CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 192/18

In the matter between:

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Applicant

and

NOMGCOBO JIBA First Respondent

LAWRENCE SITHEMBISO MRWEBI Second Respondent

SIBONGILE MZINYATHI Third Respondent

Neutral citation: *General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 23

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgment: Jafta J (unanimous)

Heard on: 14 March 2019

Decided on: 27 June 2019

Summary: Admission of Advocates Act 74 of 1964 — unethical conduct — fit and proper person test — dismissed for lack of jurisdiction

Costs — litigation pursued in the interests of justice — general rule is that bodies like the GCB are not liable for costs — adverse costs order only permissible where body has acted recklessly or irresponsibly

ORDER

On appeal from the Supreme Court of Appeal:

1. The application for leave to appeal against the merits is dismissed.
2. Leave is granted against the costs orders.
3. The order of the Supreme Court of Appeal that dismissed the counter-appeal with costs is set aside.
4. The order of the High Court that required the General Council of the Bar of South Africa to pay costs is set aside.
5. There is no order as to costs.

JUDGMENT

JAFTA J (Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.[1]

[1] *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 655-6 (*Kekana*); *Ex parte Swain* 1973 (2) SA 427 (N).

[2] One of the reasons for holding legal practitioners to this high ethical and moral standard was furnished on these terms in *Swain*:

> "[I]t is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court."[2]

[3] To underscore this requirement, the Admission of Advocates Act[3] (Admission Act) demands that before an advocate may be permitted to practise, she must satisfy the High Court that she meets all conditions, including the qualities of honesty and integrity. If satisfied, the High Court may admit the advocate into the profession and direct that her name be included on the roll of advocates in the custody of the Department of Justice and Constitutional Development.[4]

[4] If an advocate, having been so admitted and enrolled, fails to measure up to the required standard or it is established that she is no longer fit and proper to practise, an application may be instituted in the High Court by a relevant body for the removal of her name from the roll of advocates. Once an order of that kind is granted, the advocate concerned is not allowed to practise.

[5] This matter is about the fitness of the respondents to practise as advocates. The misconduct charge was that they are no longer fit and proper persons to continue to practise as advocates. It arose from the conduct in litigation where they deposed to affidavits which were presented to courts as evidence and their failure to comply with court rules and directives.

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[2] *Swain* id at 434.

[3] 74 of 1964.

[4] The Department is mandated by section 8 of the Admission Act to keep the roll of advocates.

Parties

[6] The applicant is the General Council of the Bar of South Africa (GCB), a body mandated by the Admission Act to institute disciplinary proceedings against errant advocates. Its statutory duty is to place before the court, evidence of a practitioner's misconduct to enable the court to exercise its inherent powers to discipline advocates.[5] The respondents are Ms Nomgcobo Jiba, Mr Lawrence Mrwebi and Mr Sibongile Mzinyathi. They are all advocates who were admitted and enrolled by authority of the High Court. They are senior officials in the National Prosecuting Authority, established in terms of section 179 of the Constitution and the National Prosecuting Authority Act[6] (NPA Act).

Background facts

[7] Decisions taken by Ms Jiba and Mr Mrwebi in the exercise of public power, gave rise to litigation in which those decisions were challenged successfully. The first decision related to the withdrawal of charges against General Richard Mdluli and was taken by Mr Mrwebi. Freedom Under Law, a non-profit company, instituted a review application, impugning this decision. Ms Jiba and Mr Mrwebi were cited as parties in those proceedings. At the time the decision was taken, Ms Jiba was the Acting National Director of Public Prosecutions and Mr Mrwebi was the Special Director of Public Prosecutions.

[8] In opposing the relief sought in those proceedings, Ms Jiba and Mr Mrwebi filed affidavits which sought to justify the decision. But they failed to submit to the Registrar of the Gauteng Division of the High Court, a copy of the record of proceedings that led to the withdrawal, as required by rule 53 of the Uniform Rules of Court. This, together with the failure on their part to timeously file opposing papers, caused a long delay in the adjudication of that review application.

[5] *General Council of the Bar of South Africa v Matthys* 2002 (1) SA 1 (ECD) at para 4.

[6] 32 of 1998.

[9] In its judgment the High Court was highly critical of the conduct of these respondents in relation to those proceedings. Importantly that Court found that Ms Jiba and Mr Mrwebi had lied in their affidavits and that they had suppressed information unfavourable to their defence with the objective of misleading the Court.

[10] Ms Jiba and Mr Mrwebi appealed against the condemning judgment to the Supreme Court of Appeal. But that Court dismissed the appeal and upheld the factual findings of the High Court. This meant that the respondents were, as advocates, not measuring up to the required standard of integrity and honesty.

[11] The second decision was taken by Ms Jiba to authorise the laying of charges against Major General Johan Booysen under the Prevention of Organised Crime Act.[7] This decision too was challenged in a review application that was instituted in the High Court, Durban Local Division. Ms Jiba was cited as a respondent there. In that matter too she failed to submit to the Registrar the relevant record as was required by rule 53. In opposition to the review, she deposed to an affidavit.

[12] Following an analysis of the evidence, the High Court set aside the decision on the ground that it was irrational. A reading of the High Court's judgment suggests that Ms Jiba was found to have been untruthful in some aspects of her evidence.

[13] Mr Mrwebi and Mr Mzinyathi took no part in the *Booysen*[8] matter and the adverse credibility findings made there did not apply to them. The same applies to the *Zuma*[9] matter.

[14] The *Zuma* matter related to the review of the decision to withdraw charges against Mr Zuma who later became the President of South Africa. The

[7] 121 of 1998.

[8] *Booysen v Acting National Director of Public Prosecutions* 2014 (2) SACR 556 (KZN).

[9] *Zuma v Democratic Alliance* [2014] ZASCA 101; [2014] 4 All SA 35 (SCA).

Democratic Alliance[10] launched a review application impugning that decision. Although the decision was taken by a different official, at the time the review application was instituted, Ms Jiba was the Acting National Director of Public Prosecutions. It fell upon her to submit the relevant record to the Registrar of the Gauteng Division. She failed to do so and filed affidavits in an attempt to justify the decision. She opposed an interlocutory application for an order directing her to disclose the record. On appeal, the Supreme Court of Appeal ordered that she must submit the record in question to the Registrar within 14 days. This order too was not complied with.

[15] Further litigation ensued in which the contest revolved around the ambiguity of the order. That litigation commenced in the Gauteng Division of the High Court and ended in the Supreme Court of Appeal. It was in the second judgment of the Supreme Court of Appeal that strong criticisms were levelled against Ms Jiba. She was described as having been deliberately unhelpful and having "been less than truthful".[11]

[16] Following the judgment of the Supreme Court of Appeal in the *Mdluli*[12] matter, the National Prosecuting Authority approached the GCB with the request that it should institute disciplinary proceedings in the High Court against the three advocates. The credibility findings made against them in that matter were cited as a basis for disciplinary proceedings.

Litigation history

[17] Having acceded to the National Prosecuting Authority's request, the GCB instituted these proceedings in the Gauteng Division of the High Court in April 2015. The relief sought by the GCB was that the respondents should be struck off the roll of advocates, or that they be suspended from practising as advocates for a period

[10] A political party represented in Parliament.

[11] *Zuma* above n 9 at para 40.

[12] *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP) (*Mdluli).*

determined by the Court. In support of the claim the GCB relied mainly on the judgments in the *Mdluli*, *Booysen* and *Zuma* matters. The GCB's founding affidavit quoted copiously from each of those judgments and cited credibility findings made against each respondent. On the strength of the findings to the effect that the respondents lacked integrity and had given false evidence under oath, the GCB asserted that the respondents were not fit and proper persons to continue to practice as advocates as contemplated in section 7(1)(d) of the Admission Act.

[18] Quite evidently, the GCB's cause of action was based on section 7 of the Admission Act and nothing else. The GCB relied on section 7(2) of that Act to show that it had legal standing to institute the proceedings. In relevant part section 7 reads:

> "(1) Subject to the provisions of any other law, a court of any division may, upon application suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates—
>
> (a) . . .
>
> (d) if the Court is satisfied that he or she is not a fit and proper person to continue to practise as an advocate.
>
> . . .
>
> (2) Subject to the provisions of any other law, an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates for the division which made the order for his or her admission to practise as an advocate or where such person usually practises as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph (c) of sub-section (1), also by the State Attorney referred to in the State Attorney Act No. 56 of 1957."

[19] The respondents opposed the application and all of them filed papers in answer to the case pleaded by the GCB. The matter was heard by two Judges. The High Court's judgment[13] was written by Legodi J, with Hughes J concurring. In a comprehensive

[13] *General Council of the Bar of South Africa v Jiba* 2017 (2) SA 122 (GP) (High Court judgment).

judgment, the High Court identified the test applicable to the determination of whether an advocate should be suspended or struck from the roll on the ground that she is "not a fit and proper person to continue to practise as an advocate".[14]

[20] The test is well established and has three stages. In the first stage, a court is required to determine on a balance of probabilities, whether the misconduct raised against an advocate has been proved. If not, then that would be the end of the matter. There would be no need to proceed to the second stage. If the misconduct is established in evidence, the court proceeds to the second stage. At this stage, the enquiry is into whether the advocate concerned is a fit and proper person to continue to practise. This involves the determination of facts and the application of a value judgment. If the facts show that she is unfit, the court proceeds to the third stage at which the court has to decide whether, in the circumstances of the matter, the affected advocate should be suspended from practice for a fixed period or whether she should be struck off the roll. The last stage engages the court's discretion. This test has been followed over the years in many cases.[15]

[21] Having identified the right test, the High Court proceeded to evaluate the evidence placed before it by the parties. Special attention was paid to the remarks and factual findings made against each advocate in the three judgments invoked by the GCB as proof of misconduct. The High Court considered the explanation furnished by each advocate in relation to the misconduct raised. With regard to Ms Jiba, the High Court held that no misconduct was established in respect of the *Booysen* and *Zuma* matters.[16]

[22] But the High Court found that misconduct was established against her in relation to the *Mdluli* matter. The Court held that she had given false evidence under oath and

[14] Id at para 9.

[15] *General Council of the Bar of South Africa v Geach* [2012] ZASCA 175; 2013 (2) SA 52 (SCA); *Malan v Law Society of Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); *Jasat v Natal Law Society* [2000] ZASCA 14; 2000 (3) SA 44 (SCA); and *Kekana* above n 1.

[16] High Court judgment above n 13 at paras 68 and 99.

that in some respects she tendered evidence that was misleading to the court. The High Court described her as an "unrepented and dishonest person".[17]

[23] Arising from the *Mdluli* matter, the High Court also found that misconduct had been proven against Mr Mrwebi. The Court held that he was untruthful in asserting that he took the decision to withdraw charges against General Mdluli on 5 December 2011.[18] He was found to have lied in some aspects of his evidence.[19] The Court concluded by observing that Mr Mrwebi was patently dishonest in his testimony before a disciplinary enquiry where he was called as a witness.[20]

[24] The High Court did not only find that misconduct was established against Ms Jiba and Mr Mrwebi but also concluded that they were not fit and proper persons to continue to practise.[21] Because both of them were shown to be dishonest and without integrity, the High Court ordered that their names be struck from the roll of advocates.[22]

[25] With regard to Mr Mzinyathi, the High Court found that, though Murphy J in *Mdluli* had made negative observations about his conduct, no misconduct was established. That Court was satisfied with his explanation, relating to inconsistencies between his oral testimony at a disciplinary enquiry and his confirmatory affidavit in the *Mdluli* matter. Owing to his success on the merits, the High Court ordered the GCB to pay his costs of the application.[23]

[17] Id at para 136.1.

[18] Id at para 141.

[19] Id at paras 142.3 and 152.3.1.

[20] Id at para 152.3.3.

[21] Id at paras 138 and 168.

[22] Id at para 168.

[23] Id at paras 173 and 176.

In the Supreme Court of Appeal

[26] Unhappy with the outcome Ms Jiba and Mr Mrwebi appealed to the Supreme Court of Appeal. And the GCB cross-appealed against the costs order granted in favour of Mr Mzinyathi. Split in a 3:2 ratio, the Supreme Court of Appeal upheld the appeal and dismissed the cross-appeal.

[27] As regards Ms Jiba, the majority held that misconduct was not established.[24] Shongwe ADP stated:

> "In conclusion, as regards Jiba, the evidence presented by the GCB juxtaposed with the explanation proffered by her, failed to establish the alleged offending conduct on a preponderance of probabilities. On that ground the appeal must succeed. It becomes unnecessary to consider the discretion of the court on the question whether or not she is a fit and proper person to remain on the roll of advocates."[25]

[28] In so far as Mr Mrwebi was concerned, the majority accepted that misconduct was established against him. However, the majority held that there was no proof of dishonesty on his part, because he did not gain from the misconduct. [26] In determining whether Mr Mrwebi should be struck off the roll, the High Court took into account General Mdluli's personality. The majority held that the High Court "did not bring its unbiased judgment to bear on the question before it and materially misdirected itself".[27] Consequently, the majority held that Mr Mrwebi should have been suspended from practice and ordered that he be so suspended for a period of six months, ante-dated to 15 September 2016 on which the High Court delivered its judgment.

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[24] *Jiba and Another v General Council of the Bar of South Africa* 2019 (1) SA 130 (SCA); [2018] 3 All SA 622 (SCA) (Supreme Court of Appeal judgment) per Shongwe ADP with Seriti JA and Mocumie JA concurring at para 29.

[25] Id.

[26] Id at para 21.

[27] Id at para 28.

[29] Regarding Mr Mzinyathi, the GCB did not challenge the High Court's conclusion that no misconduct was established against him. In the Supreme Court of Appeal, the GCB's cross appeal was restricted to the question of costs. The GCB had argued that, owing to the fact that this litigation was initiated in the interests of the public and its members, the High Court was wrong to apply the normal rule that costs follow the result. The GCB sought to have the costs order reversed.

[30] Mr Mzinyathi countered this argument by submitting that the High Court had correctly exercised its discretion on costs and the fact that the applicant acted as *custos morum* (guardian of morals[28]) of the profession did not insulate it from paying costs. Upholding Mr Mzinyathi's argument, the majority observed:

> "I am unable to find any reason that demonstrates that the court a quo did not exercise its discretion honestly and judiciously. Therefore this court is not empowered to interfere with the findings of the court a quo. The only recognisable basis is possibly that the GCB acted as a *custos morum*. However, section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. . . . I am unable to provide a cogent reason as to why Mzinyathi should be out of pocket when the GCB dragged him to court without sound and reasonable grounds for doing so. The GCB should at least, have withdrawn the application to strike Mzinyathi's name from the roll of advocates, immediately after the filing of his answering affidavit in this matter. The court a quo was able to identify the misunderstanding Murphy J was labouring under and the explanation given by Mzinyathi. The GCB recklessly, if not irresponsibly, continued to implicate Mzinyathi in a matter where he had no involvement without verifying the allegations. The only matter wherein Mzinyathi filed a confirmatory affidavit was the FUL [*Mdluli*] matter; he was not involved in the so-called 'spy tapes' [*Zuma*] investigation and the *Booysen* case. The GCB did not even explain its insistence in its replying affidavit. Counsel for Mzinyathi elaborated at length on the various instances where the GCB unreasonably continued to implicate Mzinyathi in its heads of argument. Due to the

[28] *Claassen v The Free State Law Society* [2018] ZAFSHC 43 at para 12.

> view I take on the issue of costs, it is not necessary to exhaust the list. The counter-appeal stands to be dismissed with costs."[29]

[31] The minority held the opposite view on all issues.[30] But they too endorsed the three-stage standard followed by the High Court in adjudicating the matter. The only material point of difference between the minority and the majority in the Supreme Court of Appeal was on the assessment of facts, pertaining to the merits of the matter.

[32] Unlike the High Court which found that Ms Jiba had lied only in respect of the *Mdluli* matter, the minority found that she "could not explain objectively false statements" made under oath in the *Booysen* matter too.[31] The minority concluded that she was also untruthful in the affidavits she filed in the *Mdluli* and *Zuma* matters. In respect of all these matters the minority stated:

> "The matters that I have mentioned extend beyond mere incompetence or unsuitability for the position of ANDPP. First, they demonstrate a serious lack of appreciation or disregard of the duty of an advocate to be of assistance to the court and to uphold the administration of justice. The fact that Ms Jiba was a litigant in official capacity in these matters is no excuse. That was all the more reason for her to conduct the litigation with the utmost trustworthiness and integrity. Second, in all three matters Ms Jiba gave untruthful evidence under oath and thus displayed dishonesty and a lack of integrity.[32]

[33] Having set out instances where the evidence of Mr Mrwebi was shown to have been false, the minority held:

> "As already set out, Mr Mrwebi lied about the events of both 5 and 9 December 2011 and abused his position. Not only has Mr Mrwebi shown himself to be seriously lacking in integrity, but has failed in these proceedings to have taken the court into his

[29] Id at para 25.

[30] Supreme Court of Appeal judgment above n 24 per Van der Merwe JA, with Leach JA concurring.

[31] Id at para 45.

[32] Id at para 55.

> confidence and fully explained his actions. All of this hallmarks him as a person unfit to practise as an advocate, particularly in the light of the authorities already referred to when dealing with Ms Jiba. I have no hesitation in endorsing the order of the court a quo that Mr Mrwebi should be struck from the roll of advocates."[33]

[34] In relation to the cross-appeal, the minority held that the High Court had improperly exercised its discretion by failing to follow the principle that the GCB, which was acting in the public interest, should not be mulcted in costs unless it is established that it had acted irresponsibly in instituting the application.[34] For this reason the minority would have overturned the costs order issued against the GCB.[35]

Leave to appeal in this Court

[35] For leave to appeal to be granted in this Court, the applicant must meet two requirements. These are that the matter must fall within the jurisdiction of this Court and that the interests of justice warrant the granting of leave. For this Court's jurisdiction to be engaged the matter must either raise a constitutional issue or an arguable point of law of general public importance that ought to be heard by this Court.[36]

[36] The interests of justice enquiry, on the other hand, involves the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors. In a case where, as here, the matter has been to the Supreme Court of Appeal the presence of reasonable prospects of success constitutes a compelling reason for granting leave.[37]

[37] The difference outlined above between the majority and the minority in the Supreme Court of Appeal, taken together with the decision of the High Court impel the

[33] Id at para 68.

[34] Id at para 72.

[35] Id at para 74.

[36] Section 167(3)(b) of the Constitution.

[37] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 6.

granting of leave. But the antecedent question that arises is whether the GCB has established jurisdiction. For what the interests of justice warrant, matters not if this Court lacks the authority necessary for entertaining the appeal.

Jurisdiction

[38] The proper approach to this inquiry is to have recourse to the pleadings and interpret them with a view to determine the nature of the claim advanced. It must be clear from that claim that a constitutional issue or an arguable point of law of general public importance is raised. For a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter.

[39] In *Gcaba*[38] this Court outlined the correct approach in determining jurisdiction. In that case Van der Westhuizen J said:

> "Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits. . . . In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are a determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence."[39]

[40] In the founding affidavit that was filed in the High Court, the GCB pleaded its case in these terms:

> "This is an application brought by the GCB in terms of sections 7(1) and 7(2) of the Admission of Advocates Act, for an order striking the name of each of the respondents from the roll of advocates alternatively, to suspend them from practising as advocates for such period as the Honourable Court may deem appropriate."

[38] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[39] Id at para 75.

[41] The factual basis sustaining this claim was said to be the conduct of the respondents in the litigation concerning the *Booysen*, *Mdluli* and *Zuma* matters. It was alleged:

> "The focus of this application is the conduct of the respondents in the litigation forming the subject matter of those proceedings and the judicial criticism of them made in consequence thereof."

[42] The GCB's founding affidavit concludes by stating—

> "that none of the respondents is a fit and proper person to continue practising as an advocate, as contemplated by section 7(1)(d) of the Admission of Advocates Act. All three of the respondents, to varying degrees, have shown themselves to be incapable of acting in accordance with the duties of an advocate."

[43] A careful reading of the GCB's pleadings reveals that its claim was based solely on section 7(1)(d) of the Admission Act. The GCB sought to have the respondents' names removed from the roll of advocates on the ground that they were no longer fit and proper persons to continue to practise as advocates. Reliance was placed on making false statements under oath, suppressing information in order to mislead a court and abusing powers of the office they held.

[44] None of these matters raises a constitutional issue. The interpretation and application of section 7 of the Admission Act does not of itself alone raise a constitutional issue. Nor did the applicant require that section 7 be construed in terms of section 39(2) of the Constitution which demands that legislation be construed in a manner that promotes the objects of the Bill of Rights.[40] The latter provision gets triggered only if the legislation under interpretation implicates a right in the Bill of

[40] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Rights. However, in an appropriate case, the application of section 7 may raise a constitutional issue. But that is not the position here.

[45] The relevant provisions of the Admission Act deal with misconduct which has rendered an advocate unfit to continue to practise. Their purpose is to protect the public against unscrupulous practitioners and they also preserve the legitimacy of the administration of justice and its proper functioning.

[46] The application of the Admission Act here can hardly be described as raising a constitutional issue. Indeed under the heading "Jurisdiction" the GCB's founding affidavit pithily mentions:

> "I submit that this Honourable Court has the requisite jurisdiction to entertain this application. Jiba and Mrwebi practise as advocates in the area of jurisdiction of this Honourable Court. The same applies to Mzinyathi. He was also admitted as an advocate by the High Court in this division."

[47] It is apparent from the judgments of the High Court and the Supreme Court of Appeal that this matter involves an application of an established three-stage standard to the present facts. All three judgments agree, rightly so, on the applicability of that test. They differ only on the evaluation of the facts. That divergence does not raise a constitutional issue. In *Loureiro* this Court declared:

> "The Loureiro family relies on the law of contract and the law of delict to protect their constitutionally recognised rights. It is well-established that the law of contract and of delict gives effect to, and provide remedies for violations of, constitutional rights. However, the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts."[41]

[41] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33.

[48] Here the GCB did not seek to protect a constitutional right. All that it sought to do was to enforce the Admission Act so as to protect the public and preserve the proper functioning of the administration of justice. While these are important objectives they do not, in this case, give rise to a constitutional issue.

[49] The apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also do not raise a constitutional issue. This is because the standard is well established and the determination of facts, whether right or wrong, does not amount to a constitutional issue. This was recently affirmed by Mhlantla J in these words:

> "Unlike in *F* and *K*, the applicant has not averred that the common-law test requires further development or that the bounds of the *F* and *K* test need to be further explored due to contextual factors. As a result, this case purely concerns the application of an accepted legal test, which this Court has repeatedly held is not a constitutional matter. It follows that no constitutional issue has been raised in this matter to clothe this Court with jurisdiction."[42]

[50] It is now axiomatic that if what is at issue in a particular case is the determination of facts, the jurisdiction of this Court is not engaged. Thus in *Mbatha* the majority observed:

> "No constitutional point can be located in the fact that Mr Mbatha claims he is an 'employee' of the University under legislation that protects employment. His dispute with the University raises no issue of interpretation or disputed application of the statutory definitions, or any contested claim about the courts' jurisdiction over employees and employment disputes. It is a simple factual dispute about who his employer was. If it were otherwise, every dispute about an employee's true employer could reach this Court."[43]

[42] *Booysen v Minister of Safety and Security* ZACC 18; 2018 (9); 2018 (6) SA 1 (CC); [2018] BCLR 1029 (CC) (*Booysen v Minister of Safety and Security)* at para 59.

[43] *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at 197.

[51] While there was no mention of a constitutional issue by the GCB in the High Court and the Supreme Court of Appeal, the GCB claimed for the first time in this Court that the matter raises constitutional issues and an arguable point of law of general public importance. The submission that constitutional issues are raised was premised on the sole assertion that the matter requires the interpretation and application of the NPA Act which is legislation contemplated in section 179 of the Constitution.

[52] There is no merit in the contention that this matter involves the interpretation of the NPA Act. The claim advanced by the GCB does not require the interpretation and application of the NPA Act. It is a self-standing claim, based as it is within the four corners of the Admission Act. The NPA Act does not regulate the admission of advocates. Nor does it address the removal of their names from the roll. Consequently, the NPA Act finds no application in the present matter. Therefore, the GCB's reliance on *Corruption Watch* in the present circumstances was misplaced.[44] That case dealt with the interpretation and application of the NPA Act read with section 179 of the Constitution. The Admission Act is not legislation envisaged in the Constitution.

[53] Section 179 of the Constitution too has no bearing on whether or not an advocate should be struck off the roll.[45] That section establishes the National Prosecuting

[44] *Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*).

[45] Section 179 of the Constitution provides:

> "(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
>
> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out and any necessary functions incidental to instituting criminal proceedings.
>
> (3) National legislation must ensure that the Directors of Public Prosecutions—
>
> (a) are appropriately qualified; and
>
> (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

Authority and prescribes how it should be structured. The fact that the removal of an advocate's name from the roll may result in her removal from office under the NPA Act does not mean that the NPA Act applies to proceedings for striking off the roll contemplated in the Admission Act. As was rightly stated by the High Court, these are separate processes, regulated by different pieces of legislation.

[54] In addition to the contention that the matter raises constitutional issues, which I have just shown is incorrect, the GCB submitted that an arguable point of law of general public importance is generated. The point that was identified as arising was described as "the legal question of the standard of conduct to which advocates, including state advocates, should be held if they are to remain on the roll of advocates, or conversely, what form of misconduct is sufficient to justify removal from that roll". It was argued that the Supreme Court of Appeal here and in *Geach*[46] was "sharply divided on the appropriate standard to be applied in matters involving dishonesty on the part of practitioners and the degree of deference to be shown to the discretion exercised by the court of first instance".

[55] Apart from the fact that the argument is cast in terms wider than the case pleaded here, it has no substance. First, the cause of action advanced by the GCB was that the respondents' names should be struck off the roll because they are no longer fit and proper persons to continue to practise as advocates. This cause of action was based on section 7(1)(d) of the Admission Act. Therefore, the standard relevant to the present inquiry is limited to the determination of whether an advocate is a fit and proper person to continue to practise.

[56] As mentioned earlier, there is a well-established test applicable to an inquiry of this kind. It is the three-stage standard referred to above. That is the test that was

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[46] *Geach* above n 15.

applied by the High Court,[47] the majority[48] and the minority[49] in the Supreme Court of Appeal. Therefore, there was no divergence on the appropriate test.

[57] The proposition that the Supreme Court of Appeal here was sharply divided on the standard to be applied in matters involving dishonesty is not correct. The divergence between the majority and the minority did not flow from the application of legal principles. It stemmed from an evaluation of the facts. In relation to Ms Jiba, the majority found that no misconduct was established in the first place.[50] The issue of dishonesty did not arise at all. With respect to Mr Mrwebi, although the majority found that misconduct was proved it held that he was not dishonest.[51] For its part the minority found that the facts had established dishonesty on the part of both respondents.[52]

[58] It may well be that the majority in the Supreme Court of Appeal here has erroneously interfered with the discretion of the High Court. However this does not raise an arguable point of law of general public importance. As outlined above, the error here lies in the factual assessment. A decision that is based on wrong facts does not amount to an arguable point of law. The enquiry that is undertaken to correct it remains factual.

[59] The wrong application of an established legal test too does not constitute an arguable point of law. All that is required to be determined in such a case is whether the court whose judgment is subject to an appeal has correctly applied the test to the facts. This issue ordinarily illustrates the presence of reasonable prospects of success. It does not generate an argument on the content or scope of the legal principle itself but

[47] High Court judgment above n 13 at para 9.

[48] Supreme Court of Appeal judgment above n 24 at para 6.

[49] Id at para 34.

[50] Id at para 29.

[51] Id at para 21.

[52] Id at paras 55 and 62-3.

indicates an incorrect application of that principle. This is relevant to the interests of justice inquiry which differs from jurisdiction.[53]

[60] For all these reasons, I conclude that the GCB has not established that the matter falls within the jurisdiction of this Court. This means that the appeal cannot be entertained.

Appeal on costs

[61] The cross-appeal relates to the dismissal by the Supreme Court of Appeal of an appeal by the GCB against the costs order issued by the High Court. It will be remembered that relying on the principle that costs follow the result, the High Court had ordered the GCB to pay Mr Mzinyathi's costs. Based on a number of reasons, including that the High Court had exercised its discretion properly, the majority in the Supreme Court of Appeal dismissed the GCB's counter-appeal. But the minority held a different view. According to the latter, the counter-appeal should have succeeded.

[62] But before we determine this issue, we must be satisfied that this Court has jurisdiction. As is apparent from the statement quoted in paragraph 30, in dismissing the counter-appeal the majority invoked section 9(1) of the Constitution. This section guarantees the right to equal protection and benefit of the law. Reliance on the section clearly raises a constitutional issue that falls within the jurisdiction of this Court.

[63] The principle that costs follow the result is not applicable to proceedings like the present because these proceedings are initiated in the interests of the general public and the court which has an inherent power to control and discipline practitioners. The GCB's role in instituting these proceedings is to enable the court to exercise its disciplinary powers.[54] These proceedings are not ordinary civil proceedings in which there is a winning and a losing side. As far back as 1931 our courts recognised the

[53] *Booysen* above n 42 at para 46.

[54] *Matthys* above n 5 at para 4.

inappropriateness of the principle that costs follow the result in proceedings such as the present.[55]

[64] The principle laid down in *Taute* was that bodies like the GCB should not be mulcted in costs if the evidence presented does not establish misconduct. An order of costs against them is permissible only in circumstances where the body has conducted itself in a manner unacceptable to the court before which proceedings are brought.[56] This may be the position where that body has acted recklessly or irresponsibly in initiating the proceedings.

[65] Section 9(1) of the Constitution on which the majority in the Supreme Court of Appeal relied does not alter this principle. Reliance on it was misplaced. *Biowatch* upon which the majority also relied illustrates that in constitutional litigation the state is not afforded equal protection and benefit of the law in relation to liability for costs.[57] According to *Biowatch* if the state loses it is liable for costs but if a private party loses against the state, it is spared from paying costs to the state.

[66] If the GCB had acted recklessly in instituting these proceedings in the High Court, a costs order against it may have been justified. The majority held that the GCB was reckless in its failure to withdraw the case against Mr Mzinyathi after the latter had filed his answering affidavit that explained his role in the *Mdluli* matter. I disagree. The case against Mr Mzinyathi was based on findings made by Murphy J in the *Mdluli* matter. The findings of that Judge could not be nullified by Mr Mzinyathi's affidavit. Moreover, it was not the GCB's function to adjudicate the matter and determine whether misconduct was established against Mr Mzinyathi. Its role was limited to placing all facts known to it before the Court in order to enable the High Court to exercise its disciplinary power over Mr Mzinyathi.

[55] *Incorporated Law Society v Taute* 1931 TPD 12 (*Taute*).

[56] *Botha v Law Society, Northern Provinces* [2008] ZASCA 106; 2009 (1) SA 227 (SCA).

[57] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[67] It follows that the majority in the Supreme Court of Appeal erred in dismissing the counter-appeal. It should have been upheld.

Costs

[68] Although the appeal on the merits has failed, the GCB should not be ordered to pay costs. The principle that the GCB may not be ordered to pay costs unless special circumstances warranting an adverse costs order exist applied here. Even though the GCB has succeeded in having the costs order made against it overturned, it is fair not to order the respondents to pay its costs. The correct order is, no order as to costs.

Order

[69] In the result the following order is made:

1. The application for leave to appeal against the merits is dismissed.
2. Leave is granted against the costs orders.
3. The order of the Supreme Court of Appeal that dismissed the counter-appeal with costs is set aside.
4. The order of the High Court that required the General Council of the Bar of South Africa to pay costs is set aside.
5. There is no order as to costs.

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For the First Respondent:	N Arendse SC and T Masuku SC instructed by Majavu Incorporated
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