constituted mainly of members of the second respondent and appointed in terms of the LPA. In sum, the purpose and policy of the LPA is indubitably to make legal practitioners as far as possible masters in their own house (*Re A Solicitor* 1928 72 Sol. Jo. 368 (Court of Appeal), approved in *Re A Solicitor* [1945] 2 All ER 445 (Court of Appeal)).

[25] Flowing from the above, it is important to signalize the following crucial point that the fact that the applicant is created by statute and in virtue of that fact a statutory body does not ipso facto make it an administrative body. In any event – and this is significant – Article 18 does not use the term ‘statutory bodies’ and this Court is not permitted by any stretch of legal imagination or judicial activism to replace the word ‘statutory’ with ‘administrative’ and from that alteration make conclusions that suit the Court. In sum, in terms of our law, given expression to in Article 18 of the Constitution, the word ‘statutory’ is not synonymous with the word ‘administrative’ as far as Article 18 is concerned. The term ‘administrative tribunal’, as proposed by Mr Khoza, may exist and may have meaning in other jurisdictions, but in Namibia under Article 18 of the Constitution such a term will have no meaning: it is alien to the law of Article 18 of the Namibian Constitution. Thus, a tribunal, like the applicant, is a statutory body in virtue of the fact that it is established by statute, but that does not by that fact alone make it an administrative body within the meaning of Article 18 of the Constitution, as aforesaid. Accordingly, I hold that the applicant is not an

administrative body within the meaning of Article 18 of the Namibian Constitution, and *a priori*, Article 18 does not apply to the applicant. I hasten to add that I do not for a modicum of a moment propose that the applicant is not bound to act fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of the LPA. The Court is not an administrative body but it must, in determining any matter, act fairly and reasonably and comply with the requirements of the rules of natural justice and the requirements of any relevant legislation. In this regard, one must not lose sight of the fact that those noble requirements are not peculiar and exclusive to the application of Article 18 in respect of administrative bodies and administrative officials: they bind courts and other tribunals because, as I say, they are not peculiar and exclusive to Article 18. In the light of the aforegoing reasoning and conclusions, I do not, with respect, find the plethora of authorities referred to us by counsel respecting what is characterized as 'administrative tribunals' (whatever that means) of any real assistance on the point under consideration.

[26] For all the aforegoing conclusions and reasoning, in my judgement, the first respondent's constitutional challenge based on Article 18 of the Namibian Constitution, too, has no merit; and so it cannot succeed.

[27] The result is that the respondent's constitutional challenge under Case No. A 370/08 is dismissed.

[28] I pass to deal with item (2) of the first respondent's points *in limine* (raised in para 9 of his opposing affidavit) which he captioned 'Expiry of the applicant's erstwhile members term of office.') The first respondent avers that when 'the then members of the applicant took the decision to visit me with a penal sanction of this

application and its subsequent launching, acted ultra vires, in that their term of office had expired on the 30 June 2008'. The first respondent has therefore raised the preliminary objection that when the applicant took a decision in terms of s. 35(9) of the Act to bring the present application moving for an order to strike the first respondent's name from the roll of legal practitioners, the term of office of the then members of the applicant that was chaired by Mr. Frank SC ('the Frank Committee') had expired, and so that decision cannot stand. The first respondent's averment is predicated upon the allegations set out in paras 9.3.1, 9.3.2, 9.3.3, 9.3.4, 9.3.5 and 9.3.6 of his opposing affidavit.

[29] From the papers I find that the following facts are undisputed or indisputable as regards the point under consideration. First, the term of office of the members of the Frank Committee expired on 30 June 2008, as aforesaid. There is no evidence that the members were re-appointed after such expiration. This factual finding is significant as I shall show in due course. Second, the first respondent appeared before the applicant on 22 April 2008 to answer the charges and the decision to find him guilty of the charges and the reasons therefor were made on the same date. Accordingly, the hearing and finding of guilty took place before 30 June 2008. Third, the first respondent delivered his written submission on mitigation to Mr. Frank SC, in his capacity as the chairperson of the applicant ('the Frank Committee') at the material time (as I have said more than once) on 30 June 2008. Fourth, the decision to bring the present application was taken after 30 June 2008 and, *a fortiori* the decision was not taken at a meeting of the applicant.

[30] I now proceed to consider the relevant statutory provisions applicable to the point under consideration and apply them to the aforementioned factual findings. In terms of s 34(3) of the LPA, a member of the applicant holds office for a fixed term of

two years and such a person may be re-appointed. Additionally, according to s 34(6), three members of the Disciplinary Committee (the applicant) constitute *a quorum at a meeting* of the applicant. (Italicized for emphasis) What is more, the opening words of s 34(7) of the LPA are telling and they say it all: 'A question before the Disciplinary Committee *shall be decided by a majority of votes of the members present* …' (Underlined and italicized for emphasis) Section, s 34(7) provides in full:

> *A question before the Disciplinary Committee shall be decided by a majority of votes of the members present*, and in the event of an equality of votes in regard to any matter, the person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

[31] I accept Mr. Tötemeyer's submission that the applicant was entitled to determine its own procedure at its meetings: there is no need to seek support in case law because s 34(8) gives the applicant such power. But I think it is not the intention of the Legislature to permit the applicant to take decisions other than at meetings where members who constitute the requisite quorum are *present*. (Italicized for emphasis) Thus, it is my view that in terms of the LPA, the applicant must take decisions at meetings at which there is a quorum so that the members *present* would have the opportunity to openly debate and deliberate on the evidence and submissions placed before them with the view to considering its binding verdict or decision together as a tribunal: a meeting where the sense thereof, that is, where the applicant's members' views, opinions, attitude, intention or will, can be ascertained by taking a vote or acting by consensus (see Sir Sebag Shaw and Judge Dennis Smith, *The Law of Meetings: Their Conduct and Procedure*, 5 edn (1979): p 95).

[32] Indeed, in my opinion, that a binding decision of the applicant can be taken by the applicant only at the applicant's meeting is put beyond doubt if regard is had to

the abovementioned sections on quorum, what majority carries a vote, and the chairperson's casting vote in addition to his or her deliberative vote. If, for example, one or two members can take a decision in the privacy of their home, office, or chambers or suchlike place and approach the rest individually for their endorsement of such decision – not at a meeting of the applicant where the issue could have been openly discussed and deliberated on by members who are present and form a quorum – why should the Legislature go into the trouble of prescribing a quorum and what majority carries a vote, and also provide for the chairperson's casting vote in addition to his or her deliberative vote? Any argument that where there is a consensus there is no need to take the decision at a meeting is, with the greatest deference, illogical: it misses the point. The questions that arise is this: who decides – and at which venue –whether there is or there has been a consensus? A consensus can only be reached at a meeting after the issue at hand has been openly discussed and deliberated on. I do not, therefore, think *Majola Investments (Pty) Ltd v Uitzigt Properties (Pty) Ltd* 1961 (4) SA 703 at 711 referred to the Court by Mr. Tötemeyer is of any real assistance on the point under consideration. According to Mr. Tötemeyer *Majola* is authority for the proposition that where the decision is unanimous, a duly assembled meeting is not necessary. In my opinion, as far as the LPA is concerned, it is only at a duly assembled meeting, where there is the requisite quorum, that a binding decision of the applicant can be taken (see *Schierhout v Union Government (Minister of Justice)* 1919 AD 30). But, of course, such decision may be arrived at by voting or by consensus.

[33] On this preliminary objection, Mr Tötemeyer argued further that once the committee (i.e. the applicant) was seized with a matter, it was implicit in its terms of appointment that it has to finalize the matters it had been seized with. I do not think this Court can read such implied power into the frame of the LPA. Since the

applicant is a creature of statute, it has no greater power than that given to it by the LPA. To start with, it is my view that the applicant is not entitled to extend its own life *ex mero motu* by some unseen and unwritten implied power, when the extent of the applicant's power is only that which, as I have said more than once, the LPA has expressly granted to it. As Mr Khoza argued, there is no provision in the LPA authorizing members whose term of office has expired to continue to carry out functions under the LPA. In my opinion, if it was the intention of the Parliament to grant such a power, the Legislature would have made such of its intention clearly known by express provision in the LPA, as it did to take care of similar eventuality in, for example, s 68 (5) of the Agricultural (Commercial) Land Reform Act, 1995 (Act No. 6 of 1995), which was passed in the same year, but before the LPA was passed. Section 68 (5) of Act No. 6 of 1995 provides:

> If the term of office of any member of the Lands Tribunal expires during the course of any proceedings before the Lands Tribunal, the Minister (of Lands and Resettlement) may authorize the member concerned to continue acting as a member of the Lands Tribunal for the purpose of completing such proceedings.

[34] Furthermore, I cannot accept the argument that the entitlement of the then members of the applicant to continue to finalize a matter which they had been seized with before the expiration of their term of office arises from s 35 and the LPA, construed with regard to the statutory purpose of that section. I do not think this Court should permit the purpose of s 35 and the LPA, as a whole, to be transformed into an open basket with measureless capacity into which every item imaginable can be thrown. If it permitted that, this Court will be amending the LPA, when it is not part of the Court's constitutional mandate so to do. By a parity of reasoning, I hold that the current members of the applicant could not lawfully resolve to ratify a decision on the proposed sanction to the Court made by the members whose term of office had

expired. If, as I hold, the members whose term of office had expired on 30 June 2008 had no power to act in terms of the LPA to propose a sanction to the Court after that critical date, then according to rudimentary logic, there was no valid decision respecting sanction which the current members could lawfully ratify. A decision that is invalid in terms of an applicable legislation means that – as a matter of law and logic – there is no decision in terms of such legislation.

[35] For the above conclusions and reasoning I uphold the first respondent's point *in limine* on this issue; but with qualification, as explained previously. Accordingly, in my judgement, the decision of finding the first respondent guilty was within the power of the Frank Committee. But the decision to bring the present application, moving the Court in terms of s. 35(9) of the LPA to strike the applicant's name from the roll cannot stand. The applicant, as constituted by the members whose term of office expired on 30 June 2008 (the Frank Committee) could not therefore act in relation to the first respondent in terms of s. 35(9) of the LPA and propose a sanction; only the applicant consisting of the current members could lawfully do so and they must act at a meeting or a series of meetings where there is the requisite quorum. In this regard, I do not, with respect, accept Mr Khoza's argument that a decision in terms of s. 39(9) of the LPA constitutes a sanction under the LPA. The sanctions that the applicant could lawfully impose are those set out in s. 35(8).

[36] From what I have said above respecting the point under consideration, the guilty finding by the Frank Committee was within that Committee's power and therefore the current members of the applicant can lawfully adopt that decision, if they so decide; but not the decision by that Committee to propose a sanction to the Court, as aforesaid. In this regard, I bear in mind the principle of construction of legislation that a statute ought to be interpreted so as to avoid absurd and

unworkable results. I also bear in mind the society's interest in the role of the applicant in the proper administration of justice of the country, as I have explained previously, and in that regard I refer to the high authority of Wessel CJ in the following pithy passage from *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408 where the learned Chief Justice states authoritatively that –

> It is difficult to see what the civil suit or action is, in the case of an application by the Law Society which sets before the Court certain facts and asks the Court to strike the attorney off the roll … The pleadings are only a means to define the question of fact to be tried by the Court … The Society institutes no action against the attorney. It merely cites him to appear before the Court and to hear its complaint against his conduct, as it is authorized to do by the Act. It is difficult to place this kind of application in a particular docket. The proceedings are statutory and *sui generis*, and are no more than a request to the Court by the *custos morum* of the profession to use its disciplinary powers over an officer of the Court who has misconducted himself …
>
> Now in these proceedings the Law Society claims nothing for itself from the applicant. It merely brings the attorney before the Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him. It asks nothing from the attorney. It does not ask *id quod sibi debetur*. The fact that it asks the Court to strike the attorney off the roll or to suspend him is not a request for *id quod sibi debetur* because he owes nothing to the Society.

[37] *Solomon v Law Society of the Cape of Good Hope* makes it clear, in my view, that the Court's jurisdiction in these matters as the present is not limited by the LPA under which the Law Society (the second respondent) is created and that the Court retains the residual inherent power to supervise the legal profession in the public interest. Accordingly, for all the aforegoing, I think it will be just and reasonable in the interest of the public and the effective supervision of the profession and the proper

administration of justice for the Court to accept and deal with the present application, as this Court has done; and I think also that the proper and just course to take in the circumstances and on the facts of this case is for this Court to refer the matter back to the applicant for the current members of the applicant to decide whether to ratify the decision as to the guilt of the first respondent and thereafter decide what appropriate sanction to impose. If they decide to impose a s. 35(9) sanction, they must bring an application in that behalf.

[38] Of the view I have taken of this matter, as can be gathered from all the aforegoing, I do not find it necessary to deal with the matters sought to be struck: they have had no influence in arriving at the decision taken by this Court. As to costs; I would say the honours have been shared substantially equally by the parties on both sides of the suit. It is my view, therefore, that this is a proper case where costs should not be awarded in favour of any party.

[39] In the result, I make the following order:

(1) The matter is referred back to the applicant, as presently constituted, and it may decide to ratify the decision (as regards the guilt of the first respondent) of the applicant, as was previously constituted, and thereafter take a decision on appropriate sanction in terms of Act No. 13 of 1996.

(2) There is no order as to costs.

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PARKER J

I agree.

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SIBOLEKA J

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