
SOUTH AFRICA / JUDGMENT

Kwazulu-Natal Law Society v Davey and Others (3406/2006) [2008] ZAKZHC 68; 2009 (2) SA 27 (N) (5 September 2008) [2008] ZAKZHC 68

COURT

High Courts - Kwazulu Natal

BEFORE

Levinsohn, Skinner

CASE / FILE NUMBER

3406/2006

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CASE NO 3406/2006

IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

In the matter between

KWAZULU-NATAL LAW SOCIETY Applicant

and

MARIA DA CONCEICAO DAVEY First Respondent

ROBERT SCOTT FINLAY Second Respondent

BRUCE McDONALD FORREST Third Respondent

RICHARD GREGORY GRANT Fourth Respondent

ANGELA GAY NESS-HARVEY Fifth Respondent

ROBERT FINDLAY WHITE Sixth Respondent

Delivered :

5 September 2008

J U D G M E N T

LEVINSOHN DJP :

- [1] On 4th May 2006 the applicant Law Society commenced proceedings in this Court seeking the removal of the five respondents from the roll of attorneys. Subsequently the sixth respondent was joined.
- [2] Essentially it is alleged that the respondents' directors and in one case a consultant in the firm of Meumann White ("MW"), have been guilty of improper and unprofessional conduct in their conveyancing practice. In the applicant's view that conduct renders them unfit to practise as attorneys, notaries and conveyancers.
- [3] The respondents have opposed the application and have delivered answering affidavits and the applicant in turn has delivered a reply. The evidentiary material before the Court is voluminous.
- [4] The matter was argued on 18th and 19th June 2008. The Court is indebted to counsel for the applicant and counsel for the respective respondents for their detailed written argument which was of great assistance to us.
- [5] Before getting to grips with the various issues that arise, it is convenient to set forth a brief summary of the salient facts that emerge from the respective affidavits.
- [6] The applicant's principal deponent is Mr Alfred Collen Rees who describes himself as the applicant's "head of regulatory affairs". At the outset Rees states that the applicant's main complaint against the respondents is what the applicant perceives to be the respondents' improper relationship with non-practitioner third parties. This particularly relates to the respondents' conveyancing practice.
- [7] The two so-called non-practitioner third parties are Wakefields who carry on business as estate agents and MortgageSA.com ("MSA.com"). The applicant charges that the respondents obtain conveyancing instructions in an improper and unprofessional manner thus breaching all of the applicant's rules and rulings as well as the international code of ethics. It is said that these breaches are of such a serious nature that it requires this Court to impose the ultimate sanction of a strike-off from the roll of attorneys.
- [8] MSA.com carries on business as "mortgage originators". According to Rees its principal function is the securing of mortgage bonds from the various financial institutions on behalf of purchasers. In the normal course mortgage originators would receive applications from members of the public and estate agents. They in turn would negotiate with the financial institution with a view to obtaining a loan on favourable terms. The financial institution concerned pays it a commission.
- [9] Rees put forward an hypothesis as follows : -

"On securing the approval of a bond from a financial institution, mortgage originators would have the ability to influence the financial institution concerned to engage the services of a specific firm of attorneys to attend to the transfer of the property. In this way, mortgage originators have the ability to influence the allocation of bond instructions to particular attorneys of their choice."

- [10] Rees goes on to aver that the arrival on the scene of these mortgage originators has in his words “significantly impinged” on the ability of financial institutions to appoint conveyancers of their choice to register their mortgage bonds.
- [11] Rees points out that mortgage originators have established their own panel of eligible attorneys and they insist that instructions to register mortgage bonds be given to those attorneys only.
- [12] According to Rees the applicant has over a period of time received complaints about certain attorneys who employ improper methods to tout work from estate agents, mortgage originators and other non-practitioner entities. Those that complain allege that the result of this is that their practices have all but dried up.
- [13] According to Rees this state of affairs has resulted in disharmony among conveyancing practitioners. The applicant in consequence of this convened a symposium of conveyancers chaired by The Honourable Mr Justice Thirion. Mr Justice’s Thirion’s report is put up as an annexure to Rees’s affidavit.
- [14] Following upon this and having regard to certain disclosures which were made by the third respondent at the said symposium the applicant decided to investigate MW’s relationship with both MSA.com and the estate agents, especially Wakefields. On 24th June 2005 the applicant’s council resolved to appoint an inspection committee to inspect the books and records of MW. The committee was mandated to determine the nature of the relationship between MW and the entities referred to above. In due course the committee submitted its report to the applicant’s council. This forms part of the founding affidavit as well.
- [15] The inspection was conducted on 3rd November 2005 in the presence of all five respondent partners. The respondents furnished extracts of the firm’s financial statements for the financial year ended 2005. In addition the committee was provided with extracts from the ledger reflecting its advertising expenditure.
- [16] The said committee focused principally on the relationship between MSA.com and Wakefields. It concluded that MW had contravened applicant’s rules of conduct as follows : -
- “(a) Rules 14(B)(vi) and (xv) in that they are touting for work and are thereby engaging in conduct which is likely to attract business unfairly.*
- Rule 14(b)(xix) in that they are securing work by conferring benefits upon estate agents in order to induce them to channel work to Meumann White.
- (c) Rule 14(b)(xvii) in that they are guilty of conduct which impairs their independence by creating conflicts of interest.
- (d) Rule 14(b)(xxiii) and (xxiv) and Sections 2 and 4 of the Prevention and Combating of Corrupt Activities Act in that they are offering inducements to estate agents and a mortgage originator to influence their appointment as conveyancers.”

- [17] Rees goes on to aver that the committee's findings in regard to the amounts expended on advertising

"....confirms the operation of an elaborate and orchestrated scheme on the part of Meumann White to remunerate estate agents and other non- practitioners in various indirect respects for the referral of work."

- [18] The committee also observed that the "partners of Meumann White entertained on a lavish scale." The inference sought to be drawn from this according to Rees was that this scale of entertainment was simply recompense for the referral of instructions. Rees makes the point that as early as 2002 after the symposium presided over by Mr Justice Thirion the respondents, notwithstanding warnings from the learned judge, persisted in their conduct which is characterised by the deponent as follows : -

"However, notwithstanding such caution and the concerns of the profession as expressed at this meeting, Meumann White have continued to engage itself in disguised schemes to buy and/or tout for instructions."

(My emphasis).

- [19] Rees goes on to emphasize that MW's extensive expenditure is in his view directed at securing instructions for the firm. He characterises this as "intentionally remunerating and benefiting non-practitioner third parties in exchange for the referral of work".

- [20] Again, in paragraph 59 of his affidavit he states : -

"In the circumstances, the Applicant contends that the Respondents have embarked on a premeditated and disguised scheme to "buy work", and that it is indisputable that the Respondents have in fact derived significant direct financial benefit as a result thereof."

- [21] At paragraph 64.4 the theme is repeated : -

"The same reasoning applies to the Applicant's prohibition against touting. The manifest objective of Meumann White advertising with estate agents and expending on these non- practitioners is to secure referrals of work. This has the effect, or is likely to have the effect, of compromising or impairing a number of core value of the profession, including the following :

The Respondents' independence and integrity. It is indisputable that the close relationship which Meumann White has fostered between itself and MortgageSA.com and the estate agents has rendered (or is likely to render) Meumann White in a special position to those non-practitioners which influences and incentivises them to refer work to Meumann and White.

The lay client's freedom of choice of attorney is compromised or is likely to be compromised. The 'scheme of arrangement' between Meumann White and MSA.com and the estate agents places (or is likely to place) an 'unwritten obligation' on the latter entities to persuade their clients to refer their conveyancing and bond instructions to Meumann White. This is clearly what is happening in the case of Meumann White.

The good repute of the firm and that of the attorney's profession. Within the context of the attorney's profession, 'buying work' has historically been regarded as an undesirable evil, which endangers the reputation of both the practitioner concerned and that of the profession. It also compromises the interests of the public. This is confirmed by formation of a concerned citizen's grouping.

The duty to act in the best interests of the client. It is notorious, within the context of touting, that, due to the fact that the attorney is required to pay (in whatever respect) for the instruction, there is a likelihood of the lay client being overcharged, which serves to the serious detriment of the client. Due to the added 'cost' in paying for the instruction, the likelihood of the standard of work being compromised also arises."

- [22] Rees goes on to specify the various rules of professional conduct and rulings of the applicant which in his view have been contravened. It is unnecessary at this stage to summarise these. I shall presently turn to consider the applicant's rules of professional conduct in detail.
- [23] With that summary of the applicant's case I turn now to the respondents' answer which I think is fairly set out in the third respondent's answering affidavit. The third respondent's affidavit is a lengthy document and I shall attempt to summarise what I conceive to be the salient and indeed relevant aspects of same.
- [24] The third respondent is the managing partner of the MW. He devised the marketing activities which are relevant to the application and thus possesses detailed knowledge of the matters which are relevant to the application. MW is predominantly a conveyancing firm. It does have both a litigation and matrimonial family law department. The latter is managed by the fifth respondent. The third respondent is the managing partner of the firm and is concerned with marketing.
- [25] The first respondent on occasion deals with conveyancing but her primary responsibility is litigation. The second and fourth respondents run branch offices of the firm and they are concerned mainly with conveyancing work. The sixth respondent is a consultant who runs the firm's Hillcrest branch which also does mainly conveyancing work.
- [26] The third respondent then proceeded to sketch the history of the firm MW, especially its relationship with Wakefields. This relationship commenced when the sixth respondent was with the firm Millar & Kimber. The Wakefields business came with the sixth respondent when MW was formed. This included commercial work and conveyancing instructions. The relationship between the founding partners of MW and Wakefields was a close one. The third respondent mentions that MW and Wakefields engaged in property investments together.
- [27] In 1980 the third respondent joined MW. He and Howard Wakefield were friends and that reinforced the pre-existing business relationship between MW and Wakefields.

- [28] MW reacted in 1997 to the legalisation of advertising in the legal profession by taking a decision to entrench its position in the market place and in the third respondent's words "create brand awareness and secure the firm's name as the law firm of choice in the minds of prospective clients and service providers in the property market". To this end MW engaged the services of a business management consultant. MW's main area of expertise was conveyancing and its aim was to apply all its resources in that sphere in order to become a first-class conveyancing firm. In pursuance of this objective it caused the whole firm to become computerised at considerable cost. According to the third respondent this substantially enhanced the firm's efficiency and its service levels.
- [29] One of the factors that motivated computerisation was the debate at the time that conveyancing ought not to be reserved work for attorneys but should be opened to non-practitioners. MW believed it should maintain its position as a leader in the conveyancing market.
- [30] There was a further change in the conveyancing market place when the major banks changed their policy in regard to reciprocal investments. Previously banks allocated work to attorneys based on the amount the particular firm had invested with them. This changed when banks centralised their bond departments. The focus then became on levels of service and turn-around times.
- [31] The third respondent makes the point that by 1999 MW was on the conveyancing panel of all the major banks. The firm took a decision to market itself. It set about advertising in the print media and on certain websites and continued fostering relationships with its existing clients including Wakefield and other estate agencies.
- [32] The third respondent believed that MW's strategies had been successful. A survey conducted by the Daily News Newspapers in regard to various service providers revealed that MW was voted the second best law firm in KwaZulu-Natal.
- [33] The third respondent observes that the marketing activities of MW are very similar to those conducted by other practices. Every firm of attorneys has a marketing and advertising budget. The third respondent quotes an extract from an article written by a public relations consultant to a firm of attorneys : -

"Clients do not buy legal services on the basis of advertising. It is used more to increase a firm's visibility, to imprint the firm's name in the minds of existing and potential clients so that when they need legal advice, the firm's name remains top of mind."

.....

We felt it was time to create more visibility for the brand. The legal environment is dynamic and law firms are marketing themselves more actively and aggressively in a highly competitive marketplace."

- [34] The third respondent refers to statistics reflecting the percentage of transfers registered by MW during the period 2002 to 2005 inclusive. These are 2.80, 3.25, 3.21 and 2.75 respectively. The third respondent avers that MW's share of the KwaZulu-Natal market is "minuscular".
- [35] The third respondent then proceeds to traverse the respective allegations made in the applicant's founding affidavit which he divides into three broad categories :
- (1) MW's relationship with MSA.com;
 - (2) Payments made directly or indirectly to Wakefields;
 - (3) Other marketing and advertising expenditure.
- [36] The third respondent described the advent of mortgage originators in the property market place. Their arrival in the market place is said to have benefited consumers in that it promoted competition among the financial institutions for loan business. A commission of usually 2% of the loan advanced is paid to the mortgage originators.
- [37] The third respondent proceeds to sum up the applicant's case in regard to MW's relationship with MSA.com. Three agreements were concluded between MW and MSA.com. The first one was in the form of an application to join MSA.com's panel of conveyancers. This was subsequently approved. The second agreement was an undertaking to pay R7 000 per month to advertise on MSA.com's website. That agreement was to endure for as long as MW remained a member of the panel. The applicant thus concluded that the advertising fee was a disguised form of payment or consideration for instructions received.
- [38] The applicant accepts that the administrative support services and the advertising agreements were cancelled on 2nd and 20th March 2000 respectively.
- [39] The applicant appears to contend that since MW advertises on the MSA.com website and is a member of MSA.com's panel and receives instructions, that payments made for advertising are in reality payments in return for instructions.
- [39] The third respondent then proceeds to answer these contentions.
- [40] Mortgage originators including MSA.com at their inception proposed to establish panels of attorneys to whom they would refer work. This was much the same system that the banks used.
- [41] MW was invited by Keith Wakefield to join the MSA.com website. This came about because of the third respondent's longstanding relationship with him. The third respondent goes on to describe the relationship in the following terms : -

"The panel application was not dependent on website advertising but an applicant was obliged to subscribe to the administrative support services which MortgageSA.com would provide. MortgageSA.com proposed to perform certain services on behalf of the conveyancers instructed, which functions had previously been performed by the banks themselves, but which, over a period of time and by virtue of the competition in the market, the banks had come to expect attorneys to perform on their

behalf and attorneys had across the board taken on these functions. These included functions such as filling in application forms and collating the supporting documents. As matters stood with the advent of mortgage origination, Meumann White had performed these functions on behalf of its bank clients and had to engage staff to do so. The proposal by MortgageSA.com that they would perform these functions was thus attractive to Meumann White. It was these 'administrative support services' that formed the subject matter of the agreement which appears as Annexure "A" to the Inspection Committee's Report, Annexure "ACR4". Clause 3 of that agreement provides that MortgageSA.com would do certain matters, including 'giving us conveyancing instructions in conjunction with banks'".

- [42] The third respondent says he saw nothing wrong with the agreement. Indeed he was advised by a colleague in Cape Town that the latter had obtained senior counsel's opinion to the effect that the principles set forth in the agreement were above board.
- [43] The agreements in question were concluded on 16th October 1999 and were to come into operation on 1 November 1999. The third respondent observes that he was one of several attorneys in the country who had concluded similar agreements. Not one of these attorneys has been disciplined. However law societies throughout the country turned their attention to these agreements. In KwaZulu-Natal the applicant took the view that the administrative support services agreement coupled with the payment provision was an agreement to pay for work.
- [44] Initially MSA.com did not perform the services it had undertaken to perform in terms of the agreement. This prompted the third respondent to cancel that agreement on or about 2nd March 2000. During the four months' period that the agreement had been in force MW had received 28 bond registration instructions and had made payment of R15 960.
- [45] On 20th March 2000 the third respondent suspended the advertising agreement. MW did not at any time thereafter do business with MSA.com on the basis of that agreement. Notwithstanding the cancellation of these agreements MW remained on MSA.com's panel and continued to receive instructions.
- [46] On 14th June 2000 the applicant sent out a circular (6/2000) to its members which it is convenient to quote in full : -

"MORTGAGE ORIGINATORS

Certain organisations termed Mortgage Originators have been established. Their function, inter alia, is to procure bank loans on behalf of purchasers of property. By agreement with certain banks, the Mortgage Originator is given authority to nominate the conveyancer who will attend to the registration of mortgage bonds in favour of those banks. It has come to the attention of your Council that one of the originators namely, Mortgage S.A. Com requires attorneys on its panel to pay a sum of money termed a subscription fee to Mortgage S.A. Com for each bond instruction allocated to the attorney. Other Mortgage Originators require payment of a percentage of the conveyancing fee.

This practice has been considered by the Councils of the Cape and Transvaal Law Societies and those Councils have issued notices to their members to inform them that the paying of subscription fees for work allocated by Mortgage S.A. Com is contrary to the Rules of those Societies. Members found acting in contravention of the Rules will be disciplined.

Your Council has investigated this new practice and is similarly satisfied that any payment by any attorney to a third party in consideration for receiving bond registration instructions amounts to a contravention of Rule 18 which stipulates that the sharing of fees may be allowed only with other attorneys.

Furthermore, Council Ruling 5(1)(c)(i) provides that ‘a member shall not do anything which is calculated to induce others to solicit work for him nor shall he offer any financial inducement whether by way of a loan or gift or otherwise to any person in order to influence that person to refer work to him or to procure that work is referred to him.’

The subscription form of Mortgage S.A. Com which is required to be signed by any attorney seeking work from that organisation contains a statement that the fee is payable by the conveyancer for services rendered to the conveyancer by the Mortgage Originator which services include ‘giving us conveyancing instructions, tracking bond conveyancing administration, monitoring our conveyancing performance and consulting to the panel regarding conveyancing performance’. This description of alleged services rendered is nothing more than a camouflage for the financial inducement given by the conveyancer to gain conveyancing work. The Council is of the view that any conveyancer requiring such services may pay only another conveyancer for such services. It is demeaning to the independence and integrity of the profession that a conveyancer should pay a non-conveyancer for such ‘assistance’.

The Council will notify Mortgage S.A. Com, other Mortgage Originators and the banks of its decision in this regard.”

[47] Shortly after the issue of the above circular the applicant wrote to the partners of MW (excluding the fifth respondent). I quote in full the relevant portion of that letter : -

“My Council’s information is that your firm is one of the small group of legal firms in the Province of KwaZulu-Natal who are nominated as conveyancers by Mortgage S.A Com to attend to the registration of mortgage bonds in favour of the banks who participate in the scheme.

If it is correct that you do receive instructions from Mortgage S.A.Com, would you please let me know the basis upon which you receive those instructions.

The Society has been given a copy of the ‘Application to Join Panel Approved Mortgage Bond Conveyancers’, as well as the form ‘Subscription to Administrative Support Services’. Paragraph 4 of the second document provides, inter alia, for a cost of subscription at a rate of R600.00 plus VAT in respect of each mortgage bond registered by Mortgage S.A.Com on instructions from them. Please will you explain whether you accept such instructions and whether you entered into the agreement with Mortgage S.A.Com every time you accept instructions for the registration of a bond.

Please will you then explain, if you are so participating, why such participation should not be regarded as a contravention of the Society's Rules and the Council's Rulings. Your attention is specifically drawn to Ruling 5(1)(c)(i) :

'5.(1)(c) Touting

- (i) A member shall not do anything which is calculated to induce others to solicit work for him nor shall he offer any financial inducement, whether by way of a loan or gift or otherwise, to any person in order to influence that person to refer

work to him or to procure that work is referred to him.'

Please will you also refer to Rule 18, which is quoted below for your convenience :

'18. Allowances

- (a) Sharing of fees shall only be allowed in the following circumstances :

- (i) Attorneys' fees with practising attorneys.

- (ii) Conveyancers' fees with practising attorneys or conveyancers.

- (iii) Notaries' fees with practising notaries or within a firm of which the notary is a partner or an employee.'

As is stated in the Circular, the Council considers participation in the arrangement by Mortgage S.A. Com as a contravention of the above-mentioned Ruling and Rule and would like your comment for their consideration."

[48] The third respondent replied by letter dated 11th July 2000. He confirmed that MW had been recommended to MSA.com by Wakefields. He further confirmed the version which has been summarised above in regard to the conclusion of the said agreements.

[49] The third respondent pointed out certain details in regard to the services being rendered : -

"We note further that in the aforementioned circular the Society omitted to note the following items, which we regard as important in regard to the services, rendered by the consultants of Mortgage SA.Com. These are the 'collection, collation and delivery of Home Loan application documents and liaising with applicants therewith.' The Society will know that over the last couple of years the various banks have divested themselves of several tasks and duties that they used to attend to and passed these onto the bond registration attorneys notwithstanding that they do not form part of the conveyancers' function. These tasks include the completion of the Home Loan application form which is an extremely time consuming task (and can sometimes be a difficult task in view of the confidential information contained therein), the obtaining of the state subsidy where the borrower is a subsidised buyer and the completion of the documentation required when the mortgage bond provides for a flexi reserve facility or a fixed rate facility.

The Agreement reached between Mortgage SA.Com and ourselves was that their consultants would attend to these tasks and issue us with the completed documentation. In addition, it was agreed between ourselves and Mortgage SA.Com that their consultants would regard as part of the documentation required by us, the identity documents and antenuptial contracts of the parties and that these would be obtained from the borrowers in each transaction and delivered to us.

It is well known that much time is taken up by conveyancers in reporting back to the banks in regard to the progress in giving effect to the registration of their mortgage bonds. Mortgage SA.Com agreed to assist in this regard by providing software which would set up a reporting system electronically with an interface with the banks so that we would not be required to report separately to the bank. This was cited as ‘tracking bond conveyancing administration and monitoring our conveyancing performance.’ We certainly saw value in the resultant elimination of certain duties required of us.

The cost of the subscription to this service was an amount of R500,00 in respect of each mortgage bond registered and we felt that this amount was good value for the service that we were to receive.

Mortgage SA.Com advised that their Cape Town attorneys had obtained an opinion that the documentation was not in contravention of any of the rules of the Law Societies of any province, and consequently we entered into the contracts on that basis.”

[50] He accordingly took issue with the applicant’s view that MW had contravened the applicant’s touting ruling or that there had been a sharing of fees. The third respondent indicated that MW would move the High Court for a declaratory order.

[51] On 31st July 2000 the applicant’s council informed MW that it had decided to take legal opinion before taking a final decision.

[51] MSA.com decided in December 2000 to amend its agreement following upon advice received from senior counsel. Notwithstanding that the applicant had received a copy of MSA.com’s new agreement the applicant expressed the view in a letter to MW as follows : -

“You are on the panel of Mortgage SA.Com. The Society has now received the draft agreement between Mortgage SA.Com and its panel attorneys which they would like to implement for future use.

Our information is that you are currently receiving instructions from Mortgage SA.Com and the Council is interested in the current arrangements. Clearly there must be a financial arrangements between your firm and Mortgage SA.Com in respect of the instructions you are receiving now and have been receiving up to this date. The new agreement which is now on the table is something for the future and is a separate issue.”

[52] In reply MW on 15th December 2000 recorded the following : -

“We are offended by your statement that ‘Clearly there must be a financial arrangement between your firm and Mortgage SA.com in respect of the instructions you are receiving now and have been up to date’ which insinuates that the reason we are receiving instructions is because we are paying for the work. You made similar allegations in your circular of 14 June 2000, with which we took issue in our letter to you of 11 July 2000. You continue to overlook the fact that our involvement is as a direct result of long standing relationships established with certain of our clients.”

- [53] The third respondent makes the point that as at 14th December 2000 the applicant was aware that MW was on MSA.com’s panel and that the agreements relating to website advertising and administrative support services were no longer in force.
- [54] The applicant was apparently not satisfied with the answer it had received and issued an inspection authority in terms of section 70 of the Attorneys Act.
- [55] The inspection committee conducted its inspection and issued a report, which is annexure HH. No disciplinary action was taken pursuant to the inspection. However on 9th May 2001 the applicant once again requested MW to furnish details in regard to the “current” arrangements in terms of which MW receives work from MSA.com. It also requested MW to state whether it had set aside any money to pay MSA.com for services rendered. MW replied to this on 22 May 2001 stating inter alia that it had not set aside funds for MSA.com.
- [56] Following upon this on 25th June 2001 the applicant wrote to MW recording that it had “formed the prima facie view that firms so participating in the aforesaid schemes (mortgage originator schemes) will fall foul of the Society Rules against the sharing of fees.”
- [57] The letter went on to record : -

“A firm may be considered to be in breach of the Society’s Rules against the sharing of fees, if it pays a fee or any consideration directly or indirectly or is a party to any such agreement, whether oral or in writing, in terms whereof the member firm is obliged to make a payment or give consideration to a Mortgage Bond Originator for obtaining mortgage bond work from a Bank or a financial institution in circumstances under which the loan is originated from the Mortgage Bond Originator to whom a payment is made or other consideration is payable or contingency provisions have been made for such payment or consideration to be made or given.”

- [58] The applicant made an interesting observation in the third paragraph of its said letter : -

“The Council is further of the view that the cumulative conduct complained of which encompasses the mortgage bond originator coercing and compelling a Bank only to instruct members participating in the scheme offends against the ethical precept of the duty of fairness to colleagues as well as subordinates the spirit of fair competition.”

- [59] The applicant in conclusion called for an undertaking that MW would not be party to any of the arrangements alluded to in their letter failing which a “charge of unprofessional conduct would be instituted”.

[60] MW responded to this by declining to give the undertaking called for and asked that the facts upon which the applicant formed its prima facie view be clearly stated.

[61] Applicant wrote to MW on 31st May 2002. Essentially the applicant mentioned issues which it had previously raised : -

"I refer to previous communication between representatives of my Council and your firm when my Council conducted an investigation regarding your participation in the mortgage bond origination scheme.

Arising from that it appears that your firm was on the Mortgage SA.Com conveyancing panel.

You will understand that my Council is receiving a number of enquiries from law firms who are concerned about their exclusion from this work and for that reason this matter is not closed.

My Council needs the following information in order to be able to establish the way forward. What the Council wants to know is whether :

You are still holding monies in trust on behalf of Mortgage SA.Com.

You are adding to those trust funds or have been adding since my Council's earlier approach.

I would appreciate if you could respond to these questions as soon as possible."

[62] MW responded as follows on 5th June 2002 : -

"Dear Sirs

MORTGAGE SA.COM

We refer to the above and to your letter dated 31st May 2002.

We respectfully refer you to our letter dated 5th July 2001 wherein we confirmed that we :-

do not pay Mortgage SA.Com for any bond registration instructions; and

Have not set aside any funds for payment at a further date.

Clearly, all our previous correspondences and submissions have gone unnoticed.

Yours faithfully

MARIA DAVEY"

[63] The price of advertising on the MSA.com website was considered to be very competitive.

[64] The third respondent takes issue with the applicant's view that since mortgage originators channel through the bank and are in a position to recommend to the bank whom to instruct there can be no direct benefit from advertising on the website.

[65] The third respondent asserts that given the substantial number of persons who access the MSA.com site it receives considerable exposure. He goes on to make the point : -

“The result of this is that by advertising on the Mortgage SA.com website, attorneys can be assured of being visible to internet users who are in the property market generally and who may well be looking for conveyancing services.”

- [66] It is also evident that MW is not the only firm of conveyancers that advertise on the site.
- [67] The third respondent then proceeds with MW's relationship with Wakefields. He records that from 1970 MW has had a close relationship with Wakefields. It has acted for Wakefields in commission disputes and various other commercial issues including a merger.
- [68] The deponent proceeds to deal with the allegation made by the inspecting committee and the applicant that the expenditure incurred by MW in respect of Wakefields is simply an orchestrated scheme for the payment for work. He then proceeds to traverse the various types of expenditure.
- [69] Firstly he deals with sponsorship of the Wakefields' Awards. The deponent says he viewed the sponsorship of the awards as an opportunity to cement the branding of MW so that as a firm “we would be uppermost in the minds of agents if and when they were in a position properly and ethically to make a recommendation to a client of [a] particular firm of attorneys”. There was no link between the amount which MW paid in a sponsorship for these awards and the instructions MW had received in respect of agreement of sale concluded through the intermediation of Wakefields' estate agents. The deponent consequently agreed that it pay one half the costs of these awards. In 2004 the deponent terminated the sponsorship. He makes the point that notwithstanding the withdrawal of this sponsorship this has had no effect on the volume of work received through Wakefields.
- [70] The third respondent contends that the sponsorship of conferences did not constitute a breach of the applicant's rules. He makes the point that had this been a problem the applicant at a much earlier stage would have taken decisive action against MW.
- [71] The third respondent deals with the issue of advertising in conjunction with Wakefields. He says that the expenditure for advertising on the Wakefields' website amounts to R15 000 a month over the period in question. He felt that this amount was reasonable given the exposure that MW received. He refers to Mr Wakefield's affidavit where this is confirmed.
- [72] In regard to joint advertising with estate agents the third respondent avers that MW was invoiced separately by the newspapers in respect of such advertisement.
- [73] The third respondent indicates that MW advertised extensively and he mentions expenditure incurred in the sum of R319 872,79. It also advertised on a number of websites.
- [74] The third respondent goes on to deal with the aspect of entertainment in some detail and I find it unnecessary to summarise this.

[75] At paragraph 201 of his affidavit the third respondent gives a breakdown of expenditure under the various heads. It appears to relate to the financial years 2004 and 2005. I quote this paragraph in full:-

“A consideration of the annotations on schedules “DDD” hereto reveals the following breakdown of expenditure :-

(a) stand alone marketing and the outdoor advertising outside the Hillcrest branch office;
R319,872.79

(b) advertising on websites and the
Berea office outdoor signage; R419,447.45

(c) sponsorships of Wakefields’
conferences and awards; R184,031.25

(d) other sponsorships; R19,355.79

(e) entertainment, such as
Breakfasts and lunches; R52,962.96

(f) entertainment of estate agents; R80,859.73

(g) advertising conducted in
conjunction with estate agents,
but for which Meumann White was
invoiced separately by the
publications concerned; R281,947.44

expenditure on staff, including
things such as birthday presents,
flowers, secretaries’ day enter-
tainment, year-end and mid-year
functions and the motivational
Gavin Sharples’ seminar to which
I have referred before; R82,803.12

(i) items which appear on the
schedules due to errors in

posting, but which do not relate
to marketing at all. The vast
majority of these are drawings,
but some relate to salaries,
etc.; R164,491.19
partners' personal expenditure
paid for by the firm because it
relates to entertainment; R57,274.06
year-end and occasional gifts
sent to Court staff, Deeds
Registries' office staff,
estate agents, clients, etc.; R16,124.91
purchases for staff meetings
and presentations. R20,835.42
TOTAL R1,700,005.80"

- [76] The third respondent submits that the vast majority of MW's marketing expenditure is entirely unobjectionable on a proper construction of the applicant's rules.
- [77] In answer to the applicant's contention that MW has grown considerably with the advent of mortgage origination the third respondent sets forth a schedule showing the firm's staff complement from 1996 through to 2006. He makes the point that the firm's staff complement throughout the period has remained constant.
- [78] In answer to the applicant's deponent who asserted that it was "plausible to assume" that Wakefields influences its clients to refer their conveyancing instructions to MW the third respondent answers by attempting to demonstrate that MW does not even do a third of Wakefields' conveyancing. The schedule shows that in the year 2002 MW did 30% of Wakefields' sales. In 2003, 32%. In 2004, 32% and 2005, 23%.
- [79] Apart from instructions received from Wakefields MW also receives instructions from many other sources including sales conducted through other estate agencies as well as estate transfers, family transactions, sales in executions and foreclosures. In addition the third respondent says that since MW began advertising extensively in the print media it received a number of instructions to do the conveyancing in private sales where no estate agent was involved.

- [80] The above concludes the summary in broad outline of the third respondent's affidavits. And I now turn to summarise the supporting affidavits which were referred to by the third respondent.
- [81] Mr Saul Benjamin Geffen is the chief executive officer of MSA.com. He confirms that he has read the affidavit of the third respondent and he confirms the various paragraphs which relate directly to MSA.com or himself.
- [82] Stephanus Burger is the general manager : KZN Home Loans, ABSA Bank Ltd. He states that he has been employed in the banking industry for the past 18 years, twelve of these years were related to home loans. He has worked in KwaZulu-Natal for the past nine months and previously he was employed by ABSA in Gauteng with a specific focus on mortgage origination. He has a Master's degree in business administration and he particularly specialised in mortgage origination.
- [82] In KwaZulu-Natal ABSA has approximately 150 attorneys on its panel. The deponent regrets that there is such a large number as not all of them would be equally committed to ABSA's business in a way that a smaller more select group would be. ABSA's bond instructions are given only to panel attorneys regardless of how a mortgage originator who referred the bond might feel. Apart from this deponent has adopted a policy that he is not prepared to instruct attorneys albeit on the panel who are not performing.
- [83] According to the deponent ABSA constantly monitors its panel attorneys on their turn-around time and customer satisfaction. The deponent then makes the point : -
- "This is important to ABSA because, in reality, when registering for a bond, the client will hardly ever interact with the bank, their dealings will be almost invariably and exclusively with the attorney instructed by the bank. Because of this contact, clients generally perceive the attorneys as being the face of the bank and it is important for the bank if it wishes to retain that client's business, that the experience be a happy one for the client. I take the results of these surveys very seriously and influence the referral of a greater volume of instructions to those firms who are seen by our clients as providing the best service."*
- [84] ABSA constantly monitors the performance of its panel of attorneys. Finally the deponent makes the point : -
- "Despite the fact that there are one hundred and fifty attorneys on ABSA's panel within the province, Meumann White is without a doubt the best performing firm in relation to all of these criteria. It is for that reason that the firm won first place in ABSA's Attorney's Awards for 2006."*
- [85] Mr Wayne Maré is the provincial head of home loans operations employed by Standard Bank of South Africa Ltd. He confirms that Standard Bank has a panel of attorneys that he uses for purposes of registering mortgage bonds. This panel has been in existence for many years and comprises attorneys who meet certain criteria and are able to deliver certain performance levels.

[86] MW has been on the panel since shortly after the inception of Standard Bank's home loan division.

[87] The deponent states in paragraph 4 : -

From the Standard Bank's perspective, Meumann White has always willingly embraced technological advances and changes. As a result it is not uncommon that the bank would liaise with Meumann White with regards obtaining opinion on concepts and ideas that affect bond registration."

[88] The deponent states that mortgage originators who refer bond instructions to the bank generally request that a specific attorney attend to the registration. The bank in general has no objection to such suggestion provided the attorney is on the bank's panel and is able to meet the performance criteria of the bank.

[89] Mr Keith Howard Wakefield is a director of the various companies comprising the "Wakefields Group". He is also the non-executive chairman of MSA.com.

[90] The deponent sketches the history of mortgage origination. He says it started in 1999. One Lawrence Seeff decided to form a company comprising a group of estate agents to perform mortgage origination functions. He approached Wakefields to join in the creation of this company and the deponent agreed to this. He was allocated a small shareholding in MSA.com and appointed the non-executive chairman. The executive functions were carried out by other persons on the board of directors including Saul Geffen who is the managing director.

[91] The deponent then goes on to sketch the history of Wakefields' relationship with MW.

[92] In 1974 Wakefields engaged in a development on the Bluff called "Creasewood". A development company Creasewood (Pty) Ltd was formed for this purpose. The directors of the company were the directors of Wakefields as well as the partners of MW and the representatives of the building contractor. Creasewood (Pty) Ltd as the seller of the sites in that development appointed MW as the conveyancers and Wakefields as the estate agents.

[93] The deponent says that Wakefields has been operational since 1939 and was a business started by his grandfather and then run by his father and his uncle and he eventually took it over.

[94] When he joined the firm in 1971 the relationship between Wakefields and Denis Meumann and Robert White had been well established. The deponent knew the third respondent because they played tennis together. After he joined Wakefields and the third respondent joined MW this previously existing relationship strengthened

[95] In 1996 MW attended to the legal aspects surrounding the merger of Wakefields and J. H. Isaacs & Company. MW continues to attend to all Wakefields' commercial needs.

- [96] According to the deponent Wakefields has 30 offices and is engaged in ten different developments. It employs 480 agents throughout KwaZulu-Natal. This includes Pietermaritzburg, the Midlands, the South Coast and the Greater Durban area.
- [97] The deponent refers to the administration of fee of R300 per sale Wakefields charged its agents. Eventually this fee was waived when MW were engaged in the conveyancing since it was so efficient and the branch managers of Wakefields had virtually no rôle to play in the transaction. The deponent emphasises that MW had nothing whatsoever to do with the administration fee that was charged. This was made clear to a representative of the applicant who referred the issue to the Estate Agents Board. That Board in turn ruled that there was nothing untoward in the practice and in any event had nothing to do with the applicant.
- [98] The deponent emphasises that MW has always demonstrated its reliability and trustworthiness. These are important factors which may influence an estate agent who is asked to make a recommendation of a conveyancer. Handling a conveyancing transaction expeditiously and efficiently will no doubt influence an estate agent whose commission only becomes payable on registration of the transfer.
- [99] Wakefields lays great stress on the estate agents' code of conduct. When a new agent joins Wakefields they are obliged to undertake seven to eight training sessions at which the contents of the code of ethics is reinforced and everyone is obliged to acknowledge that they know and will follow the Wakefields' training manual before they are appointed. The manual categorically states that it is improper for an estate agent to recommend a particular conveyancer unless a recommendation is asked for and then the recommendation must be well motivated. Clause 7 of the particular code states the following:-

"7. PROHIBITION AGAINST UNDER INFLUENCE

No estate agent shall without good and sufficient cause, directly or indirectly, in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a completed transaction to utilise or refrain from utilising –

Code :

7.1 the services of any particular attorney, conveyancer or firm of attorneys;"

- [100] The deponent goes on to deal with sponsorship of the awards. These sponsorships came to an end in February 2004 when the third respondent took the view that the amount awarded as a prize was no longer justified. Notwithstanding the third respondent's withdrawal from the awards ceremony they still continue to the present time.

- [101] Mention was also made of the sales conferences where MW was a co-sponsor. The deponent believed that this was regarded by MW as an opportunity to address delegates and market its services. The Gavin Sharples Motivational Seminar held in Durban is also dealt with by the deponent. Here MW wished its staff to attend the seminar with staff of Wakefields. Thus it was fitting in the deponent's view that MW and Wakefields share the costs equally.
- [102] The deponent also deals with the benefits MW derives from advertising on the Wakefields' website.
- [103] I now turn to the respective affidavits delivered by the other respondents.
- [104] The first respondent states that she was a partner in MW since 1st March 1994. She had previously been articulated to the third respondent. She confirms the allegations in broad outline that the third respondent makes in his affidavit. It was made clear to her at the outset that the litigation department of the firm was first and foremost a back-up to the conveyancing. Thus if there were any disputes that arose in the conveyancing department between purchaser and seller the litigation department was required to intervene and endeavour to seek an amicable resolution. The deponent took over the litigation department of the practice in 1991 when the third respondent moved to the Pinetown office. She handled much of Wakefields' work including estate agents' commission claims.
- [105] Although she was generally aware of the marketing and advertising of the firm she did not negotiate anything connected with it. She would have known about it after being informed by the third respondent. She knew the total amounts expended on the marketing as she would be given the cheques to sign together with copies of the credit card statement, invoices and the like. She would not be aware of the precise nature of the entertainment or who had been entertained. She knew of the sponsoring breakfasts and the awards.
- [106] I turn now to the second respondent's affidavit. He is a partner of MW and is in charge of the Amanzimtoti office. He joined MW in 1983 and became a partner in 1984. He was charged with the duty of supervising the Amanzimtoti office which had been in existence for many years prior to his joining the firm. He sometimes relieves at the Bluff office. The other office that he attends is the Berea office which is the firm's head office where all the administrative and bookkeeping work is handled. He attends monthly meetings at those offices. He does meet his fellow partners at social functions, seminars and conferences. The marketing ledger sheets which were attached to the founding affidavit had not been seen by him before. He had been informed in the past that the costs of marketing is spread over all the offices. He accepted this when he signed the financial statements. In Amanzimtoti he has on occasions entertained estate agents to luncheons and to an annual function at the end or beginning of a particular year.
- [107] The deponent confirms that he has advertised on the Brian Foley Properties/Acutts' website and paid the costs of advertising which was approximately R2 000,00 per month in 2005.
- [108] The deponent states : -

"I have not negotiated with or been a party to any negotiation, nor have I authorised any payment or made any payment to Wakefield Estate Agency or to SA Mortgage.Com , or any other estate agent other than is set out in paragraph 10 above."

- [109] I turn now to the fourth respondent's affidavit. He has been a partner since 1st March 1997. He confirms the affidavit of the third respondent in broad outline. He mentions that he has a B.Com degree with a major in marketing and economics and thus is aware of the benefits obtained from marketing in a business context. He was aware of entertainment and the sponsoring of awards. He was not aware of the detailed amounts involved but knew about these in general. He acted as a master of ceremonies at one of the seminars. He attended most of them and was aware that MW had sponsored either a portion or the whole of the expenses of the conference. MW also provided marketing material at these events. He was not involved in the negotiation relating to the individual sponsorships. He knew that the third respondent negotiated with MSA.com and became aware of this after the agreements had been concluded. He knew about the Law Society's inquiries. He believed that if the Law Society was not satisfied with the reply that they were given they ought to have indicated this in detail and stated what practices should be discontinued. He draws the conclusion that the applicant has been influenced by a section of the conveyancing profession which in his words "is jealous of our success which I believe is largely due to the efficiency and effectiveness of the service our firm provides."
- [110] I turn now to the fifth respondent's affidavit. The fifth respondent's employment with MW commenced in August 1994 as a candidate attorney. She worked in the litigation department. She was encouraged to particularly specialise in the field of matrimonial law. After she had completed her articles she convinced her principal that matrimonial work was an area in which attorneys at other firms specialised and it was financially profitable. She believed that she could develop a specialist matrimonial practice.
- [111] She qualified as a conveyancer in August 1998. However although on a few isolated occasions she signed deeds she has not practised as a conveyancer at MW.
- [112] In March 2002 she became a partner. She mentions the difficulties in maintaining the financial viability of a litigation practice. She emphasises that she essentially runs a separate practice within MW. She has never been involved in the conveyancing department nor has she been invited to participate in the firm's decisions in regard to its marketing strategies.
- [113] She said that it was the third respondent who makes decisions pertaining to marketing and advertising without these matters being discussed at partnership meetings. She did however ask the first and third respondents when she became a partner whether the firm "bought work". At that stage she had no firsthand knowledge of conveyancing. She was assured by them that the firm did not buy conveyancing work and she gave the matter no further thought.

- [114] The deponent had no reason to believe that MW was remunerating non-practitioner third parties in exchange for the referral of work. Certainly she personally had never done so. She never had reason to believe that the payments made for advertising on the MSA.com website were a disguised form of payment for work.
- [115] She was not aware that MW had in the past been cautioned by the Law Society. She personally was never cautioned by it. The fifth respondent denies that she has been guilty of a breach of any of the applicant's rules.
- [116] I now turn to the affidavit of the sixth respondent.
- [117] The sixth respondent is at present a consultant employed by MW. He was formerly a partner but retired at the end of February
2005. He is at present in charge of MW's Hillcrest branch as a consultant.
- [118] The sixth respondent aligns himself with the submissions made by the third respondent in his affidavit.
- [119] He states that on occasions he has taken estate agents, bankers and clients to lunch. This occurred very infrequently. He has never been directly involved in the formulation of any marketing strategies except the computerisation of the firm, if that can be regarded as a marketing strategy. Marketing was left to the third respondent. He never attended seminars and similar gatherings but did hear about them and also heard in passing that MW had participated in sponsorships. He never questioned any of these activities because it did not occur to him that anything was amiss. He knew of the Law Society's queries and the first respondent asked him for comments on her proposed response.
- [120] With this summary of the salient features that emerge from the affidavits of the respective parties I turn now to consider the issues in the case.
- [121] Before doing so it is necessary to set forth the legal principles and the approach of the Court in matters of this nature.
- [122] Section 22(1) of the Attorneys Act, No 53 of 1979 ("the Act"), provides as follows : -
- "Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises –*
-
-
-
- if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney;

.....”

[123] An application for the strike off or suspension of a practitioner is not a civil proceeding but is in the nature of disciplinary proceedings brought by a law society against one of its members. This principle has been laid down in several cases in the Appellate Division.

See *Solomon v Law Society of Cape of Good Hope* 1934 AD 401 at 408;

Hassim (also known as Essack) v Incorporated Law Society of Natal 1977 (2) SA 757 (A) at 767 – 8.

[124] In *Solomon's case*, supra, Wessels CJ said :-

“The proceedings are statutory and sui generis, and are no more than a request to the Court by the custos morum of the profession to use its disciplinary powers over an officer of the Court who has misconducted himself”

[125] In *Jasat v Natal Law Society* 2000 (3) SA 44 at 51 Scott JA said that a finding in terms of section 22(1)(d) of the Act (supra) involved a three-stage inquiry : -

“First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities.”

The second inquiry is whether, as stated in s 22(1)(d), the person concerned 'in the discretion of the Court' is not a fit and proper person to continue to practise. The words italicised were inserted in 1984 (see *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637B - C). It would seem clear, however, that, in the context of the section, the exercise of the discretion referred to involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment. The discretion is that of the Court of first instance.

.....

The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. This is similarly a matter for the discretion of the Court of first instance and the power of a Court of appeal to interfere is likewise limited.”

[126] As indicated by the learned judge of appeal in *Jasat's case* the onus of proof is on a preponderance of probability. The issue of the standard of proof was settled by the Appellate Division in the case of *Olivier v Die Kaapse Balieraad* 1972

(3) 485 AD at 496. However the learned judge of appeal, Rabie JA (as he then was), sounded a note of caution after he had reached that conclusion. He said the following : -

“Die toepassing van 'n maatstaf van oorwig van waarskynlikhede beteken natuurlik nie dat in 'n geval soos die onderhawige ligtelik aanvaar sal word dat 'n advokaat hom aan wangedrag skuldig gemaak het nie, want daar sal rekening gehou word met die onwaarskynlikheid dat 'n advokaat hom sal skuldig maak aan gedrag wat in stryd is met die reëls wat in sy beroep nageleef word.”

[127] It seems to me to be a self-evident principle of law that in a case of this nature where professional misconduct is imputed to all the partners of the firm and its consultant, the Court is required to examine whether each individual is guilty of unprofessional conduct. It would be entirely wrong I think to approach the matter on the basis that because one partner may have breached the rules, therefore on the principle of vicarious liability all the partners are held accountable for such wrongdoing. Clearly the conduct of an individual partner should be assessed and the Court would be required at the end of the day to infer on a balance of probability that such partner was either a party to the wrongdoing or with full knowledge of the wrongdoing acquiesced in or condoned same and allowed it to persist.

[128] Insofar as there are disputes of fact on the affidavits, it seems to me in the absence of a request by any of the parties that disputed issues be referred for the hearing of oral evidence, the approach of the this Court should be based on the dicta of Corbett JA (as he then was) in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984

(3) 623 as follows : -

*“..... It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972*

(3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, supra at 924A).”

- [129] Bearing in mind the sui generis nature of these proceedings the Court is required to evaluate all the evidentiary material that is before it, including the respondents' explanations, in order to determine finally whether the charges laid at the door of the respondents have been brought home.
- [130] Before evaluating the facts in this case, I make this observation. In terms of the Act a law society has the power to institute its own disciplinary proceedings against its members. Before embarking on such an inquiry it is also entitled to conduct an inspection. What occurred in this case was that during the period from 2000 to 2005 the applicant in fact conducted two inspections.
- [131] Following upon the 2005 inspection the applicant resolved to move the Court for the strike-off the respondents. Clearly there is no obligation on the applicant to hold a disciplinary inquiry. In an appropriate case it may go directly to Court. Even if an inquiry has been launched and is pending, it may nevertheless still move the Court for the ultimate sanction.
- [132] If of course the applicant had chosen the disciplinary inquiry route, it is clear that all the respondents would have been furnished with a charge sheet. That would have set out precisely which rule or rules they had been breached and in what respect. I see no difference between that and the present sui generis disciplinary proceedings. Here serious misconduct is alleged against a professional firm. In my view the founding affidavit ought likewise to have apprised them of which rule or rules they are said to have contravened and when such contravention had taken place. Counsel for the applicant in their heads of argument appeared to rely on rules which came into force after the impugned conduct. To my mind that is wholly impermissible and offends against one's notion of fairness, apart from the fact that this approach is contrary to the doctrine of retrospectivity
- [133] This Court must perforce traverse the applicant's founding affidavit to discern what the impugned conduct was and which professional rule is said to have been contravened. The applicant and its counsel in argument have mentioned several which they say on a conspectus of all the facts have been contravened by the respondents.
- [134] The applicant on a proper analysis of its founding affidavit contends that MW was guilty of professional misconduct inasmuch as it had an improper relationship with MSA.com. It appears that the facts and circumstances relied upon by the applicant took place between the period October 1999 through to July 2000. In broad outline the applicant's case is that the administrative services agreement concluded between MSA.com and MW was simply a simulated agreement. The parties did not intend that the services would be performed. The payment promised was in essence a payment to be made in consideration for obtaining the work. In short, MW was "buying" work and the whole arrangement was just a sophisticated form of touting.

[135] The applicant also points to both the administrative services agreement and the advertising agreement and makes the legal contention that contrary to the third respondent's assertion these agreements were incapable of being cancelled. In my view however there is no merit in the latter submission. The clauses in question seek to record the duration of the agreement. In no way can it be said that the right to cancel an agreement based on material breach can be circumscribed or indeed altogether lost.

See *Singh v McCarthy Retail Ltd* 2000 (4)

SA 795(A) at paragraph [15]

[136] The third respondent has provided the Court with a detailed explanation in regard to the MSA.com agreements. I have attempted to summarise his version on these issues at paragraphs [36] through to [58] above.

[137] I have carefully considered the third respondent's explanations in the light of the applicant's submissions. In my view there is no reason at all to reject the third respondent's evidence.

[138] First of all there is the third respondent's bona fides. There is absolutely nothing untoward in an attorney applying to join a panel of conveyancers whether such panel exists in a bank or a mortgage originator. The applicant in these proceedings accepts that principle. The application to join the panel of conveyancers was linked to the administrative services agreement. The third respondent says that he considered the propriety of this arrangement. He believed that the services to be provided were those which previously were performed by the banks and latterly by the attorneys. He considered that the fee payable was reasonable and above-board. As mentioned he discussed it with a colleague in Cape Town and was told that a senior counsel had furnished an opinion that the arrangement was above-board. There is no reason to reject this evidence. More particularly I cannot find on a balance of probability that the third respondent knew that these were simulated agreements, which as I have said, were simply a ruse to buy work. The objective facts in the case seem to demonstrate otherwise. If indeed this was a simulated agreement one would not have expected the third respondent to have written the letter he did to MSA.com in March 2000 which recorded: -

"We refer to the agreement entered into between us and yourselves in October, 1999.

It is our respectful view that at this stage you have not been able to supply the services that you stated that you would and consequently we advise that we will be suspending any further payments until such time as we can resolve this issue.

We look forward to hearing from you in regard to the resolution of this matter."

[136] One would have expected him to have simply ignored the fact that the services had not been performed and to have perpetuated the agreement in order to obtain instructions on an on-going basis.

[137] Again, evidence of the third respondent's bona fides is revealed in a letter he wrote as far back as 11th July 2000 to the applicant in which he recorded: -

"Mortgage SA.Com advised that their Cape Town attorneys had obtained an opinion that the documentation was not in contravention of any of the rules of the Law Societies of any province, and consequently we entered into the contracts on that basis."

[138] It was clear that by the end of March 2000 MW had ceased doing business with MSA.com on the basis of both the advertising agreement and the services agreement. Indeed the applicant's second inspection committee did not dispute that the agreements were cancelled.

[139] Now, notwithstanding that the agreements were cancelled MW continued to receive instructions via MSA.com.

[140] In response to an inquiry dated 3rd July 2000 the third respondent provided the applicant with a detailed explanation entirely consistent with his present version on 11 July

2000. (See annexures "AA1", "AA2", "AA3" and annexure "B").

[141] The only response received from the applicant was that it would obtain counsel's opinion on the matter. Whether such an opinion was obtained is however not revealed in the papers before us.

[142] After the applicant was apprised of the cancellation of these agreements it appeared to persist with its inquiries against MW, believing that some financial arrangement still existed between MW and MSA.com. That appears to have given rise to the appointment of the first inspection committee which as I understand the evidence did not make any adverse findings against MW in its report.

[143] In summary, insofar as the administrative agreement is concerned as well as the payments made to MSA.com during that short period in 1999/2000 I find that these agreements did not offend against any professional rule then in existence nor did MW breach any rule when it made the payments concerned. The opinion obtained from counsel regarded the agreement as being above-board and initially so did the Law Society of the Northern Province.

[144] However in or about July 2000 various law societies including the applicant took the view that agreements of this nature were improper and should henceforth be proscribed. This in turn led to MSA.com agreeing to cancel the various agreements it had concluded with practitioners throughout the country. In this context it must be emphasised that by July 2000 MW had cancelled the administrative service agreement. It would be grossly unfair if MW were now branded with having been guilty of unprofessional conduct on the basis of a ruling which occurred after the conduct in question.

[145] Turning now to the advertising agreement concluded with MSA.com, counsel for the applicant in his written heads of argument makes the following points : -

“14.8.3 Meumann White made payment of the advertising subscription fee, in terms of the website advertising agreement, of R7000.00 per month plus VAT.

14.8.4 Notwithstanding Meumann White’s payment under the website advertising agreement, no advertisements were placed on MSA’s website during the period November 1999 to March 2000 as the website was not functional. Meumann White accordingly paid the monthly advertising subscription fee without receiving any benefit therefor.”

[146] If I understand this submission correctly, the applicant implies that the fee for advertising on MSA.com’s website were paid but the service was not rendered, therefore these payments are once again simply a disguised consideration in return for instructions received.

[147] Once again I have considered the third respondent’s explanation on this part of the case and I find myself unable to reject this evidence. I refer particularly to paragraph 109 of the third respondent’s answering affidavit where he says : -

“Later that month, and on 20 March 2000, as is evident from Annexure “D” to the Inspection Committee’s Report, I suspended the Advertising Agreement because, in my view, the website was not yet up and running to the levels envisaged in the proposal pursuant to which the advertising agreement was concluded. In reality, the agreement was cancelled. As I shall demonstrate, I did not at any time thereafter do business with Mortgage SA.com on the basis of that agreement.”

[148] In its replying affidavit the applicant accepts that the third respondent sent annexure “D” (to the inspection committee’s report) to MSA.com. The applicant finds it “disconcerting” that MSA.com did not perform the services it had undertaken. In making this point the applicant unfortunately did not pay due regard to the contents of annexure “D” which once again in my view enhances both the third respondent’s credibility and his bona fides at the time. Annexure “D” records as follows : -

“I refer to various telephone conversations with you in regard to the above and in view of the fact that you have to date been unable to finalise the Mortgage SA.Com Website, we will suspend all further payments to you in regard to this Website and ask that the payments that we have made be credited to our account when your Website is up and running.

We look forward to hearing from you when the Website is up and running.”

[149] What is of significance is that the third respondent asks that the amounts paid to date be credited. It is unlikely in the extreme that the third respondent would say this if he knew that this agreement and the payments made in terms thereof were a sham.

[150] It follows in my view that neither the third respondent nor his firm in entering into the - advertising agreement and in making the payments therefor were guilty of professional misconduct.

[150A] In paragraphs [9] and [10] I attempted to set forth in summary form the applicant's allegations in regard to MSA.com's ability to appoint their own conveyancers and this has significantly impinged on the ability of financial institutions to appoint conveyancers of their choice. In my view the applicant's assertions in this regard are an apparent overstatement when one considers them against the background of the obviously independent evidence of particularly Stephanus Burger (paragraphs [82] to

[83] supra), and Wayne Maré. Burger says that ABSA's bond instructions are given to attorneys who are performing satisfactorily and he makes it clear that it exercises a choice no matter what the mortgage originator may feel.

In similar vein Wayne Maré says that mortgage originators generally request that a specific attorney attend to the registration provided the attorney concerned meets the bank's performance criteria and is on the bank's own panel.

To suggest as the applicant appears to do that the banks simply rubberstamp a mortgage originator's choice appears to be incorrect.

The undisputed evidence of Burger indicates clearly that MW renders efficient and competent service to its clients and it is that factor which appears to influence ABSA. The applicant has not suggested that there exists an improper relationship between MW and any of the banks, particularly ABSA.

[151] I now turn to consider what I think is the most important issue in this case and that relates to MW's marketing and advertising campaigns and in particular its relationship with Wakefields.

[152] Advertising in the attorneys' profession is a fairly recent innovation. Prior to 1992 it was improper for attorneys to advertise their services in any way. At that time the applicant's relevant rule was rule 14(b)(vi) which read as follows : -

"Directly or indirectly inviting or advertising or touting for instructions for professional business or doing or permitting in the carrying on of his practice anything which may reasonably be regarded as likely to attract business unfairly."

[153] Clearly any form of advertising was proscribed. Reference to the applicant's rulings at the time indicates that the attorneys' profession was strictly controlled. For example, with regard to directories the following rulings were made: -

"2.1 Directories

An attorney should not permit his name or the name of his firm to appear :

In bold type in a telephone or similar directory.

In a directory in conjunction with the name of any client for whom the attorney acts.

In a Chamber of Commerce or Publicity Association Directory in which the attorney's name is classified under

the heading of 'Attorneys', 'Notaries' or 'Conveyancers'.

[154] Similarly under ruling number "11. Signwriting" it was provided :-

"All nameplates and office signs painted on external doors, walls or windows or otherwise should be discreet, decorous and no more than is sufficient to enable the public to locate and except with the prior written consent of the Council the lettering on such nameplates and office signs shall not be more than 150mm in height."

[155] In 1992 a significant change took place. At a special general meeting of members of the applicant a motion was adopted to permit advertising. This crystallised eventually in rule 14(d) which was promulgated in the year 1992. The rule is referred to in the papers as "the advertising rule" although, as will be seen, its ambit appears to be wider than mere advertising. It reads as follows :-

"Subject to the provisions of Rule 14(b)(vi), a member may at his discretion publicise his practice, or permit another person to do so, provided that in publicising his practice he, or such other person, shall not do anything which in any manner compromises or impairs, or is likely to compromise or impair, any of the following -

his independence or integrity;

the client's freedom to instruct an attorney of his choice;

his duty to act in the best interest of the client;

his good repute or that of the attorney's profession;

his proper standard of work."

[156] It will be seen that the advertising rule is "subject to" the provisions of rule 14(d)(vi). The latter rule underwent significant metamorphosis over the years. Prior to 2005 it read as follows :-

"14(b) Unprofessional, dishonourable or unworthy conduct on the part of a member shall, without restricting the generality of those terms, include :

.....

(vi) Doing or permitting in the carrying on of or in the course of his practice anything which may reasonably be regarded as likely to attract business unfairly."

[157] After the 2005 amendment it reads :-

“Conduct direct or indirect in the course of his/her practice, which may reasonably be regarded as likely to attract business unfairly.”

- [158] It seems to me that for present purposes there is really no material difference between the rule as it previously read and in its present form. What is important however is that rule 14(d) is said to be subject to the provisions of rule 14(b)(vi). Now the phrase “subject to” as used in legislation has received judicial attention. In *S v Marwane* 1982 (3) SA 717 (AD) at 747 Miller JA said the following: -

*“The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As MEGARRY JA observed in *C and J Clark v Inland Revenue Commissioners* (1973) 2 All ER 513 at 520:*

'In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.”

- [159] In the instant case, the master provision is rule 14(b)(vi) and the advertising rule is subordinate to it. I fear that there is a measure of ambiguity that is created herein. Rule 14(d) opens the door to an attorney to “publicise” his practice. That to my mind connotes at least that he/she is entitled to engage in various forms of advertising whether such advertising be in the print, sound or electronic media. Indeed, I venture to suggest that it goes even further than that; it may include sponsorship of an event in order to use that event as a platform to publicise one’s practice. I agree with the submission made by the third respondent in his affidavit that the advertising rule does not limit the class of persons to whom such publicising may be directed.
- [160] As indicated, it appears that Rule 14(b)(vi) was intended to limit or put a brake on the extent to which an attorney could publicise his/her firm. That limitation appears to be that the publicising activities should not be calculated to attract business unfairly.
- [161] One can very readily get to grips with the notion of advertising or publicising which could be said to attract business unfairly. A few examples come to mind. Misleading advertisement in regard to the specialist skills of a particular firm, gross undercutting of fees and advertisements that compare services with that of competitors which are calculated to denigrate such competitors.

[162] It seems to me therefore that on a proper interpretation of the two rules all forms of advertisement must undergo the litmus test as to whether such advertisement is of such a nature that it is calculated to attract business unfairly. Save for that, there is no basis to suggest that the advertising rule read with rule 14(b)(vi) places any restraints per se on the manner in which one can publicise one's practice.

[163] The next relevant consideration is the concept of "touting" and how that fits in with advertising or publicising one's practice.

[164] Very little need be said to emphasise that touting in the legal profession is an evil which whenever it rears its ugly head must be stamped out. The dictionary definition of "tout" suggests improper conduct : -

"To solicit custom, employment, etc. importunately"

(The Shorter Oxford English Dictionary).

[165] In *Cirota and Another v Law Society, Transvaal* 1979

(1) SA 172 at 192 Muller JA quoted with approval the following statement from a decided case on the subject of touting

"This Court cannot look upon a transgression of this nature as being unimportant. It is a practice which should be eradicated. It is a practice which cannot be leniently dealt with by this Court."

[166] On the same page Muller JA went on to approve the finding of the Court a quo which was as follows: -

"I hold that the practice of touting is the most disloyal and despicable conduct towards other members of the profession that can be conceived. The fact that the clients, who were introduced by touts, were fairly treated is a substantial factor in favour of respondents, but the unworthy and dishonourable conduct of procuring professional work through a tout is not diminished by the absence of the usually aggravating result that clients procured by touts are overcharged."

[167] In *Cirota's* case the first appellant had embarked on systematic touting. Third party clients were brought to him by persons who received remuneration for introducing these people to the practice.

[168] It is thus not surprising that one finds in the applicant's rules an express prohibition against the practice : -

"14(b)(xv) Touting, otherwise than as permitted in terms of Rule 14(d)."

[168] It is however significant to note that the draftsman of the rule appeared to accept that the advertising rule, that is to say, publicising of one's practice was a permissible form of touting. There is grave difficulty with this concept. I have attempted to set out above that the very use of the word "touting" implies impropriety. Publicising one's practice, as I have said, with due regard to the prohibition against attracting work unfairly, does not bear any

improper connotation at all and should not be linked to “touting”. To my mind there is a serious anomaly in the applicant’s rules.

[169] Turning now to MW’s relationship with Wakefields, the applicant makes the case, as I understand it in both the founding papers and the heads of argument, that MW’s relationship with Wakefields was at all material times an improper one. It is said that the sponsorships of Wakefields’s awards, seminars, entertainment and conjunctive advertising were flagrant breaches of the applicant’s various rules of professional conduct. These rules include the rule against sharing of fees, buying work and much more seriously, engaging in corrupt practices.

[170] Counsel for the applicant in their heads of argument have made detailed submissions in this regard. At paragraph 277 the following submission is recorded: -

“If consideration is given to Meumann White’s lavish entertainment of Wakefields’ agents in conjunction with the vast sponsorships and contributions, it is manifest that Meumann White incentivises Wakefields and its individual agents to refer instructions to Meumann White. Wakefields and its agents patently have the ability to do so and Meumann White has no legal entitlement to receive such instructions, on account of the client’s freedom of choice. This is affirmed by the ‘administration fee’ which Wakefields charged to its individual agents, but which Wakefields waived in the case of Meumann White.”

[171] Counsel then goes on to submit that MW’s relationship with Wakefields is a generally corrupt one. In other words, to put it more simply, the amounts that MW spent on its various marketing activities connected with Wakefields was nothing more or less than a bribe calculated to induce both the directors of Wakefields and more importantly its individual estate agents to refer conveyancing work to MW. The fundamental assumption in the applicant’s submission is that Wakefields’s agents who conclude sales of immovable property will improperly induce the sellers of such properties to instruct MW to do the conveyancing. Those sellers would otherwise have a free choice in the appointment of conveyancers but exercise of that choice would be obstructed by the corrupt influence of the particular Wakefields’s estate agent.

[172] The question that now arises is whether the applicant has on a balance of probabilities succeeded in bringing home these serious allegations.

[173] To answer this I turn once again to consider the evidence of the third respondent and that of Mr Keith Wakefield. It is not in dispute that MW’s relationship with Wakefields is one of long standing. Virtually from inception MW handled Wakefields’s commercial and litigation work. Keith Wakefield in his affidavit stresses that MW has always performed satisfactorily and he measures them by that criterion notwithstanding the personal relationship which exists between him and the third respondent.

[174] Keith Wakefield goes on to say that all the agents who are employed by Wakefields adhere to a code of ethics which lays down that no estate agent may recommend a particular conveyancer unless he is asked to do so. The particular extract from the training manual has been referred to above. He says that it is sellers at the bottom end of the market who in all likelihood would ask for a recommendation since they are unlikely to know any conveyancers. In regard to MW's marketing activities where Wakefields is concerned, Keith Wakefield says the idea of the sponsorship of awards was to provide a platform at which the third respondent would be able to market MW's services to those present.

[175] The third respondent in turn says in his affidavit : -

"... I viewed it as an opportunity to cement the branding of Meumann White so that, as a firm, we would be uppermost in the mind of agents if and when they were in a position properly and ethically to make a recommendation to a client of [a] particular firm of attorneys. Provided that the agents did not do so without just cause, I saw nothing wrong with attempting to achieve this end and in fact viewed it as an opportunity to encourage Wakefields' agents to publicise Meumann White's practice for the firm."

(Para 162, page 316).

[176] According to Wakefield MW began sponsoring sales conferences on the basis that MW's services could also be marketed as such conferences.

[177] At paragraph [75] above I have quoted the third respondent's evidence in regard to various amounts expended on marketing activities. Applicant and indeed its second inspection committee appeared to take the view that MW's expenditure in this regard was grossly excessive and justified the drawing of an inference that MW was simply buying work.

[178] I am not persuaded at all that the applicant has proved its case on a balance of probability. Commencing firstly with the nature of the marketing activities engaged in by MW, I find that none of these breached any professional rule. The advertising rule (supra) permits an attorney to "publicise" his/her practice. A specialist conveyancing practice such as MW would seek to publicise its practice in the relevant market place. That market place to my mind is the property industry. Conveyancing firms would be entitled in my view to increase their visibility among those engaged in the property industry and more particularly estate agents.

[179] There is nothing to contradict the evidence of both the third respondent and Keith Wakefield to the effect that estate agents that are bound by a code of conduct will only recommend a conveyancer when asked to do so.

[180] In the second place I find that there is no evidence to suggest that MW's expenditure taken as a whole is excessive or more particularly their entertainment of clients is lavish. Third respondent has put up detailed information in regard to this aspect. He has also in his letter dated 13th October 2005 put up invoices and demonstrated the reasonableness of the advertising charges incurred by MW in the various media. I refer particularly to page 715, annexure "CCC3" where the third respondent records in the fourth paragraph of that page :

-
"Our total expenditure on marketing, advertising, entertainment, relationship building etc for our financial years ending February 2004 and 2005 was approximately R1 500 000. This figure represents approximately 11,5% of turnover."

[181] It is of some significance that the applicant did not in its replying affidavit challenge the assertions made by the third respondent in paragraph 249(d) of the third respondent's affidavit which subparagraph specifically dealt with annexure "CCC3" nor did the applicant challenge the other assertions contained therein.

[182] In the third place submissions made by the applicant's counsel in their heads of argument as follows

"114.9 We consequently submit that, having regard to the practical realities of the profession, exaggerated, lavish and excessive attempts to attract business will be unfair. So will conduct which bears the likelihood of eliminating competitors or allowing a few practitioners to capture and retain certain categories of work, and thereby

to monopolise the market"

fall to be firmly rejected. In an open democratic society which recognises free economic activity and free enterprise it is almost monstrous to suggest, for example, that the multinational accounting firms and the larger legal firms in this country should not be permitted to advertise on television or in the Sunday Times newspaper simply because their smaller rivals cannot afford to do likewise. I therefore agree with counsel for the respondents' submission that the scale of marketing and promotions in and of itself can never be the yardstick by which the fairness or unfairness of the advertising can be gauged.

[183] Fourthly third respondent's statistical evidence in regard to instructions received from MW militates against the inference sought to be drawn by the applicant. As mentioned in paragraph [78] of the summary the third respondent's statistics for the years 2002 to 2005 inclusive show that MW received under one third of Wakefields's conveyancing work. Against the background of the applicant's accusations that MW enjoys an overly close relationship with Wakefields these statistics are significant because they reveal that the amount of instructions received was substantially less than one would have probably expected from a practice that is said to have an improper relationship with this firm of estate agents.

[184] In its replying affidavit in answer to these allegations the applicant's deponent says baldly that he does not have any knowledge of the factual basis upon which these statistics have been calculated. It is also suggested that these statistics are not a competent yardstick. There is no basis to reject the third respondent's evidence. Nor is there any basis to suggest that these statistics are not of some consequence. As I have said in an improper relationship there must surely be a distinct probability that a very substantial percentage of the conveyancing work would find its way to MW.

[185] On the probabilities a corollary to this is that during the years in question roughly 66⅔% of Wakefields's conveyancing work went to others. That tends to enhance the evidence of both Keith Wakefield and the third respondent that the estate agents who work for Wakefields adhere to their ethical obligations.

[186] Counsel for the applicant has submitted in paragraph 274 of his heads of argument the following:-

"Meumann White also undoubtedly receives a significant volume of instructions from Wakefields. Mr Keith Wakefield himself states that Wakefields recommends Meumann White as conveyancers in respect of sales brokered by Wakefields without reservation. No significant non-conveyancing (legal) instructions are received by Meumann White from Wakefields."

[187] Keith Wakefield did not say anything like this. What he said was the following : -

"Meuman White does the conveyancing for roughly a quarter to a third of the sales concluded through Wakefields' estate agents. I have no doubt that they are instructed because of the high level of service they offer, their efficiency and approachability. Having worked as an estate agent and interacting with my staff on a daily basis, I can state categorically that unless an attorney performs he will not be recommended by an agent when a client asks for a suggestion as to which conveyancer to use. My staff and I know that Meumann White will not let us down and they always come through for us."

[188] It follows that counsel's submission is wrong. Nowhere did Mr Keith Wakefield say that MW are "recommended without reservation". Nor can that be implied from the passage of his evidence quoted above.

[189] Fifthly I turn to consider the last sentence of counsel's submission at paragraph 277 of their heads which has been quoted above at paragraph [170]. This is highlighted and reads as follows: -

"This is affirmed by the 'administration fee' which Wakefields charged to its individual agents, but which Wakefields waived in the case of Meumann White."

[190] There is no substance in this submission. Keith Wakefield explained that in 1996 Wakefields employed five or six staff to oversee the administration of conveyancing matters. As he put it, they provided an "interface" between the selling agent and the attorney. Wakefields charged the selling agent an administration fee of R150 per sale. That was subsequently increased to R300 per sale. Because MW had proved to be so efficient it turned out that the

administrative staff and subsequently the branch managers had no rôle to play. Consequently Keith Wakefield waived the administration fee. He says he did this because of MW's efficiency which saved Wakefields's resources in respect of the various transactions. He did not discuss this scheme with MW. It was entirely his own decision. An attorney acting on behalf of the applicant queried this practice and referred the matter to the Estate Agents Board which ruled that there was nothing untoward in the practice and in any event it had nothing to do with the applicant. Wakefield makes the point that the administration fee charged was minuscule in relation to the commission that each agent would receive and it could hardly operate as an incentive to an agent to ensure that MW were instructed as conveyancers.

[191] In my view no sinister inference can be drawn against MW arising from Wakefields's actions in regard to the administration fee.

[192] Sixthly I deal with the applicant's counsel's submission in paragraph 155 and 156 of the heads which I set out in full : -

"155. The circumscribed scope for legitimate advertising has been taken even further by the 2007 amendment to Rule 14(d), which has introduced four further restrictions to legitimate advertising. These restrictions are :

A practitioner shall not attract work unfairly.

The practitioner shall not advertise jointly with a non-attorney. This would include an estate agent and a mortgage originator.

The practitioner shall not pay any of the advertising costs of a non- attorney.

The practitioner shall be entitled to advertise informatively only.

156. We submit that although the four further prohibitions contained in the amended rule only took effect after the amendment to the rule during 2007, all of those prohibitions would also constitute prohibitions under the pre-amendment rule, given its wide reach, except where specifically permitted. They would also constitute unprofessional conduct in the general sense."

(My emphasis).

[193] I find it surprising that the applicant makes these submissions. I have alluded above to the issue of retrospectivity. The applicant's submissions now impel me to refer to the authorities in more detail. In *National Director of Public Prosecutions v Basson* 2002

(1) SA 419 SCA at 426 Nugent AJA (as he then was) said the following : -

"[11] There is a natural resistance to creating legal consequences for conduct only after the conduct has occurred. As stated by Justice Scalia, concurring with the majority in Kaiser Aluminium and Chemical Corporation et al v Bonjorno et al

[1990] USSC 50; 494 US 827 (1990) at 855:

'The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognised by the Greeks . . . by the Romans . . . by English common law . . . and by the Code Napoleon. It has long been a solid foundation of American Law. . . .'

[12] That principle is also recognised by the law of this country in which there is a strong presumption against the retrospective operation of a statute: generally a statute will be construed as operating prospectively only unless the Legislature has clearly expressed a contrary intention (*Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others*

[1994] ZASCA 143; 1995 (1) SA 563 (A) at 572E - F). Moreover, a statute that purports to create an offence (which was not at least an offence in international law) or to prescribe a punishment, with retrospective effect, will conflict with ss 35(3)(l) and (n) respectively of the Constitution and might be invalid unless it can be justified in terms of s 36(1)."

[194] In *Yew Bon Tew v Kenderaan Bas Mara*

[1982] 3 All ER 833 (PC) at 836b-d Lord Brightman said: -

"A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."

[195] There is evidence that the applicant itself appeared to accept that there was no objection to conjunctive advertising. That appears from a statement which was made in the handout at the workshop on conveyancing in the year 2002 which read as follows : -

"Another 'scheme' is the so-called payment of advertising costs by attorneys. It appears that in their desperate endeavours to procure conveyancing, certain conveyancers are 'sponsoring' advertising costs of estate agents and the estate agents advertisement appears alongside that of an estate agent. An examination of this transaction has revealed that the contribution by the attorney is dependent on the amount of work that his/her firm receives from the estate agent, which is an indirect form of payment to the estate agent by the attorney. In order for this transaction to be regular, the amount paid for advertising must not be linked to the work received from the estate agent. It is, therefore, not the advertising per se along with estate agents that is offensive."

[196] If the above represents the thinking of the applicant in 2002, it can hardly turn the clock back and say "if indeed you advertised conjunctively with an estate agent in the year 2002 you are now deemed to have been guilty of unprofessional conduct". This appears to be the import of counsel for the applicant's submission and it falls to be rejected.

- [197] There is no evidence at all to gainsay the third respondent's version that MW paid separately for the conjunctive advertisements with Wakefields. Nothing improper emerges from this aspect of the case.
- [198] The seventh issue relates to that of corruption. It appears that with the advent of the Prevention and Combating of Corrupt Activities, No 12 of 2004, the applicant introduced rules 14(b)(xxiii) and 14(b)(xxiv) into the professional rules of conduct. In essence the applicant's submissions on this part of the case are that MW was guilty of offering improper inducements to MSA.com, Wakefields and other estate agents to induce such persons to refer conveyancing work to MW.
- [199] The findings which I have made in regard to MSA.com's and Wakefields's relationship with MW proclaim that the applicant has failed to prove on a balance of probability that such corrupt activities occurred. Bearing in mind the dictum of Rabie JA in the Olivier case, *supra*, quoted in paragraph [126] above in relation to the onus of proof in matters of this nature, I cannot reject the evidence of and the various explanations given by the third respondent. To my mind on a conspectus of all the facts of this case the third respondent's version appears to me to be truthful and acceptable.
- [200] To sum up therefore I have concluded in all the circumstances of this case that MW has not been guilty of any wrongdoing. This therefore concludes the first part of the inquiry envisaged by the learned judge of appeal in Jasat's, *supra*, para [125]. Accordingly it must follow that the application falls to be dismissed.
- [201] Having reached the foregoing conclusion on the facts, I consider it unnecessary for this Court to decide the very interesting

issues

which were raised in regard to the Competition Act. It may be of some assistance to the parties however if I set forth my *prima facie* views on that issue.

- [202] The basic hypothesis upon which the respondents' case is predicated is that the applicant, through the Law Society of South Africa, having made an application for an exemption in terms of SCHEDULE 1, PART A, section 1, has brought about a situation where it in fact confesses that its professional rules "contain restrictions that have the effect of substantially preventing or lessening competition in a market." Thus, according to the respondents, the applicant has through its own mouth branded its rules as anticompetitive and has rendered them illegal and unenforceable.
- [203] I have carefully read the application for an exemption which appears at page 1169 and the following pages. At the outset the applicant through its attorneys at page 1167 records as follows : -

“We are instructed to bring an application (“the LSSA Application”), pursuant to Schedule 1 of the Competition Act, No. 89 of 1998, as amended (“the Competition Act”), in relation to certain of the respective rules of the four statutory provincial law societies in South Africa – being the Law Society of the Cape of Good Hope, the Law Society of the Free State, the Law Society of KwaZulu Natal and the Law Society of the Northern Provinces (collectively referred to herein as “the Statutory Associations”) - to the extent that such rules might potentially be considered to contravene the Competition Act.”

- [204] The phrase “contravene the Competition Act” must be looked at broadly. What the author of the letter intended to convey was that the rules may have the effect potentially of lessening competition. These rules of course bind all attorneys within the jurisdiction of a law society. Some of them in turn can be said to be in a horizontal relationship with other attorneys in their own particular geographical area. Thus because of this, in that sense since they are bound by the same rules, for example, fixing of fees and the like, they may be said to be indulging in restrictive horizontal practices.
- [205] In my view it was a wise precaution by the various law societies to invoke the exemption provision in order to assure the integrity of the profession. Many of these rules may or may not be anticompetitive. The application which has been lodged in the form that it has does not in my view carry with it the implication of illegality. Rather it seems to me that the various law societies have proceeded ex abundanti cautela.
- [206] In regard to the jurisdiction issue, I prima facie agree with the arguments put up by the applicant that it is the Competition Commission in the first place and the Competition Appeal Court finally which has the necessary jurisdiction to adjudicate upon whether the professional rules are indeed anticompetitive.
- [207] Finally I turn to the issue of costs. The respondents have been successful in this application. In a normal civil case they would have been entitled to their costs. However as pointed out above these are not civil proceedings. The principle is embedded in our case law that a law society being the custodian of the profession is entitled to act as informant and to bring to the notice of the Court any conduct which it believes to be unprofessional or unworthy. There has not been one instance that I have been able to find where a law society was mulcted in costs even though its application was unsuccessful. (See, for example, *Vaatz v Law Society of Namibia* 1991
- (4) SA 382 (Namibia). The situation may be different if it were shown that there was mala fides. However that is clearly not the case in casu.
- [208] Mr Ploos van Amstel SC who appeared on behalf of the fifth respondent submitted in his oral argument that the applicant should at least bear a portion of the fifth respondent’s costs. There is much to be said for Mr van Amstel’s argument. The evidence clearly showed that the fifth respondent played no rôle at all in the marketing and advertising strategies devised by the third respondent. Indeed the third respondent quite categorically in his affidavit took the responsibility for all these decisions. One would have expected the applicant to have carefully investigated and then evaluated the fifth respondent’s rôle in her

practice and whether she could be held accountable for any alleged wrongdoing. Calling upon her to furnish an explanation in regard to the allegations would have in my view been a fair process. Instead she is joined as one of the respondents in an application where very serious allegations are made against her. When she puts up her affidavit and gives a detailed explanation, the applicant persists in seeking relief against her. It was only at the eleventh hour that counsel for the applicant conceded that a strike-off was not appropriate but he nonetheless sought her suspension from practice. On the assumption that my above findings of fact are incorrect, I would nonetheless in the case of the fifth respondent have completely exonerated her. I am in entire disagreement with the approach of the applicant in this regard.

[209] Having said all this, I am constrained by well-established precedent not to make any order for costs in favour of the fifth respondent. It may be that in the future this issue could be reconsidered by the Supreme Court of Appeal.

[210] In the result the application is dismissed. There will be no order for costs.

SKINNER AJ : I agree.

DATE OF JUDGMENT : 5 SEPTEMBER 2008

DATES OF HEARING : 18 & 19 JUNE 2008

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