IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: (YES) / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / ~~NO~~
(3) REVISED ✓
DATE 22/7/16 SIGNATURE

CASE NO: 62599/2011

DATE: 22/7/16

IN THE APPLICATION OF

THE LAW SOCIETY OF THE NORTHERN PROVINCES (Incorporated as the Law Society of the Transvaal)	APPLICANT
AND	
RAPHAEL SMITH	1ST RESPONDENT
DAVID ANTHONY SMITH	2ND RESPONDENT
RAPHAEL & DAVID SMITH Inc	3RD RESPONDENT

AND IN THE COUNTER-APPLICATION OF

RAPHAEL SMITH	1ST APPLICANT IN RECONVENTION
DAVID ANTHONY SMITH	2ND APPLICANT IN RECONVENTION
RAPHAEL & DAVID SMITH Inc	3RD APPLICANT IN RECONVENTION
AND	
THE LAW SOCIETY OF THE NORTHERN PROVINCES (Incorporated as the Law Society of the Transvaal)	1ST RESPONDENT IN RECONVENTION
MINISTER OF JUSTICE	2ND RESPONDENT IN RECONVENTION

JUDGMENT

PRINSLOO, J

[1] The applicant Law Society seeks certain relief against the respondents in terms of the provisions of the Attorneys Act, Act no 53 of 1979 ("the Act").

[2] When the application was launched, the first and second respondents were directors of the third respondent firm of attorneys. Sadly, the first respondent, who was the senior partner in the firm, has since passed away. When the application came before me, nothing was made of the fact that the first respondent had not yet, by then, been replaced by the executor of his estate. In the circumstances, and without intending any disrespect, I will prepare this judgment on the basis of the citation of the parties as it was when the matter was heard.

The same applies to the citation for purposes of the counter-application which was launched a considerable period of time before the unfortunate passing of the first respondent.

The applicants in reconvention nominally cited the second respondent as the Minister involved with the administration of the Act. The second respondent played no active part in these proceedings.

[3] Before me Mr Stein SC assisted by Mr Premhid, appeared for the applicant and Mr Chaskalson SC assisted by Mr Van der Spuy, appeared for the first, second and third respondents.

[4] Argument was presented over a period of three days, and the record runs into more than 800 pages.

Brief synopsis

[5] The case, by and large, revolves around the proper interpretation and application of, in particular, sections 70, 71 and 78 of the Act.

[6] It is convenient to quote the contents, and in some cases only relevant extracts, of and from these provisions:

> "**70. Council's power of inspection.** –
>
> (1) A council may for the purposes of an enquiry under section 71 of or in order to enable it to decide whether or not such an enquiry should be held, direct any practitioner to produce for inspection, either by the council itself or by any person authorised thereto by the council, any book, document, record or thing which is in the possession or custody or under the control of such practitioner and which relates to his or her practice or former practice.
>
> (2) The refusal or failure by a practitioner to comply with a direction in terms of subsection (1) shall constitute unprofessional conduct.
>
> **71. Enquiry by council into alleged cases of unprofessional or dishonourable or unworthy conduct.** –
>
> (1) A council may in the prescribed manner inquire into cases of alleged unprofessional or dishonourable or unworthy conduct

on the part of any attorney, notary or conveyancer whose name has been placed on the roll of any court within the province of its society, whether or not he or she is a member of such society or of any person serving articles of clerkship or a contract of service with a member of its society, or of any former candidate attorney referred to in section 8(4). (My note: for present purposes I quote only subsection (1).)

78. Trust accounts. –

(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the republic and shall deposit therein the money held or received by him or her on account of any person.

(2) ...

(3) ...

(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person, of any money invested by him or her in a trust, savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him or her.

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

subsections (1), (2), (2A), (3) and (4) are being observed, and, if on such inspection it is found that such practitioner has not complied with such provisions, the council may write up the accounting records of such practitioner and recover the costs of the inspection or of such writing up, as the case may be, from the practitioner.

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

(a) money invested in a trust, savings or other interest-bearing account referred to in subsection (2) or (2A);

(b) interest on money so invested;

(c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which such practitioner is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or

(d) his practice."

(My note: for present purposes I do not quote the remaining eight subsections.)

[7] Every attorney, notary and conveyancer duly admitted, enrolled and practising as such in the Gauteng, Mpumalanga, Limpopo provinces and portions of North-West province is, *ipso facto*, a member of the applicant.

[8] The affairs of the applicant are managed and controlled by a council ("the council"), consisting of 24 practising attorneys who hold office in terms of the provisions of part IV of the rules of the applicant Law Society.

[9] The council was established in terms of section 60 of the Act which provides:

> "**60. Council to manage and control affairs of society. –**
>
> (1) The affairs of a society shall be managed and controlled by a council, which may, subject to the provisions of subsection (2), exercise the powers of the society."

[10] The objects and powers of the applicant society are set out in sections 58 and 59 of the Act, and, *inter alia*, the applicant is empowered to "generally, do anything that is necessary for or conducive to the attainment of the objects of the society ..." and one of the objects is "to provide for the effective control of the professional conduct of practitioners".

The applicant has been at it for well over a century since it first came into existence by Volksraadbesluit 1307, dated 19 October 1892, of the Zuid-Afrikaansche Republiek.

[11] On 23 September 2011, the council, at a meeting held at Pretoria, passed the following resolution:

> "1. That the Law Society's attorneys (Rooth & Wessels Incorporated) be instructed to proceed with an application to compel Raphael & David Smith Incorporated, Raphael Smith and David Smith (hereinafter

referred to as 'the attorneys') to make the following records/data available to the Law Society for investigation:

1.1 the complete accounting records relating to all claims handled on behalf of clients against the Road Accident Fund containing particulars and information of any money received, held or paid by the firm for or on account of any person, of any money invested by the firm in a trust, savings or other interest bearing account and of any interest on money so invested which was paid over or credited to the firm as is more fully described in section 78(4) of the Attorneys Act no 53 of 1979;

1.2 the complete office files relating to all claims handled on behalf of clients against the Road Accident Fund containing, without limiting the generality thereof, correspondence, statements of account, receipts, reports and pleadings; and

1.3 the complete and/or any books, documents, records or things relating to the practice of the attorneys in relation to all matters handled by the attorneys on behalf of all clients against the Road Accident Fund as is more fully described in section 70 of th Attorneys Act no 53 of 1979;

1.4 the records/data of clients referred to in paragraphs 1.1, 1.2 and 1.3 shall include, but not be limited to all matters in which the Law Society has received complaints.

1.5 In the event of further complaints being lodged against the attorneys with the Law Society, after date of this resolution, the

Law Society's attorneys are hereby authorised to include reference to such complaints at the hearing of the application.

2. That the President of the Law Society, be and is hereby authorised to sign all documents necessary to give effect to this resolution on behalf of the council of the Law Society."

[12] Pursuant to the passing of the resolution on 23 September 2011, the applicant, on or about 2 November 2011, launched the application which came before me. The applicant prays for an order directing the respondents to make the records/data referred to in the resolution available to the applicant for investigation. There is also a prayer for costs to be paid on the scale as between attorney and client.

[13] In February 2012, the respondents filed a counter-application accompanied by an answering affidavit and founding affidavit in the counter-application.

[14] The relevant paragraphs of the notice of motion in the counter-application read as follows:

"(i) Reviewing and setting aside the decision of the Council of the First Respondent in Reconvention taken 13 September 2011 (*sic*, should read 23 September) that an inspection of the accounting records and Road Accident Fund claim files of the practice of the applicants in reconvention be conducted.

(ii) To the extent that it is necessary for the relief sought in prayer (i) above, an order declaring that section 70 of the Attorneys Act 53 of 1979 ('the Act') is inconsistent with the Constitution and invalid.

(iii) Directing the first respondent in reconvention to pay the Applicants' in Reconvention costs in the counter-application on the attorney and client scale."

[15] In formulating the defence of the respondents, their counsel described the situation as follows in their heads of argument:

"The Smith firm has nothing to hide. It has comprehensively answered the 31 complaints on the papers. It has tendered upon production by the Law Society of proof that the clients in question have waived privilege, to make available to the Law Society for inspection all of its existing files and accounts relating to those 31 complaints. (Some records were destroyed because the files had been closed more than five years before the firm was notified of any complaint.)

The Smith firm is confident that any inspection of its files and accounting records will show that it is innocent of any wrongdoing of which it may be suspected by the Law Society. However, it cannot consent to the generalised inspection relief sought by the Law Society because that relief would, by its very nature, destroy the Smith firm even if it is ultimately established that the attorneys in the Smith firm have been innocent of any misconduct:

1. An attorney is duty bound to protect his or her client's privileged documents from inspection by a regulatory authority unless the client has waived privilege in respect of the file.
2. The Law Society demands that the Smith firm hand over all its RAF files and accounts to the Law Society inspectors. These RAF files

contain privileged documents relating *inter alia* to the medical conditions and financial affairs of the clients of the Smith firm.

3. So before releasing such documents to the Law Society inspectors, the Smith firm would have to contact each one of their more than 16 000 past and present RAF clients, to inform that client that the Law Society is conducting an inspection of the Smith firm on the basis of a suspicion of generalised professional misconduct and to ask the client whether s/he is willing to waive privilege in respect of the contents of his/her file to facilitate the inspection of the Law Society. Such a process would destroy the professional reputation of the Smith firm in a manner from which it would be unlikely ever to recover."

[16] I will deal with the question of privilege later in this judgment, but at this point I make the observation that it is not quite clear why the respondents relied on the argument that it would be incumbent upon them to contact each of those 16 000 clients. It has been the approach of the respondents all along, also when similar proceedings were launched by the applicant in 2007, that it was the duty of the applicant Law Society to obtain affidavits from the clients involved in the complaints to the effect that they waive privilege. Indeed, and quite unnecessarily in my view, during earlier proceedings, the Law Society went to the trouble of obtaining such affidavits. This attitude was again expressed in the heads of argument of counsel for the respondents where they state:

"It has repeatedly offered to make available to the Law Society all of its records and accounts in respect of each of those complaints, provided that the

Law Society satisfies it that the clients in question have waived their privilege over the relevant documents."

[17] Counsel for the respondents, in their heads of argument, after describing the perceived destruction of the professional reputation of the respondents if they have to contact all the clients, then motivated the decision to bring the counter-application in the following terms:

"The Smith firm has accordingly brought a counter-application to review and set aside the decision of the Law Society to conduct a generalised inspection of all the files and accounts of the Smith firm. It does so on the basis that the inspection decision of the Law Society ..."

Then follows five alleged review grounds based on the provisions of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). In summary, it is mentioned in the heads of argument that the decision was taken by the applicant without properly applying its mind to the matter, alternatively for the ulterior purpose of victimising the respondents so that it is accordingly inconsistent with the constitutional legality principle and reviewable in terms of section 6. It was further argued that the decision was wholly unjustified and oppressive and accordingly *ultra vires* section 70 of the Act and inconsistent with the constitutional legality principle and reviewable in terms of certain subsections of section 6. Another review ground advanced was that the decision was taken by an unfair procedure which renders it reviewable and, further, was not rationally related to the reasons proffered by the applicant for the inspection decision or to the information made available to the applicant in relation to the complaints. Finally, it was submitted in the heads of

argument that the decision was calculated to interfere unlawfully with the personal and commercial reputations of the respondents so that it is inconsistent with section 6(2)(i) of PAJA.

[18] At the commencement of the hearing, counsel for the respondents filed supplementary heads of argument dealing with the "interpretation of section 70(1) of the Act and the constitutionality of the section". I will revert to all these subjects.

[19] Finally, for purposes of this synopsis, I turn to the procedural chronology of events leading up to the hearing before me almost five years after the application was launched, and almost ten years after earlier, similar, proceedings were launched in 2007:

- As I have mentioned, the application was launched in November 2011.

- The answering affidavit and counter-application as well as the founding affidavit in the counter-application saw the light in February 2012.

- Then followed a series of interlocutory skirmishes: the applicant filed the record of proceedings, in terms of rule 53, on 2 February 2012. On 7 March 2012 the respondents' attorneys wrote a letter to the applicant's attorneys requesting proof that the record had been filed. This was confirmed in writing on 8 March 2012. There were then negotiations to extend the time within which the supplementary affidavit, provided for in terms of rule 53(4), could be filed by the respondents. Thereafter there was a suggestion on behalf of the

respondents that the record filed was incomplete followed by a threat by the respondents to launch an application to compel disclosure of all the documents.

The matter was further delayed when the first respondent, sadly, was injured during a robbery and hospitalised. It appears that he unfortunately passed away during or about September 2012. When nothing came of the threatened application to compel the filing of a more complete record, the replying affidavit was filed in April 2013.

- In August 2013, respondents filed a replying affidavit to the answering affidavit to the counter-application.

- In July 2014, the applicant filed a supplementary answering affidavit dealing with allegations by the respondents that the applicant had unreasonably delayed the progress of the matter and secondly, with an indication from the respondents that they were contemplating an application to refer the matter to oral evidence, targeting previous Presidents of the Law Society to give such evidence.

- This inspired the respondents to launch a rule 30 application aimed at setting aside the supplementary answering affidavit alternatively seeking leave to supplement the replying affidavit of August 2013.

- The rule 30 proceedings came before this court on 13 April 2015 when it was recorded that the rule 30 application was withdrawn and that the respondents

could file a response to the supplementary answering affidavit within ten days of that order, followed by a time frame prescribing days for filing heads of argument.

- The opposing affidavit to the supplementary affidavit saw the light in April 2015.

[20] The matter came before me in March 2016.

[21] So much for the "brief" synopsis.

Some remarks about historical events leading up to the adoption of the September 2011 resolution, complaints lodged against the respondents and related matters

[22] In 2007 the applicant brought an application against the respondents for an order to compel them to produce for inspection their complete accounting records, office files and all books, documents, records or things relating to their practice with regard to complaints lodged with the applicant regarding claims against the RAF handled by the respondents ("the 2007 application").

[23] There were ten complaints at the time.

[24] The application was opposed and on 15 October 2007 the erstwhile attorneys of the applicant, in writing, proposed an amicable settlement on the basis that the accounting records, files and related documents pertaining to the specific complainants be made available by a certain date, and that each party bears its own costs.

[25] On 9 November 2007 the late first respondent wrote to the applicant's attorneys rejecting the settlement offer in the following terms (I only quote extracts from the letter):

> "I note that your suggested settlement of this matter, as contained in your said facsimile, does not mention the aspect of privilege. In my answering affidavit my tender to make the relevant files available was conditional upon the complainants waiving privilege. I remain firmly of the view that there must be a waiver of privilege before the files in question can be handed over to you.
>
> Ordinarily, I would expect your client to act only on the basis of active complaints by attorneys' clients from whom it had procured a waiver of privilege to pursue its investigations ... I cannot simply assume that there has been a waiver of privilege by the nine clients whose files are listed in the notice of motion.
>
> Under the circumstances, I cannot agree to provide your client with access to the files of my clients unless you can provide me with satisfactory proof from the clients whose files your client seeks to inspect that they had properly waived their privilege in respect of their files and consent to your client's inspection.
>
> I await to hear from you."

This letter set the tone for the attitude adopted by the respondents towards the applicant throughout the proceedings and right up to the time when the matter came before me. I have quoted extracts from the heads of argument filed on behalf of the respondent. I add that, during the hearing, there may have been a slight change of stance, if I understood counsel correctly, to the extent that waiver of privilege with regard to the specific complaint files was no longer insisted upon. It is also difficult to understand on what basis waiver of privilege can be insisted upon in respect of specific complainants who, in my view, clearly waived any privilege they had, if it existed in this context, when they lodged the complaints. I will revert to this subject.

[26] To his credit, and in my view unnecessarily so, the reasonable attorney of the applicant obtained affidavits from the complainants and sent them to the respondents on 16 September 2008.

On 17 September 2008 the respondents stated that the relevant files would be delivered "shortly".

On 19 September 2008 the attorneys of the respondents wrote to the applicant's attorney stating that the files were placed in the respondents' company vehicle, which vehicle was broken into when it was parked outside the Maroela Hotel, and the files were stolen. It was recorded that the matter was reported to the police.

[27] After this event, the mandate of the erstwhile attorneys was terminated and the present attorneys of record were appointed to deal with the matter further. These attorneys adopted the view that even if the files may have been stolen, the accounting records

relating to all the stolen files could still be made available for inspection. In September 2010, a letter to this effect was addressed to the respondents' attorney. This was pursuant to the settlement reached to which I have referred.

The response on behalf of the respondents was that they required confirmation that the applicant would not proceed with the 2007 application in order to allow *bona fide* settlement negotiations to proceed. It was acknowledged that the applicant could then proceed with the 2007 application if material problems with the accounting records were detected.

I again find it convenient to quote extracts from the late first respondent's letter to the applicant's attorney dated 5 October 2010 (it is noteworthy that the respondents conducted the litigation under the name of the third respondent and did not, at least at that stage, employ separate attorneys for the purpose):

> "I have no objection in principle to letting your client have sight of my accounting records in respect of the files referred to by you. ... If the documentation requested by you is in order for you to prepare for the hearing, then I must first check with my counsel whether it will be in order for your client to have sight of the documentation in question.
>
> It would appear from the import of your letter that you are requesting the documentation for the purpose of attempting to settle this matter. Under the circumstances I would suggest in order for *bona fide* settlement negotiations to proceed without the threat of litigation hanging over my head that you confirm that your client will not be proceeding with this matter on either the 4th of

March 2011 or the 29th of April 2011. Naturally if your client does find material problems with the accounting records that I supply then it will be their prerogative to again apply for a date for the hearing of this matter ..."

[28] On 25 October 2010 the applicant's attorneys responded by indicating that they would not proceed with the 2007 application under those circumstances and again called for the delivery of the requested accounting records.

On 8 December 2010 the first respondent wrote a letter stating "I now enclose herewith copies of the relevant accounting records". Attached to the letter were ledger accounts of 1 (one) page each for only five of the nine complainants mentioned in the 2007 application. The accounts related to the matters of Marudi, Molefe, Molekwa, Dyasi and Masoku. There were no records relating to the matters of Nkosi, Mazibuko, Lamula and Molalogi.

The applicant, correctly in my view, felt that it had to be placed in possession of all the source documents over and above the ledger accounts. A letter was sent to the first respondent on 22 February 2011 recording this attitude and the fact that what was supplied was incomplete. In the letter there was a request for all books of prime entry and all ledger accounts, receipts and books, bank statements, fee notes, fee journals and transfer journals, invoices, cheque counterfoils or copies of issued cheques and all supporting documents in the event of electronic transfers. This was requested in respect of all nine the complainants in the 2007 application and not only in respect of some of them. This comprehensive letter, exhibit "LS11", was transmitted by fax to the correct fax number as it appears on the third respondent's letterhead.

The applicant alleges that there was no response to "LS11" and this is what prompted the decision to launch a fresh application (further complaints were received by then). The result was the adoption of the September 2011 resolution and the launching of this application in November 2011. The allegations about "LS11" were met with a blanket denial in the answering affidavit. In this affidavit, the respondents referred to a lengthy paragraph 26 in their answer, which does not appear to deal explicitly with the allegations around "LS11". Nevertheless, the respondents, in their opposing affidavit, adopt the attitude that all the particulars required were supplied. They also referred to a fire which allegedly took place in August 2009 at Docufile where some of the records stored in that facility by the respondents were allegedly destroyed. On this version, the fire took place after, for example, September 2008, when the requested files featuring in the 2007 application were allegedly sent to the applicant but stolen from the parked vehicle. It is also noteworthy that the first respondent, as I mentioned, already in a letter of 8 December 2010 (after the alleged fire) stated emphatically that he was attaching the requested "relevant accounting records". In the event, as I mentioned, he failed to do so.

[29] I turn to briefly consider some details relating to the complaints received by the applicant against the respondents.

[30] In the founding affidavit, the deponent on behalf of the applicant comprehensively deals with thirty one complaints received, mentioning the names of the complainants and some relevant particulars. The deponent states that all the complaints relate to "third party matters" handled by the respondents on behalf of clients. Some features

of the complaints include failure by the respondents to account properly or pay over the settlement amounts received from the RAF and, in some instances, monies invested on behalf of the clients without the consent of the latter.

[31] Although I consider this to be strictly unnecessary, I offer, for illustrative purposes, a trancated overview of some of the complaints without mentioning the names of the complainants or too much detail:

- The biological mother of a severely injured child (head injuries) instructed the respondents to file a claim. The matter was settled for R1,25 million which was paid to the third respondent. The respondents paid an amount of R5 000,00 to the complainant and informed her that she would receive R1 500,00 a month. Details of the actual settlement amount, and what appeared to be an investment made on behalf of this complainant were not supplied. The complainant's affidavit in support of these allegations is attached to the founding papers and dated 16 January 2007. Attached to the letter is documentary proof of the amount paid to the respondents by the RAF. The amount is R1 225 135,00.

- The complainant's claim was settled for R445 000,00. Documentary proof is attached. She only received R292 550,00 by cheque which was attached to the founding affidavit. It appears that before she got the cheque, she was handed another cheque for R30 000,00 and sent to the bank, where she had to identify a particular teller, one Leah, who would cash the cheque. She did so, and brought the money back to the respondents where one of the attorneys employed by the respondents told her that the money would be used to pay the

doctor who examined her. After she reported the matter to the Law Society she received a call from the attorney at the third respondent, one Kim, who invited her to a meeting where she was reprimanded for lodging a complaint. She was given an amount of R15 000,00 in cash by the second respondent and informed that she would receive a call to collect "the outstanding R15 000,00".

- The mother of a claimant and client of the respondents who had passed away, became the executrix of the estate of her son and established that an Expenditure Authorisation Statement obtained from the RAF indicated that a net amount of R420 000,00 was paid to the respondents and thereafter, in terms of a second Expenditure Authorisation Statement an amount of R157 933,23 was paid in respect of attorneys' and counsel's fees and medico-legal costs. From the settlement figure of R420 000,00 a fee of R147 000,00 was deducted but the attorney in the employ of the respondents never disclosed the fact that, in terms of a second Expenditure Authorisation Statement an amount of R157 933,23 was paid in respect of costs.

- The complainant is the mother of a child injured in 2007. The RAF paid a settlement amount of R1,2 million which the respondents invested without her consent. She reported the matter to the *Sowetan* newspaper. Newspaper cuttings form part of the founding papers. She was invited to the offices of the respondents by an attorney employed there who asked her to sign a prepared affidavit contradicting her claims to the newspaper. In a number of cases such prepared affidavits, ostensibly withdrawing complaints, were handed to complainants for signature.

- The complainant is the mother of an injured minor. She was told by the respondents that the RAF paid a settlement amount of R249 338,00. She was given R10 000,00 and informed that the rest would "go to her son's name". She was presented with "Momentum forms" and advised that the money had been invested. She requested copies of these papers but the request was denied. Attached to the founding affidavit is a notice of offer of settlement from the attorneys, presumably representing the Fund, for an amount of R402 611,00.

[32] For present purposes, I consider it unnecessary to deal with further examples.

[33] It should be recorded, in fairness, that the respondents offered explanations in response to all these complaints in their answering papers.

[34] At the same time, compelling counter-allegations are contained in the replying affidavit filed by the applicant.

[35] In many instances, there are mutually destructive versions. In my view, it is obvious that the records of the respondents will have to be inspected by qualified officials of the applicant to determine, in the spirit of section 70 of the Act, whether or not a section 71 disciplinary inquiry is indicated.

[36] So much for the background notes and events leading up to the launching of the present proceedings.

The attempted Faris inspection

[37] In the founding affidavit the following is stated:

> "15.1 Prior to instituting the 2007 application the applicant had mandated Mr Vincent Faris, a chartered accountant and auditor who has expertise in conducting investigations into attorneys practices and into the manner in which they keep their accounting records and maintain their trust banking accounts, to conduct an inspection of the attorneys' accounting records.
>
> 15.2 The attorneys resisted the inspection and held the view that they were being victimised and harassed and expressed a view that section 70 of the Act is unconstitutional.
>
> 15.3 The resistance to the proposed inspection was amid serious allegations of impropriety. These allegations were never fully investigated and serious questions remain regarding the conduct of the attorneys in all the matters in which the applicant has received complaints."

[38] In the answering affidavit, the allegations in 15.1 and 15.2 are admitted. It is submitted on behalf of the respondents "that the mandate purportedly granted to Mr Faris by the applicant in 2007 was unlawful and unconstitutional for the same reasons that the inspection decision challenged in the present counter-application is unlawful and unconstitutional.

[39] Where the resistance to the proposed inspection is admitted, and where it is obvious that the inspection was proposed "amid serious allegations of impropriety" it is difficult to understand how this allegation can be denied.

[40] In my view, the conduct of the respondents to refuse Mr Faris entry and the opportunity to conduct an inspection is totally unacceptable and not something which a court should tolerate. The decision of the applicant to mandate Mr Faris to do the inspection clearly falls well inside the applicant's section 58 and 59 objects and powers.

More about sections 70, 71 and 78 and the proposed proper approach to be adopted

[41] In the founding affidavit, certain submissions are made on this subject by the deponent for the applicant with which I find myself in respectful agreement.

[42] At the risk of sacrificing a measure of brevity, I consider it convenient to quote the submissions:

> "16.1 The applicant's council has carefully considered the complaints against the attorneys and has decided that there are sufficient grounds to warrant a preliminary enquiry into the attorneys' practice in terms of section 70 of the Attorneys Act in order to determine whether there are any reasons for the Law Society to institute a disciplinary enquiry.
>
> 16.2 Although the attorneys have commented on some of the allegations when confronted with complaints, the reasons advanced are contradictory to the complainants' versions. In the circumstances, the applicant is faced with two conflicting versions of what had transpired.

The uncertainty created by contradictory versions necessitates the preliminary enquiry into the respondents' practice.

16.3 It is the duty of the Law Society to act in the interests of the profession and the general public when it receives information relating to alleged impropriety and it is also the applicant's duty to investigate all complaints even though there is an allegation that the complaint may have been withdrawn and explanations in respect thereof have been received. This is particularly so where complaints are *prima facie* of a serious nature. It is the Law Society's duty to confirm whether the explanations given are correct or not.

16.4 The envisaged inspection by the applicant is intended to clarify the uncertainties created by the two contradicting versions in each complaint. If the respondents are confident with their explanations, where explanations were given, it is submitted that allowing the applicant to inspect their records and files will only serve to exonerate them and bring credible closure to each complaint.

16.5 The applicant has a duty to inspect the attorneys' accounting records and files and wishes to do so in order to determine whether there are any irregularities in such records or in the manner in which the respondents have dealt with trust monies under their control so that a decision can be taken whether to proceed with disciplinary steps in terms of section 71 of the Act.

16.6 It is submitted that the purpose of an inspection in terms of section 70 of the Attorneys Act is at this stage to enable the applicant to decide

whether an enquiry in terms of section 71 should be held and that the applicant has sufficient information to warrant such an inspection.

16.7 The complaints against the attorneys are serious. The attorneys' resistance to the applicant's proposed inspection compels the applicant to conclude that the attorneys have something to hide. As such, the applicant cannot discharge its duties diligently to the members of the public and the complaints in particular without satisfying itself that all is well by inspecting the actual records which are the bone of contention.

16.8 The applicant has now resolved that the inspection in terms of section 70(1) of the Act should proceed and it is evident that the attorneys will not allow the proposed inspection to proceed without an order of this Honourable Court. Hence the applicant's council has resolved to bring this application."

[43] In dealing with these allegations in praragraph 16 of the founding affidavit in their answering affidavit, the respondents deny that the members of the council applied their mind to the inspection decision. This is a decision taken by some 24 practising attorneys at a formal meeting and it is repeatedly stated on behalf of the applicant that the council members duly applied their minds before passing the resolution.

Respondents deny that the applicant has a duty to investigate a complaint which had been withdrawn. With this I disagree. I also pointed out that some of the complainants indicated that they were presented with prepared affidavits to sign and that they do not agree with the contents thereof.

Importantly, the respondents unblushingly admit that they will not consent to the proposed "unlawful inspection" which supports the attitude of the applicant that this is so, and that a court order is required for purposes of obtaining the necessary relief.

The respondents then, in rather general terms, deny that the relief claimed "is lawful or in any way justified". The respondents also introduce a rather novel argument that the applicant had not followed its "normal procedures in respect of disciplinary proceedings in terms of part XIII of its Practice Manual to determine whether there was validity to any of the complaints it now invokes against the respondents". In my view, the relief sought has to do with the preliminary inspection to decide whether disciplinary proceedings are to be instituted, and the section 70 inspection does not constitute disciplinary proceedings as such. Moreover, there is no room for analysing, and arguing about, the merits of the complaints before the section 70 preliminary enquiry, designed to get to the bottom of the complaints, has become a reality. I find nothing in part XIII of the Practice Manual to gainsay the aforesaid conclusions.

[44] In its replying affidavit, the applicant's deponent makes further submissions to develop what was already stated in paragraph 16 of the founding affidavit. I offer a brief summary:

- The provisions of section 70(2) are emphasised, namely that the refusal or failure by a practitioner to comply with a direction in terms of subsection (1) constitutes unprofessional conduct.

- No formal enquiry in terms of section 71 has been instituted. It follows that there can be no finding as to unprofessional, dishonourable or unworthy conduct on the part of the respondents in these proceedings.

- What the respondents are currently resisting is a preliminary inspection of their records which is prompted by the existence of several serious complaints against them.

- The respondents are members of the Law Society and share an interest in ensuring that the standards, reputation and integrity of the attorneys' profession are maintained. As such the respondents should subject themselves to the disciplinary powers and the regulatory framework of the attorneys' profession. They should in fact welcome the proposed preliminary inspection.

- The detailed and persistent efforts of the respondents to, at this stage, insist on ventilating the merits of all the complaints are premature and simply defeat the very purpose of the preliminary inspection. By answering to the complaints at this stage the respondents are pre-empting the statutory mechanisms by addressing issues which should be dealt with during an enquiry in terms of section 71.

- It is entirely proper for the Law Society, when presented with information indicating possible unprofessional conduct, to investigate that information and to take appropriate action. It is equally important to hold back charges of misconduct, where possible, until the Law Society has taken reasonable steps

to satisfy itself about the validity of the complaints levelled against a practitioner.

[45] The main thrust of the case of the respondents, as I understand it, barring the attack on the constitutionality of section 70 and the counter-application, is that it is not open to the applicant, on the strength of the section 70 provisions, to inspect files other than those directly related to the complaints lodged with the applicant.

In this regard, I was referred by the applicant to the case of *Mda v Law Society of the Cape of Good Hope* 2012 1 SA 15 (SCA) where the appellant raised exactly the same argument. In rejecting this argument, the learned Judge of Appeal, in the court's unanimous judgment, says the following:

"[7] Law Societies have, among their objects, the responsibility to uphold the integrity of practitioners and ensure that the standards and control of their professional conduct are maintained. This task falls to a council, which runs the affairs and exercises the powers of a society. Among the powers given to a council to achieve these objects is section 71, which sanctions an enquiry into allegations of 'unprofessional or dishonourable or unworthy conduct' on the part of a practitioner. To decide whether or not an enquiry should be held a council may use section 70(1) to inspect 'any book, document, record, or thing' pertaining to a practice. There is no limit to the ambit of the inspection.

[8] A council may also, under section 78(5), satisfy itself that a practitioner's trust accounts are in order by inspecting the 'accounting records' of the practice. In this regard it must be noted that section

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

[9] In my view the High Court was correct in its conclusion. Concerning Mr Mda's submission that section 70(1) permits a council to inspect documentary material pertaining only to specific allegations of misconduct, this cannot be so. As I have indicated above, the section does not limit a council's authority when it is deciding whether or not to hold a misconduct enquiry. However, once the council has decided to hold an enquiry, sections 71(2)(a)(i) and (ii) require any person who is summoned to testify to produce any documentary material that has a bearing on the subject of the enquiry. Section 71(2) is concerned only with documentary material that may be relevant to an enquiry. Section 70(1), on the other hand, has a specific purpose, which is to place a council in a position to decide whether or not to hold an enquiry. This is why the legislature permitted a broader inspection under section 71 than it did under section 71(2).

[10] There is also no merit in Mr Mda's objection to the Law Society relying on section 78(5), which he maintains may be used only to police trust

> accounts, and not to investigate misconduct. If this contention were correct it would mean that a council may not request documentary material regarding any allegation of misconduct when it concerns a practitioner's failure to keep proper accounting records, which is absurd. This is why section 78(6) in terms authorises inspection of more than merely the 'accounting records' of a practice."

[46] In my view, this is clear and binding authority for the proposition that the applicant is entitled to conduct an inspection which is not limited to the papers relating to the complaints as such.

[47] Quite properly, counsel for the respondents, in their heads of argument, conceded that "the *Mda* decision is clearly binding authority and it is not open to the respondents to argue in this Court that section 70 of the Act is confined to inspections for the purposes of verifying or refuting specific allegations or complaints". Counsel then go on to argue and emphasise that -

> "Any generalised power of inspection under section 70 of the sort contemplated in the *Mda* decision is not only highly intrusive, it is inevitably likely to cause commercial harm to the attorney against whom it is exercised and may well destroy his or her practice entirely. This proposition has been illustrated in paragraph 14 above in relation to the harm likely to be caused to the Smith firm if the Law Society's inspection is allowed to proceed to implementation. For present purposes we point out that the extensive nature of the harm likely to be caused by a generalised inspection must be borne in mind when deciding to authorise such an inspection. So if section 70(1) is to be

interpreted and applied in a manner consistent with the Constitution, it can only authorise generalised inspections in circumstances where the need for such a generalised inspection outweighs the harm that it is inevitably going to inflict on an attorney."

[48] It was submitted on behalf of the applicant that in the context of section 70 the allegations of unprofessional, dishonourable or unworthy conduct on the part of the practitioner would trigger the inspection powers under section 70. Only a reasonable suspicion is required of such misconduct for the inspection to be launched. I agree.

[49] On the other hand, it was argued on behalf of the respondents that while a "reasonable suspicion" of unprofessional or unworthy conduct was necessary for any exercise of the section 70 inspection power there must be a distinction between exercising of the power to investigate specific allegations and exercising of the power to conduct generalised inspections. In the latter case, so it was argued, there are two additional requirements which must be satisfied before a generalised inspection can legally be instituted:

(i) "The reasonable suspicion of unprofessional or unworthy conduct must be reasonable suspicion of such conduct on a widespread scale."

No authority is quoted in support of this submission. In any event, in the present case, there are 31 complaints of serious misconduct so that the requirement for the existence of a 'reasonable suspicion' was clearly met.

Respondents' counsel argue that "no harm is caused by investigating specific allegations of misconduct brought by disgruntled clients". I have difficulty in

accepting this argument. In the first place, the applicant appears to have every intention to investigate the specific allegations of misconduct relating to the 31 complaints (which investigation, if I understand the argument correctly, will not cause any harm to the respondents) and, secondly, such complaints and allegations of misconduct by disgruntled clients can be made public by the latter, like in the present case where it was reported to the newspapers. To that extent, the reputation of the respondents would in any event already have been adversely affected. The proposition can be tested by considering an extreme example of a few hundred disgruntled clients complaining about specific instances of misconduct and passing it on to the press as well. Harm to the practitioner flowing from such a state of affairs would probably outweigh the harm complained of on behalf of the respondent namely that "the harm of a generalised inspection is triggered by the need of an attorney to alert non-complaining clients to the fact that his/her practice is being inspected because of a suspicion of generalised misconduct". Rather graciously, counsel qualify this submission by stating that "that harm cannot be inflicted unless the Law Society has a reasonable suspicion of unprofessional or unworthy conduct that goes beyond any individual complaints that it has received from clients". In the present case, such a suspicion would not be unjustified bearing in mind the quantity and nature of the complaints lodged with the applicant.

Assuming that the perceived need for the attorney to alert all his non-complaining clients flows from an acceptance that the question of attorney and client privilege comes into the equation, I am of the view that such privilege does not arise for present purposes, for the following reasons:

- In *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director, Office for Serious Economic Offences and Others* 1996 1 SA 785 (AD) the two appellant attorneys were confronted with a search and seizure operation in terms of the Investigation of Serious Economic Offences Act 117 of 1991 involving certain documents of the appellants. The main question that arose was whether they were protected from seizure by reason of legal professional privilege.

The following is said at 793G-794C:

> "It follows from what has been said that the matter must be approached on the basis that each of the files seized contained some privileged documents. But privilege is not cast in stone; it has its limitations. It may be waived. Or it may be destroyed ... There is also the possibility referred to in *Safatsa* (at 8861) (my note: a reference to *State v Safatsa and Others* 1988 1 SA 868 (A)) that the court has the power to relax the rules of privilege. But most important for our purpose is the principle that privilege does not arise automatically. It must be claimed. This may be done not only by the client but by the attorney. Indeed, he is under a duty to claim the privilege. However, because the privilege is the right of the client, the attorney, in claiming it, must act not in his own interests or on his own behalf but for the benefit of the client. Unless he does so, his claim to privilege may be regarded as not genuine. And, in this event, a court would be entitled to disregard the claim to

> privilege and admit the document in evidence or permit its seizure, as the case may be. This has occurred where the attorney has claimed the privilege ostensibly on behalf of his client but in truth in order to frustrate an investigation into his own alleged criminal conduct. *In re Impounded Case (Law Firm)* 879 F 2d 1211 (3rd Cir 1989) was such a case. It involved the seizure of documents. At 1213-14 the Court said:
>
> 'It is not apparent to us what interest is truly served by permitting an attorney to prevent this type of investigation of his own alleged criminal conduct by asserting an innocent client's privilege with respect to documents tending to show criminal activity by the lawyer. On the contrary, the values implicated, particularly the search for the truth, weigh heavily in favour of denying the privilege in these circumstances.'"

In *Bogoshi*, the claim to privilege was rejected and the appeal was dismissed.

In this particular case, I am of the view that the respondents are claiming privilege, not on behalf of their clients, but in truth in order to frustrate the investigation into their affairs. Initially (and throughout, until at a very late stage) the respondents even claimed privilege on behalf of the complainants who, as I indicated, would clearly have waived privilege when they laid the complaints insisting on the matter being investigated. To boot, the respondents, as I illustrated, insisted on the applicant submitting proof that

privilege had been waived. This was the stance adopted up to the stage when the proceedings came before me. Not one of the clients on whose behalf privilege was purportedly claimed was identified. On a general reading of the papers, and without intending to offend the body of clients of these respondents, it would appear that they are, by and large, relatively uneducated and impecunious people interested only in successfully conducting their claims against the RAF. On the probabilities, I am of the view, and I find, that the respondents, in truth, have been claiming privilege in order to frustrate the investigation and not for the benefit of the clients. In the result, I consider that this is an appropriate case for the rules in respect of privilege to be relaxed and for the claim with regard to privilege, offered by the respondents, to be dismissed. I rule accordingly.

- Some reliance was also placed before me on the case of *Sasol III (Edms) Bpk v Minister van Wet en Orde* 1991 3 SA 766 (TPA). In that case, subsequent to a fire taking place at the applicant's petrochemical plant, during which twelve people were killed, the applicant appointed a panel of experts to compile a report of the incident, which it then submitted to its attorneys with the view to obtaining legal advice in respect of possible civil and criminal proceedings resulting from the fire. When the Attorney-General of the Transvaal requested the applicant to furnish him with the report, legal professional privilege was claimed. The respondent nevertheless went ahead to obtain a search warrant in terms of certain sections of the Criminal Procedure Act 51 of 1977, and found the report in the possession of the applicant's attorney and seized the

document. In an urgent application the applicant was granted the necessary relief and its claim to privilege was upheld.

In my view, *Sasol III* is clearly distinguishable from the present matter where there was no question of an attorney claiming privilege to protect its own interests rather than that of the client. *Sasol III* was also referred to in *Bogoshi* and duly considered.

- I add that it is noteworthy, in my view, that the question of privilege is not mentioned in section 70. The question of privilege was also not raised for consideration in *Mda*.

In striking contradiction thereto, privilege was provided for by the legislature when enacting section 71. The provisions of section 71(2)(c) stipulate:

> "In connection with the interrogation of any person who has been summoned under this section or the production by such person of any book, document, record or thing, the law relating to privilege as applicable to a witness summoned to give evidence or to produce a book, document, record or thing in a civil trial before a court of law shall apply."

In my view, if the legislature intended privilege to be applicable with regard to a section 70 preliminary enquiry, it would have said so.

Moreover, to allow an attorney, in the position of the respondents, to claim blanket privilege on behalf of thousands of unknown and non-participating clients, past and present, would lead to absurd results: that would mean that either the attorney (or on the respondents' version the applicant) would have to communicate with all his clients before the preliminary enquiry can get under way. That would lead to an absurd state of affairs. Such an enquiry could then be delayed by months or years. In many cases these enquiries have to be conducted as a matter of urgency.

One of the rules and presumptions of statutory interpretation is that it is presumed that the legislature did not intend unfair, unjust or unreasonable results to flow from its enactments – see J R De Ville *Constitutional and Statutory Interpretation* p67. I do not quote the footnotes.

At p194, this author, when dealing with this presumption or rule of interpretation, and after taking due note of the provisions of section 39(2) of the Constitution, states:

> "This presumption has also traditionally had more specific applications in that (in terms of this presumption) onerous provisions were restrictively construed, provisions were presumed not to sanction discrimination, and absurd results and the retrospective operation of statutes were avoided."
>
> Footnotes are not referred to but they appear on p194.

Finally, it seems to me that the legislature, when enacting section 70, and far from introducing protective measures with regard to privilege as it did with section 71(2)(c), placed emphasis on the importance and urgency of the section 70 preliminary enquiry by enacting section 70(2) which provides that the refusal or failure by a practitioner to comply with a direction in terms of subsection (1) shall constitute unprofessional conduct.

(ii) I turn to the second of the two "additional requirements" which, according to counsel for the respondents, must be satisfied before a generalised inspection can legally be instituted: it is this -

> "... If the reasonable suspicion of unprofessional or unworthy conduct on a wide spread scale is based only on untested allegations in a series of individual complaints, a generalised inspection cannot lawfully be authorised prior to the investigation of those individual complaints unless there are reasonable grounds for believing that a delay in authorising a generalised inspection will cause harm to clients that outweighs the harm that will inevitably be caused to an attorney by conducting a generalised inspection."

In my view, such an approach would defeat the whole purpose of the preliminary enquiry: as already indicated, the idea of conducting a preliminary enquiry is to establish whether or not a section 71 disciplinary procedure should be instituted. There is no room for prior ventilation of the allegations by the clients and the counter-allegations by the attorney. Those issues fall to be considered during a section 71 enquiry, if there is one. No authority is

quoted in support of this contention by counsel for the respondents. Moreover, I have expressed the view that the alleged prejudice to be suffered by a preliminary enquiry is, if anything, overstated: firstly, I have found that this is not an appropriate case to entertain reliance on professional privilege so that the need to contact 16 000 clients before the preliminary inspection can get under way does not exist. If I am wrong in that respect, it seems to me that more harm has already been caused by the bad press received by the respondents following the complaints and that such harm would outweigh any harm which may result from communications by the respondents to their clients to the effect that the applicant is conducting a preliminary enquiry to determine whether or not there is a basis for disciplinary proceedings.

I add that counsel for the respondents attempted to distinguish this case from that of *Mda*. The argument seems to be that the present respondents have a far better disciplinary record than was the case with Mr Mda who, by all accounts, did not distinguish himself as a model practitioner. In my view this argument is ill-founded: the court in *Mda* laid down the general principle that:

> "... to decide whether or not an enquiry should be held a council may use section 70(1) to inspect 'any book, document, record, or thing' pertaining to a practice. There is no limit to the ambit of the inspection."

Indeed, counsel, as I have pointed out, conceded as much in their heads of argument.

[50] I turn to the relief sought by the applicant in terms of section 78 of the Act. This is described in paragraphs 1, read with 1.1 and 1.4 of the notice of motion:

> "1. That (the respondents) make the following records/data available to the Law Society for investigation:
>
> 1.1 the complete accounting records relating to all claims handled on behalf of clients against the Road Accident Fund containing particulars and information of any money received, held or paid by the firm for or on account of any person, of any money invested by the firm in a trust, savings or other interest-bearing account and of any interest on money so invested which was paid over or credited to the firm as is more fully described in section 78(4) of the Attorneys Act no 53 of 1979;
>
> 1.2 ...
>
> 1.3 ...
>
> 1.4 the records/data of clients referred to in paragraphs 1.1, 1.2 and 1.3 to include, but not be limited to all matters in which the Law Society has received complaints."

[51] The section 70 relief (also covered by the blanket prayer 1.4) is to be found in prayer 1.3 seeking an order directing the respondents to make the following available for inspection by the applicant:

> "The complete and/or any books, documents, records or things relating to the practice of the attorneys in relation to all matters handled by the attorneys on behalf of all clients against the Road Accident Fund as is more fully described in section 70 of the Attorneys Act No 53 of 1979."

There is perhaps some overlapping with the relief sought in 1.2 of the notice of motion dealing with the delivery of the complete office files relating to all the RAF claims.

[52] The relief sought in 1.1 and based on section 78(4) is, to quote the word used by counsel for the applicant, "self standing" from the relief sought in 1.3.

[53] I have quoted the wording of the relevant subsections of section 78, but, for easy reference, it is useful to revisit the wording or part thereof:

> "78(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her or on account of any person, of any money invested by him or her in a trust, savings or other interest bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him or her. (This is what is stipulated in 1.1 of the notice of motion.)
>
> (5) The council of the Society of the province in which a practitioner practises may by itself or though its nominee, and at its own cost, inspect the accounting records of any practitioner in order to satisfy itself that the provisions of subsections (1), (2), (2A), (3) and (4) are being observed, and, if on such inspection it is found that such practitioner has not complied with such provisions, the council may write up the accounting records of such practitioner and recover the costs of the inspection or of such writing up, as the case may be, from that practitioner.

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

(a) money invested in a trust, savings or other interest-bearing account, ...

(b) interest on money so invested;

(c) any estate of a deceased person ...

(d) his practice."

[54] It is useful to revisit the words of the learned Judge of Appeal in *Mda* at 18C-D:

"So whether a council is considering a possible professional misconduct enquiry under section 70(1), or the supervision of a practitioner's trust accounts under section 78(5), both provisions expressly permit the council to inspect all the records and documents concerning the practice. It is on this basis that the High Court found that the Law Society was entitled to conduct the envisaged inspection."

And at 19C-D:

"There is also no merit in Mr Mda's objection to the Law Society relying on section 78(5), which he maintains may be used only to police trust accounts, and not to investigate misconduct. If this contention were correct it would mean that a council may not request documentary material regarding any allegation of misconduct when it concerns a practitioner's failure to keep proper accounting records, which is absurd. This is why section 78(6) in terms

authorises inspection of more than merely the 'accounting records' of a practice."

[55] The constitutionality of section 78 is not attacked in the counter-application but only that of section 70. However, the review application comprising the counter-application, appears to be aimed at the whole September 2011 resolution which provides for the applicant's attorneys to proceed with an application to compel the respondents to also make the "accounting records" available to the applicant for investigation.

[56] Nevertheless, against this background, and in view of what was held in *Mda* about section 78, it is difficult to see how the counter-application can succeed with regard to the "self standing" relief sought in terms of section 78.

[57] I turn to the counter-application.

The counter-application and the constitutionality of section 70

[58] The counter-application is based, by and large, on the PAJA section 6 review grounds.

[59] The first question to determine is whether the applicant's decision to conduct a section 70 preliminary investigation amounts to "administrative action" as defined in PAJA.

[60] Section 1 of PAJA provides that "administrative action" –

"means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect."

[61] In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 1 SA 327 (CC) the organ of state in a tender process had to investigate a reasonable suspicion of fraud on the part of a tenderer.

[62] At 341B-F, the following is said:

"[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.

[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and

actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

[39] If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City. This case has not, however, reached that stage yet." (Emphasis added.)

[63] I have mentioned, also when dealing with the submissions contained in paragraph 16 of the founding affidavit and paragraph 2 of the replying affidavit, that the section 70 inspection is not designed to determine culpability and/or to pronounce thereupon. As counsel for the applicant point out:

> "Culpability will only be determined at a subsequent section 71 enquiry, if there is one at all. The section 71 decision is unquestionably administrative action and the Smith attorneys will be fully entitled to the protections afforded by PAJA at that stage. Furthermore, the affected attorneys can then raise any problems they have with confidential information being used against them."

I have also mentioned that the question of privilege is specifically mentioned in section 71 but not in section 70.

[64] See also *Law Society, Northern Provinces (incorporated as the Law Society of the Transvaal) v Maseka and Another* 2005 6 SA 372 (BH) where the learned Judge, dealing with the same subject, says the following at 382D:

> "Where a functionary merely performs an investigative function which does not materially and adversely affect the person's rights, he or she need not, unless a statute provides otherwise, observe the principles of natural justice. See *Van der Merwe and Others v Slabbert NO and others* 1998 3 SA 613 (N) at 624D-E.
>
> I am satisfied that the NP Law Society was not obliged to afford the first applicant a hearing before deciding to inspect the first respondent's books. But to the extent that it might have been necessary, the NP Law Society has complied with the basic requirements of the *audi alteram partem* principle.
>
> ... in my opinion the NP Law Society has made out a *prima facie* case to hold an inspection as contemplated by section 70 of the Attorneys Act of 1979 or the equivalent in the Attorneys Act of 1984 (B)."

[65] In this case, in any event, the respondents, over a number of years, entertained, and rejected, efforts by the applicant to hold a preliminary section 70 investigation. They adopted, in my view, an obstructive and evasive approach.

[66] I have also dealt with the alleged prejudice which the respondents claim will be suffered in the event of the section 70 enquiry going ahead. I disagree with those submissions.

[67] Under these circumstances, I am not persuaded that the decision by the council to apply for an order facilitating a section 70 inspection amounts to administrative action. I take the liberty to revisit the words of the Constitutional Court judgment in *Viking Pony* at 341C-D:

> "It is unlikely that a decision to investigate a process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."

[68] In the result, I have come to the conclusion that the purported PAJA review is ill-founded and, for that reason alone, falls to be dismissed.

I am alive to the fact that the respondents, in addition to their reliance on the PAJA review grounds, also, in the alternative, offer the review under the banner of a so-called "legality review".

For example, in the founding papers offered in support of the counter-application, the following submissions are made:

> "27.1 (the inspection decision) was taken by the applicant without properly applying its mind to the matter, alternatively for the ulterior purpose of victimising the respondents and is accordingly inconsistent with the constitutional legality principle and section 6(2)(e) of PAJA;

27.2 was wholly unjustified and oppressive and accordingly is *ultra vires* section 70 of the Act and inconsistent with the constitutional legality principle and sections 6(2)(e), (f), (h) and (i) of PAJA."

The argument that the decision was taken for the ulterior purpose of victimising the respondents and was "unjustified and oppressive" appears to be based on allegations by the respondents that the council was inspired to be biased against the respondents by one Mr Ronald Bobroff, a former president of the applicant society, who is biased against the respondents and also a competitor in the practice of conducting these damages actions against the RAF.

These allegations are expressly denied in the answering papers. Inasmuch as there may be an *onus* to discharge, that would rest, in terms of the *Plascon-Evans* principle, on the respondents. On these papers, I am not persuaded that such an *onus* was discharged or that it was shown on a balance of probabilities that Mr Bobroff was biased or influenced the decision.

Moreover, counsel for the applicant argued that even if one assumes that Mr Bobroff was not entitled to participate in the council's investigation decision, the decision remains valid under section 66 of the Act which stipulates:

"66. **Validity of decisions taken by, or acts performed under authority of, council**

No decision taken by a council or act performed under authority of a council shall be invalid by reason only of the existence of a vacancy on that council or of the fact that a person who was not entitled to sit as a

> member of the council, sat as a member of the council, if the decision was taken or the act was authorised by the requisite majority of the members of the council who were present at the time and entitled to sit as members."

There was no evidence of the absence of the required quorum when the decision was taken.

[69] In their heads of argument, counsel for the respondents appear to identify the first ground of review (that the Law Society applicant acted *ultra vires* in taking its inspection decision, and thereby, presumably, offended the legality principle) on an argument which I have already dealt with, namely that there are "two additional requirements" which must be satisfied before a genaralised inspection can legally be instituted. As far as I could make out, and as I have mentioned, no authority was quoted in support of this argument but the first of these "additional requirements" was said to be the need for a reasonable suspicion of unprofessional or unworthy conduct on a wide spread scale. The second, linked to the first, is if the reasonable suspicion of unprofessional or unworthy conduct on a wide spread scale is based only on untested allegations in a series of individual complaints, a generalised inspection cannot lawfully be authorised prior to the investigation of those individual complaints unless there are reasonable grounds for believing that a delay in authorising a generalised inspection will cause harm to clients that outweighs the harm that will inevitably be caused to an attorney by conducting a generalised inspection. I have fully dealt with these arguments, and rejected them. I do not propose embarking upon unnecessary repetition.

[70] The second ground of review mentioned in counsel's heads of argument is the one I have mentioned by quoting from the founding papers, namely that the applicant took its inspection decision without properly applying its mind (this was specifically denied in the applicant's papers) alternatively for the ulterior purpose of victimising the respondents and that the inspection decision is accordingly inconsistent with the constitutional legality principle and also reviewable under section 6 of PAJA. This is where Mr Bobroff enters the equation and also the argument that it was only necessary to inspect the 31 files and not to embark upon a generalised inspection. These submissions I have fully dealt with, also with reference to *Mda*, and I have rejected them.

[71] The third ground of review is linked to the second ground and, essentially, based on a complaint that the respondents' submissions with regard to the merits of the complaints were not properly taken into account. There was also a submission that some of the complaints were not brought to the attention of the respondents before the decision was taken. It appears, on the argument on behalf of the applicant, that there were only four such complaints which are insignificant and irrelevant in the general scheme of things bearing in mind the number of complaints and the provisions of section 70.

[72] The fourth ground of review is that the inspection decision is not rationally related to the reasons proffered by the applicant for the inspection decision or the information made available to the applicant in relation to all the complaints. The respondents rely on the exhaustive and detailed analysis offered of all the complaints. This I have dealt

with. I have mentioned that, on my understanding of section 70, a full ventilation of the complaints, bearing in mind the mutually destructive versions, is not indicated for purposes of a section 70 inspection.

[73] The final ground of review is that the inspection decision was calculated to interfere unlawfully with the personal and commercial reputations of the respondents, and is accordingly inconsistent with section 6(2)(i) of PAJA. Reliance is also placed on the alleged extensive harm that the generalised nature of the inspection decision is calculated to cause to the respondents and the reputations of the attorneys practising there. I have dealt with these issues.

Inasmuch as this ground is also based on the argument offered that "the Law Society also appears not to have applied its mind to the unnecessarily intrusive nature of the inspection decision in so far as it sought a generalised inspection", counsel for the respondents, if I understand their argument correctly, appear to differ from the approach that the section 70 inspection is only a preliminary one and a process by which a decision will be taken on whether or not to institute disciplinary enquiries in relation to specific complaints that have been made. This has been dealt with, and the fact that it is only a preliminary process where culpability will not be pronounced upon appears to be trite for all the reasons mentioned. Similarly, counsel for the respondents insist, as I have mentioned, that only the "complaint files" ought to have been inspected. They state in their heads of argument: "moreover, the Smith firm has always made clear that it will willingly hand over the file of any complainant who waives privilege in respect of his/her file" and they base the alleged victimisation (which is explicitly denied) on, *inter alia*, "the continued inexplicable refusal of the

Law Society to accept the respondents' tender of inspection of all of the 31 files relevant to the complaints against proof of a waiver of privilege from the clients concerned". I have dealt expressly with these arguments.

[74] Against this background, and even if I am wrong in finding that the decision taken by the applicant's council did not amount to administrative action, I have come to the conclusion, and I find, that the respondents failed to make out a proper case for adequate review grounds, either in terms of PAJA or based on the legality principle, to set aside the decision of the council as adopted in the 23 September 2011 resolution.

I turn to the constitutionality of section 70.

This argument is contained in prayer (ii) of the notice of motion in the counter-application which reads as follows:

> "(ii) To the extent that it is necessary for the relief sought in prayer (i) above (the review application of the decision) an order declaring that section 70 of the Attorneys Act 53 of 1979 ('the Act') is inconsistent with the Constitution and invalid."

[75] In supplementary heads of argument handed up by counsel for the respondents during the hearing, they appear to capture their argument on the constitutionality of section 70 in the following paragraph of the heads:

> "8. On a proper interpretation of the Act, the suspicion conteinplated by section 70(1) must be a reasonable suspicion. This was common cause between the parties before the Law Society withdrew the concession of law it had made on the papers and repeated in its heads. The original

concession was well made by the Law Society. In the *Gaertner* case (my note: this is a reference to what is said in paragraph 71 of the judgment in *Gaertner v Minister of Finance* 2014 1 SA 442 (CC)) correctly cited by the Law Society in this regard, the Constitutional Court stated:

'When legislation authorises warrantless regulatory inspections, provision must be made for a constitutionally adequate substitute to ensure certainty in the conduct of the inspections and limit the discretion of the inspectors.' (The emphasis is that of counsel for the respondents.) (my note: see *Gaertner* at 461B.)

9. A mere suspicion of unprofessional or dishonourable or unworthy conduct can never be a constitutionally adequate standard to authorise a warrantless regulatory inspection unless the suspicion is a reasonable suspicion. Thus unless, the requirement of a reasonable suspicion is held to be a tacit requirement for the second category of inspections under section 70(1) the section would be unconstitutional. In such circumstances, section 39(2) of the Constitution demands that the section be interpreted in a manner that would avoid its unconstitutionality by making it subject to an implied requirement that the suspicion triggering the inspection is a reasonable suspicion."

I have already dealt with the approach of the applicant as set out in its papers, where the existence of a reasonable suspicion is recognised. I do not pronounce on the correctness or lack thereof of this argument advanced on behalf of the respondents, namely the tacit recognition that there must be a reasonable suspicion, but I have in

any event found that there was a reasonable suspicion, particularly when dealing with the submissions in paragraph 16 of the founding affidavit and paragraph 2 of the replying affidavit. I am also not aware of a withdrawal of such a concession by counsel for the applicant, but, nevertheless, treated the matter on the strength of the applicant's submissions, *supra*, that a reasonable suspicion was required.

[76] In their founding papers offered in support of the counter-application, the respondents formulate their stance about the constitutionality, or lack thereof, of section 70 in the following terms:

> "Accordingly, the respondents respectfully submit that section 70 of the Act does not authorise an oppressive and untargeted fishing expedition of the sort pursued by the applicant against the Smith firm. In view of the applicant's apparent contentions to the contrary in relation to the ambit of section 70 of the Act, the respondents conditionally, and in the alternative to the primary review relief sought in the counter-application, seek an order declaring section 70 of the Act to be unconstitutional and invalid. In this regard, the respondents respectfully submit that if section 70 is to be interpreted along the lines apparently suggested by the applicant, it is inconsistent with the following fundamental rights:
>
> (1) the fundamental rights of clients under section 14 of the Constitution to the privacy of their confidential communications with their attorneys;
>
> (2) the fundamental rights of attorneys to human dignity under section 10 of the Constitution and to freedom of trade, occupation and profession under section 22 of the Constitution; and

(3) the fundamental rights of attorneys to reasonable and procedurally fair administrative action under section 33 of the Constitution."

[77] These contentions were not argued with any force during the proceedings before me. In any event, the ambit of a section 70 inspection has been clearly formulated in *Mda*.

[78] As far as the section 14 argument is concerned, I have dealt with the question of privilege by reference to *Bogoshi* and *Sasol III*.

[79] I consider it doubtful whether sections 10, 22 and 33 come into the equation at all: we are dealing with clear statutory powers of inspection ordained by the legislature for the watch-dog of the legal profession.

[80] Returning to *Gaertner*, it deals with the reading in by the High Court and later the Constitutional Court of certain moderating provisions into section 4 of the Customs and Excise Act 91 of 1964. Before the reading in, these sections authorised warrantless searches "at any time", and "at any premises whatsoever" by Customs and Excise officers. It authorised the demanding of books, documents or things from any person believed to have it in his or her possession "at any time" and "at any place". It authorised the breaking-open of any door or window or breaking through any wall of "any premises" and "at any time" and the breaking up "at any time" of any ground or flooring on "any premises" for the purpose of a search and the opening, in any manner, of any room, place, safe, chest, box or package at any premises if it is locked and the keys are not produced on demand.

[81] It is clear that section 70 is not that intrusive. Section 70 does not provide for search and seizure, neither does it provide for visits to "any premises" such as the residence of the practitioner. It simply provides for the council directing the practitioner to produce for inspection the books, documents, records or things in the possession or custody or under the control of the practitioner and which relates to his or her practice or former practice. Where the practitioner adopts a recalcitrant attitude, as is the case at present, the council may approach the court for the necessary relief.

[82] Nevertheless, counsel for the applicant, in their heads of argument, point out that the Constitutional Court has indicated that regulatory inspections, properly constrained in scope, are constitutionally permissible particularly when the industry in question is public, extensively regulated and potentially hazardous to the public – *Gaertner* at 453D-E where the following is said:

> "In *Mistry* (my note: a reference to *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 4 SA 112 (CC)) this court considered the right to privacy in the context of regulatory inspections. Relying on *Bernstein* (my note: a reference to *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC)) it stated that regulated businesses possess a more attenuated right to privacy, more so if the business is public, closely regulated and potentially hazardous to the public."

[83] *Mistry* dealt with the powers of entry, search and seizure of inspectors of medicines in terms of section 28(1) of the Medicines and Related Substances Control Act no 101 of 1965. At 1144B-1145D the following is said (only extracts are quoted):

"[27] For the purpose of the present case it has not been necessary to determine whether or not regulatory inspections should be regarded as searches and seizures as contemplated by section 13. Yet, even if one were to accept in favour of applicant that there were situations where they did so qualify, it would be necessary to decide on a case by case basis how invasive any such regulatory inspections would be. The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion ... In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Members of professional bodies, for example, share an interest in seeing to it that the standards, reputation and integrity of their professions are maintained. In *Almeida-Sanchez v United States* ... Stewart J ... highlighted well the expectations of privacy involved in the modern world of closely regulated enterprises:

> 'The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the court stated in *Biswell*: "... when a dealer chooses to engage in this pervasively regulated business and to accept a federal licence, it does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection ... The dealer is not left to wonder about the purposes of the inspector or the limits of his task."' "

[84] In all the circumstances, and for the reasons mentioned, I have come to the conclusion, and I find, that the respondents failed to make out a case that section 70 is unconstitutional and invalid and inconsistent with the fundamental rights mentioned. Section 70 is not intrusive and its scope of application is now well settled following the judgment in *Mda*.

[85] In the result, I have come to the conclusion, and I find, that the application ought to be upheld and the counter-claim falls to be dismissed.

The costs

[86] The Law Society acts in the public interest and should, in the ordinary course, be awarded costs on the scale as between attorney and client if successful. As was stated in *Botha v Law Society, Northern Provinces* 2009 1 SA 227 (SCA) at 236F:

> "... the respondent was obliged to approach the court to obtain the order which this court has held was appropriate. The respondent is not an ordinary litigant and in bringing proceedings of this nature, it performs a public duty. In the

circumstances the order of the court *a quo* directing the appellant to pay the respondent's costs on the scale as between attorney and client should remain."

[87] Regrettably, I find it necessary to make a few remarks about the conduct of the respondents in this matter, quite apart from what I consider to be obstructive behaviour.

Counsel for the applicant submitted, correctly in my view, that the respondents, to a significant extent, launched an attack on the Law Society and its officials. Some of the respondents' allegations included that:

- the Law Society seeks far-reaching, disruptive and punitive relief against the respondents;
- the Law Society harasses the respondents;
- the Law Society's conduct is oppressive;
- the respondents have been targeted by the Law Society;
- the Law Society is conducting a fishing expedition;
- the Law Society's founding affidavit is misleading in several respects or, put differently, the Law Society attempts to mislead the court; and
- the Law Society decided to conduct the inspection for the ulterior purpose of causing harm to the respondents.

[88] In *Law Society, Northern Provinces v Mogami* 2010 1 SA 186 (SCA) the learned Deputy President, although also criticising the Law Society in that case, said the following at 195H-J:

"Very serious, however, is the respondents' dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of a wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional ..."

See also *Prokureursorde van Transvaal v Kleynhans* 1995 1 SA 839 (TPA) where the following is said at 853E-H (only extracts are quoted):

"Die respondent het die onderhawige verrigtinge benader soos 'n strafsaak. Dikwels is feitelike stellings breedweg ontken sonder verdere verduideliking en is van die applikant geverg dat hy dit moet bewys. Hierdie benadering is verkeerd. Die hof is besig met 'n ondersoek van dissiplinêre aard ... Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie."

[89] Counsel also addressed me with regard to the costs flowing from the respondents' rule 30 interlocutory application.

I have dealt, at some length, with the chronological sequence of events and also, for example, objections by the respondents about the rule 53 record that was filed by the applicant.

On a general reading of the papers I am of the view that the "inordinate delay" complained of can largely be laid at the door of the respondents.

Moreover, as I mentioned, the rule 30 application was withdrawn, and the threat to refer the matter to oral evidence never became a reality.

In all the circumstances, I am of the view that the costs of the interlocutory proceedings should also be borne by the respondents on the same punitive scale.

The order

[90] Towards the end of the proceedings before me, I debated with counsel the possibility of both sides submitting draft proposals aimed at refining the logistical aspects of conducting the inspection in terms of section 70 if I were to decide to uphold the application.

I received proposals from both sides. The suggestions made on behalf of the applicant appear to me to be the more acceptable and realistic. It proposes the introduction of a new paragraph 2 following prayer 1 (including subparagraphs 1.1 to 1.4) of the notice of motion.

This proposal appears to me to be designed to facilitate matters from the point of view of the respondents, *inter alia* in the conduct of their practice while the inspection is under way. The suggested proposals will be incorporated in the order.

[91] I make the following order:

1. The respondents are ordered to make the following records/data available to the Law Society for investigation:

   1.1 the complete accounting records relating to all claims handled on behalf of clients against the Road Accident Fund containing particulars and information of any money received, held or paid by the firm for or on account of any person, of any money invested by the firm in a trust, savings or other interest-bearing account and of any interest on money so invested which was paid over or credited to the firm as is more fully described in section 78(4) of the Attorneys Act no 53 of 1979;

   1.2 the complete office files relating to all claims handled on behalf of clients against the Road Accident Fund containing, without limiting the generality thereof, correspondence, statements of account, receipts, reports and pleadings; and

   1.3 the complete and/or any books, documents, records or things relating to the practice of the attorneys in relation to all matters handled by the attorneys on behalf of all clients against the Road Accident Fund as is more fully described in section 70 of the Attorneys Act no 53 of 1979;

   1.4 the records/data of clients referred to in paragraphs 1.1, 1.2 and 1.3 to include, but not to be limited to all matters in which the Law Society has received complaints.

2. The inspection of the records/data referred to in paragraph 1 of the order above (including paragraphs 1.1 to 1.4):

2.1 will be conducted at the offices of the attorneys and/or any storage facility at which the records/data may be stored (in which event, if necessary, the attorneys will procure access to such storage facility for the purposes of the inspection);

2.2 will be commenced on a date mutually agreed upon between the attorneys and the Law Society, but not later than one calendar month from the date of this order;

2.3 will be conducted during normal office hours (ie between the hours of 08:00 and 17:00) unless by prior arrangement with the attorneys which will not be unreasonably withheld;

2.4 where the Law Society wishes to inspect any file on which the attorneys, at that particular time, are working, the attorneys will make suitable arrangements for the file to be inspected at the earliest opportunity thereafter, including, if necessary, after hours, so as to ensure minimal disruption to the conduct of that client's case;

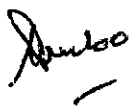
2.5 the Law Society will be entiled, at its own expense, to make copies of any records/data, electronic or otherwise, which is the subject of this order;

2.6 any and all records/data and/or other information which is obtained in the course of the inspection under this order, as provided for in paragraphs 1 and 2 of this order, will be used by the Law Society only in the exercise of its powers and obligations under the Attorneys Act, no 53 of 1979. For the avoidance of any doubt, no records/data or

information procured in terms of this order may be utilised by the Law Society or any other person or agency in any proceedings against any client of the attorneys.

3. The counter-application is dismissed.

4. The attorneys (respondents), jointly and severally, are ordered to pay the costs of this application and the counter-application, which will include the costs flowing from the rule 30 interlocutory proceedings, on the scale as between attorney and client and will include the costs flowing from the employment of two counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

62599-2011

HEARD ON: 8, 9 AND 10 MARCH 2016
FOR THE APPLICANTS: A STEIN SC ASSISTED BY D WATSON
INSTRUCTED BY: ROOTH & WESSELS
FOR THE RESPONDENTS: M CHASKALSON SC ASSISTED BY C VAN DER SPUY
INSTRUCTED BY: RAPHAEL & DAVID SMITH INCORPORATED
c/o LOUBSER VAN DER WALT INCORPORATED