IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A CIV/16/2012**

In the matter between:-

MATŠASENG RALEKOALA **APPELLANT**

AND

MINISTER OF JUSTICE, HUMAN RIGHTS, LAW AND CONSTITUTIONAL AFFAIRS **1ST RESPONDENT**
THE LAW SOCIETY **2ND RESPONDENT**
ATTORNEY-GENERAL **3RD RESPONDENT**
QHALEHANG LETSIKA (Amicus Curiae) **4TH RESPONDENT**

CORAM: SMALBERGER, JA
MELUNSKY, JA
SCOTT, JA
HOWIE, JA
HURT, JA

HEARD: 1 OCTOBER 2012
DELIVERED: 19 OCTOBER 2012

SUMMARY

Constitutional Law – Legal Practitioners Act 11 of 1983 and the relevant Rules of Court not in conflict with the equality provisions in the Constitution of Lesotho in requiring that exercise of an advocate's right of audience be subject to the advocate being duly instructed by a practising attorney.

JUDGMENT

HOWIE, JA

[1] Before the High Court, exercising its jurisdiction in terms of s 22(2) of the Constitution, the appellant, a practising advocate of Teyateyaneng, applied for an order declaring unconstitutional, and striking down, those provisions of the Legal Practitioners Act, 11 of 1983 ("the Act") and the relevant Rules of the Court of Appeal, High Court and Subordinate Courts which, to summarise such provisions for convenience, require an advocate appearing in those courts to do so duly instructed by an attorney in possession of a practising certificate. His case was that these provisions offend against ss 18 and 19 of the Constitution.

[2] Cited as respondents were the Minister of Justice and Human Rights, Law and Constitutional Affairs (first respondent), the Law Society of Lesotho (second respondent) and the Attorney-General (third respondent). The application having been dismissed, the appellant appeals.

[3] In this Court Mr. Sakoane argued the case for the appellant. Mr. Mabathoana appeared in a watching capacity for the Law Society and advanced no submissions. Mr. Letsika appeared as amicus curiae and supported the decision of the High Court.

[4] Two things should be mentioned at the outset. First, the relief sought in the notice of motion was also aimed at removal of the bar in s 6(2) (b) of the Act against an advocate's receipt of money or instructions from a client except through the advocate's instructing attorney. Before us, however, pursuit of that relief was abandoned. Second, reliance on s 18 of the Constitution was not persisted in.

[5] Section 19 of the Constitution of Lesotho says:

> "Every person shall be entitled to equality before the law and to the equal protection of the law."

[6] The thrust of what the appellant said in his founding affidavit, read with the relief claimed, amounts to this. Apart from

doing attorneys' work, attorneys may, without restriction do everything advocates may do. Advocates, on the other hand, apart from the fact that they may not do everything attorneys do are, in addition, restricted by what I may call the briefing requirement when they seek to exercise their right of audience. Accordingly, the effect of the relief sought was essentially to enable advocates to appear without the need for instructions from an attorney and, by necessary implication, to enable them to take instructions directly from the client.

[7] In this Court, however, counsel for the appellant disavowed any intention to seek removal of the briefing requirement. Instead, he urged that attorneys ought to bear an obligation to brief advocates and that the provisions in question ought to be so construed as a matter of proper constitutional and statutory interpretation. I shall revert to that submission and its implications.

[8] Counsel for the appellant also sought assistance for his case on the basis of the approach of the German Federal

Constitutional Court in relation to article 12 (1) of the German Basic Law, as discussed and referred to in the South African case of Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).

[9] Article 12 (1) of the Basic Law provides for the right freely to choose, inter alia, one's trade, occupation or profession and goes on to say that the practice of trades, occupations and professions may be regulated by or pursuant to a law.

[10] Section 22 of the South African Constitution is in substantially similar terms to those of the German article 12 (1).

[11] It must be observed at once that the German and South African provisions do not concern the right to equality or equal protection of the law. Nor did the Affordable Medicines case. That matter was concerned with the right of choice of a profession and the extent to which internal regulation of a profession affected the freedom of choice.

[12] Despite that material difference from the present case, and despite the absence from the Lesotho Constitution of a provision similar to the respective provisions of Germany and South Africa referred to above, the judgment in Affordable Medicines nevertheless contains important statements conducive to decision of the matter before us.

[13] It is appropriate to cite the relevant paragraphs in the judgment:

> "[91] … As pointed out earlier, under our jurisprudence, the exercise of legislative and executive power is subject to two constraints, namely the minimum threshold requirement of rationality and that it must not infringe any of the rights contained in the Bill of Rights. If exercise of power limits any such rights, it must pass the s 36(1) test. And proportionality analysis is central to the s 36(1) enquiry.
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> [92] Under our constitutional scheme, the proportionality analysis is required to give effect to the criterion of reasonableness in s 36(1). To require reasonableness, and thus the proportionality analysis, in the context of s 22 would be to ignore the language of s 22. It is clear

from the text of the provision that choice and practice are not to be regulated to the same extent. Where the regulation, viewed objectively, would have a negative impact on choice, the regulation must be tested under s 36(1). In other cases, the test is one of rationality.

[93] That said, however, the scope of permissible regulation that we adopt here is not entirely inconsistent with the German approach. It recognizes that it is not always possible to draw a clear line of distinction between regulation that affects the practice of a profession, on the one hand, and one that affects choice on the other. It requires that where, objectively viewed, the regulation of the practice of a profession impacts negatively on choice such regulation must be tested under s 36(1). Such regulation does not fall within the purview of s 22, and must therefore meet, amongst other requirements, the standard of reasonableness, of which proportionality analysis is an important component. The same standard must be met where the regulation of the practice of a profession limits any of the rights in the Bill of Rights. However where, as here, the regulation, objectively viewed, does not impact negatively on choice, it need only satisfy the rationality test. In the result, restrictions on the right to practise a profession are

subject to a less stringent test than restrictions on the choice of a profession.

[94] Where, as here, the Constitution gives the power to regulate a right, not every regulation of that right amounts to a limitation of the right in question. But at the same time Parliament may not unconstitutionally limit the right to practise a profession under the guise of regulating it. Where the regulation of the right amounts to a limitation of that right, such a limitation will have to be tested under s 36(1). In this case we are concerned with regulation that merely regulates in the sense of facilitating the proper exercise of the right to practise a profession. It does not limit the right to practise. The applicants did not contend otherwise.

[95] The question that falls to be determined, therefore, is whether the linking of a licence to dispense medicines to particular premises is rationally related to the government purpose of increasing access to medicines that are safe for consumption. It is to that question that I now turn."

[14] In our case neither the Act nor the Rules in any way restrict the freedom to choose whether one wishes to be an advocate

or an attorney. Counsel for the appellant did not seek to contend that they did. The briefing requirement therefore does not concern the freedom to make that choice. What it does is to impose a restriction applicable to the advocates' profession. It is a provision to do with the regulation of that profession. It does not impact on the equality right in s 19 of the Lesotho Constitution. Lesotho law treats advocates, as advocates, equally.

[15] That is really the end of the appellant's case as formulated in his papers and pursued in the High Court. Nevertheless it is appropriate to add several observations.

[16] First, as regards regulation of the advocates' profession, there can be no doubt that the law of Lesotho is the same as that of South Africa in so far as the latter holds that the exercise of legislative and executive power is subject to the minimum threshold requirement of rationality. Consequently a law must always have a rational connection to a legitimate governmental purpose.

[17] As far as the briefing requirement is concerned the appellant's legal representatives chose, for strategic or other reasons, to separate and leave aside the matter of an advocate's taking payment directly from the public. It is wrong and misleading to effect that separation. The reason for the requirement that an advocate must appear on the instructions of a practising attorney has nothing to do with supposed subservience of the one or the other, nor with any assumed incapacity of the one or the other properly to implement a client's instructions or to deal with a client's money. As explained in various judgments, of which Society of Advocates of Natal v De Freitas (Natal Law Society Intervening) 1997 (4) SA 1134 (N), De Freitas v Society of Advocates of Natal 2001 (3) SA 750 (SCA) and Rősemann v General Council of the Bar of South Africa 2004 (1) SA 568 (SCA) are leading examples, the division between advocates and attorneys is to ensure an appropriate allocation of experience, expertise and function, legal and administrative. To afford the advocate the fullest opportunity to research and present the client's case in court, the business of receiving the client's instructions and payment is for the attorney to attend

to. And as protection for the client's funds, the attorney has to keep a trust account, from which the advocate will be paid.

[18] There is in that situation a legitimate governmental purpose in liberating advocates from the obligation to keep a trust account because they are not intended to deal with the public or to take money from the public. At the same time that very legitimate governmental purpose requires that advocates be duly instructed because briefing signifies that they are authorized to represent their clients, with whom, after all, they have not dealt and to whom they will not look for payment.

[19] Between that purpose and the briefing requirement there is plainly a rational connection. For the same reasons it is rational for the law to treat attorneys differently from advocates.

[20] The second observation to be made is that when counsel for the appellant was asked by members of this Court to formulate a re-wording of the order he submitted should issue,

he ventured that it should be to the effect that the impugned provisions were unconstitutional to the extent that they prohibited, and criminalized, an advocate's appearance in court without being briefed by an attorney who had no corresponding obligation to brief the advocate. To the inevitable question as to when an attorney would have such an obligation, counsel suggested that it would arise in "complex cases" or when the attorney "had too much work" (presumably too much to deal with properly and timeously). An order in those suggested terms would be unworkable. Nor was it the case the respondents were confronted with. Counsel's suggestion could, therefore, not have been implemented in any event.

[21] The final observation that warrants being made is this. As an alternative to the relief based on unconstitutionality of the impugned provisions the appellant's notice of motion contained a prayer directing the first and third respondents to cause amendment of the provisions within a stipulated time failing which striking down should ensue. Those respondents

signified broad acceptance of such an alternative and suggested an additional prayer directing the Law Society to consider a "bar system suitable for the proper administration of justice in Lesotho." As for the Law Society, it supported the striking down of the impugned provisions as unconstitutional and alleged, inter alia, that the disproportion between advocates and attorneys in Lesotho undermined citizens' access to legal representation.

[22] It is a fact that in Lesotho advocates far outnumber attorneys and that in some rural areas there are advocates and no attorneys. It would seem that in this situation, and given the attitudes expressed by the respondents, a fundamental re-think is required as to what system of legal practice best suits the needs of this Kingdom. It hardly needs emphasis that the required process of deliberation should be expeditious and comprehensive.

[23] The law being presently what it is, the High Court was right in dismissing the application. It follows that the appeal must fail. No order was sought by any party as regards costs.

[24] The appeal is dismissed.

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C T HOWIE
JUSTICE OF APPEAL

I agree: _____

J W SMALBERGER
JUSTICE OF APPEAL

I agree: _____

L S MELUNSKY
JUSTICE OF APPEAL

I agree: _____

D G SCOTT
JUSTICE OF APPEAL

I agree: _____

N V HURT
JUSTICE OF APPEAL

For the Appellant	:	Adv. S.P. Sakoane
		Adv. S. Ratau
For the Second Respondent:		Mr. H.J. Mabathoana
As Amicus Curiae	:	Mr. Q. Letsika