COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 24/CR/Mar12 (014688)

In the matter between:

Johan Venter	**Complainant**
and	
The Law Society of the Cape of Good Hope	**Respondent**
The Law Society of South Africa	**First Third Party**
The Competition Commission	**Second Third Party**

Panel	:	Norman Manoim (Presiding Member) Andreas Wessels (Tribunal Member) Takalani Madima (Tribunal Member)
Heard on	:	20 August 2013
Order issued on	:	14 October 2013
Reasons issued	:	14 October 2013

DECISION

1. This case involves the question of whether a rule of a professional association, the Law Society of the Cape of Good Hope, contravenes section 4(1) of the Competition Act, Act 89 of 1998 ("the Act") which prohibits horizontal agreements i.e. agreements between competitors that restrain competition.

2. To decide this case we first have to determine a dispute as to whether the rule in question is subject to section 4(1) of the Act and then, if we find that it does,

which of the two sub-sections of section 4(1) applies, for they involve different legal burdens for the party alleging the illegality of the rule, as we go on to discuss.[1]

BACKGROUND

3. This case comes to us via an unusual route. It emanates from a referral to us by the High Court in the Western Cape in terms of section 65(2)(b) of the Act.[2] That section states that if a question arises in a civil trial concerning conduct that might be anti-competitive, and if it would be decisive in determining a civil dispute to determine the legality of that conduct under the Act, the Court should, if requested, refer the matter to the Tribunal to decide.[3] What the Tribunal decides in this process, is not the dispute before the civil court, but the legality, in terms of the Act, of the conduct referred to it. The reason this circuitous route has to be followed is that the Tribunal and the Competition Appeal Court ("CAC") have exclusive jurisdiction over such matters and hence a civil court cannot decide the issue of the legality of the conduct under the Act.[4]

4. In this case the High Court was considering an application to have an attorney, Johan Venter, the applicant in this matter, stuck off the role at the behest of his Law Society, the Law Society of the Cape of Good Hope (the "CLS"). Venter currently practises as a sole practitioner in Somerset West.

5. In brief, a complaint had been laid against Venter by his erstwhile clients in a Road Accident Fund ("RAF") case, in which his firm had initially represented them. Venter, it is common cause had acquired these instructions through the medium of a consultant, a certain Ms Lindveldt, who was not an attorney, but in the language of the CLS's rule, which we consider later, a 'non-qualified' person. Lindveldt had allegedly solicited the instruction for Venter whilst visiting the

[1] The relevant sub-sections are 4(1)(a) and 4(1)(b) of the Act and are discussed more fully below.
[2] See the *Law Society of the Cape of Good Hope v Johan Venter* case number 17292/10, Western Cape High Court, Cape Town, unreported, dated 15 February 2012. (Hereinafter to be referred to as the "High Court decision".)
[3] It must also be satisfied that the issue had not been raised in 'a frivolous or vexatious manner' (see section 65(2)(b)(i) of the Act).
[4] See section 62(1) of the Act.

clients in hospital[5]. At some stage the clients became dissatisfied with Venter's services and terminated his instructions and briefed a new attorney. The other attorney assisted the clients in lodging a complaint against Venter with the CLS.

6. The CLS instituted an enquiry and having found Venter had contravened its rules that prohibit 'touting' and overreaching[6] brought an application to the Cape High Court to have him struck off the roll in terms of section 22 of the Attorneys Act.[7] The Court concluded, as appears from its judgment, that due to disputes of fact – these being application proceedings – the charge based on overreaching had not been established.[8] However the Court held that the charge of 'touting' could be established on the facts of the respondent's (Venter's) version and thus on common cause facts. The Court sets these out in the following passage:

> *"Accepting that Ms Lindveldt worked as independent consultant the respondent [Venter] appears to concede that the express or tacit arrangement or scheme of operation that he had with her had the result or potential result that professional work was secured for him which was solicited by Ms Lindveldt, being an 'unqualified person'. Moreover, in terms of that arrangement or scheme, she would enjoy, share or participate in fees or other charges for professional work or earnings or commission from the supply or any commodity, service or facility. On his own version, therefore, the respondent's* [Venter's] *arrangement with Ms Lindveldt appears to fall foul of the provisions of the applicant's* [CLS'] *Rule 14.6.1 read with the Ruling of 26 August 2002."*[9]

7. In the course of this High Court litigation Venter indicated that he would assert that the provisions of the CLS's Rule 14.6.1 were in conflict with the Competition Act and hence were not enforceable against him. It was indicated to the Court that the rule in question, had been the subject of a prior, but unsuccessful,

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[5] See CLS' answering affidavit, record page 28, paragraph 11.
[6] The rule in question does not use the word touting, but is widely understood to address the issue of touting. Overreaching is understood to mean overcharging. This aspect of the dispute concerns the treatment of Ms Lindtveld's fee for soliciting the instruction.
[7] Act 53 of 1979.
[8] See High Court judgement, ibid, paragraph 15.
[9] Ibid paragraph 16.

application for exemption made by the Law Society of South Africa (the "LSSA"), (the umbrella association of attorneys' societies to which the CLS is affiliated) to the Competition Commission ("Commission"). Whilst there was some disagreement between Venter and the CLS about what the implications of the refusal were for the purpose of the rule in *casu,* the Court was quite clear that there had been no ruling on this point by either the Tribunal or the Competition Appeal Court and hence this meant that their validity had not yet been determined. Because the Court was precluded from making this determination it referred the matter to the Tribunal in the following terms.

> *"In terms of section 65(2) of the Competition Act, 89 of 1998, the question as to whether or not the provisions of the applicant's Rule 14.6.1 and its Ruling of 26 August 2002 are prohibited in terms of the Act is referred to the Competition Tribunal."*[10]

8. Hence with the failure of the other charges against him, Rule 14.6.1 becomes the crucial hurdle for Venter to overcome in mounting his defence against the striking off application, which explains why the matter comes before us.

RULE IN QUESTION

9. The rule subject to challenge is rule 14.6.1 of the rules of the CLS, the relevant part of which states:

> *"14.6.1 A member shall not directly or indirectly enter into any express or tacit agreement, arrangement or scheme of operations, the result or potential result whereof is:*
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> *14.6.1.1 to secure for the member professional work solicited by an unqualified person; and/or*
>
> *14.6.1.2 that an unqualified person will enjoy, share or participate in fees or other charges for professional work or earnings or commissions from conducting auction sales, the sale or*

[10] See High Court judgement, ibid, paragraph 24.

letting of immovable property, the sale or other supply of any commodity, service or facility, the sale of insurance or work on behalf of a bank, unless such unqualified person is in the full time employ of such member."

10. This rule has since been amended, but it is common cause that for the purpose of our present decision we should confine ourselves to the rule as it was at the time of the alleged contravention. Note that although this rule is commonly referred to as the 'no touting rule', no reference to the term 'touting' appears in the rule. (During the course of argument, it was common cause that we should only determine the validity of the rule 14.6.1. The ruling of the CLS of August 26 2002 which the High Court refers to, was simply the CLS's interpretation of the rule i.e. a guidance note, and could not affect its validity. We have not therefore considered the terms of this ruling further.)

OUR PROCEEDINGS

11. Venter duly referred the case to the Tribunal in accordance with the High Court's directive. The CLS opposed the case. Pleadings closed and a hearing of oral evidence was held onthe14th and 15th November 2012. Each side called only one witness. Venter called Nicolaas Terblanche, a professor from Stellenbosch University, who specialises in marketing, whilst the CLS called Phillip Sutherland, a law professor from the same university, who specialises in competition law.

12. With final argument due to begin, Mr Koen who appeared for the CLS, advised the Tribunal that he wished to raise an *in limine argument* regarding the application of section 4(1) of the Act to the rules of the CLS.[11] As we had heard in the course of these proceedings that the LSSA had been involved in negotiations with the Commission for an exemption from the Act for its affiliates rules, and that central to the issues between them was the status of rules against touting – the objective apparently of the rule in question in this case – we therefore felt it appropriate to require the joinder of the Commission and LSSA, to enable them

[11] See pages 180 – 182 of the transcript of proceedings.

to address argument on this issue if they wished. As it was, both took up the opportunity and submitted heads of argument.

13. On 20 August 2013, the hearing resumed and we heard argument from all four parties.

14. We have approached these reasons by considering each of the issues raised in a logical sequence i.e. moving from questions of jurisdiction, to those of application and then finally to the merits, and at each step, considering the respective arguments made by the parties which addressed them.

WHOSE CONDUCT HAS BEEN REFERRED

15. In oral argument the Commission argued that the conduct referred was not the rule of the CLS but the conduct of Venter. None of the other parties agreed with this approach. Nor do we. The conduct raised is conduct allegedly in violation of the Act. That conduct, which was raised as an issue by Venter, was the CLS' rule and it is this conduct, not Venter's that clearly was the subject of the referral. The Court's decision is quite clear on this.[12]

DOES THE ACT APPLY – THE JURISDICTION POINT

16. An initial argument that it appeared the CLS was going to address, was that the Act did not apply to rules of the CLS, because the CLS is a regulatory authority and that its rules therefore have the character of public regulation. At one time, *"...acts subject to or authorised by public regulation"* were excluded from the ambit of the Act.[13] Since an amendment to the Act in 2000, this exclusion was deleted and replaced with a regime of concurrent jurisdiction.[14]

17. The argument, the logic of which was difficult to follow, appears to contend for two consequences of this. Because there is now concurrent jurisdiction, where the Law Society makes rules pursuant to powers given to it under the Attorneys

[12] See High Court judgement, ibid, paragraph 22.
[13] See section 3(1)(d) of the Act, prior to its amendment in 2000.
[14] By section 2(a) of the Competition Second Amendment Act, No 39 of 2000.

Act, it acts as regulatory authority making public regulation. Where it makes a rule, an attorney is subject to it, as it has the force of law. If the same rule also conflicts with the Act, they appear to argue that the rule cannot be set aside by the Tribunal because such a declaration would be *ultra vires* given that only courts can strike down laws in terms of the Constitution.[15]

18. The logic of this argument seems to be that once one regularity authority makes a rule over an area of concurrency the other authority must respect this and not strike it down. Then there appears to be a separate but unrelated argument of constitutional competence.

19. Neither of these arguments is correct. Concurrent jurisdiction suggests an authority has jurisdiction over a sphere of activity but shares it with another and hence the term concurrency. It does not suggest jurisdiction is ousted by the one in favour of the other – quite the contrary. Secondly, the Act makes it clear that concurrency exists in respect of a regulatory authority which has jurisdiction in respect of the conduct regulated in terms of Chapters 2 and 3 of the Act i.e. competition matters.

20. As the Supreme Court of Appeal has noted in the *Telkom* case,

> *"Concurrent jurisdiction exists only where the other regulatory authority has the competence to adjudicate the competition aspects of the conduct."*[16]

21. There is nothing in the Attorneys Act which grants such a competition competence to Law Societies; the mere fact that societies may regulate their members does not mean that they regulate conduct referred to in Chapters 2 and 3 of the Act. But even if they do have such authority, concurrent jurisdiction does not mean such authority is ousted, absent some express intention to do so. As we go on to show in the next section, a schedule to the Act contains a provision dealing with a regime for the exemption of rules of professions from the Act. Why

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[15] See section 172(2) of the Constitution.
[16] See *Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009)paragraph 28.

would such a schedule have been inserted unless the clear legislative intention was that such rules would be subject to the Act? Nor is the argument based on the Constitution correct. The provision applies only to the constitutional validity of Acts of Parliament and provincial authorities, not to rules made pursuant to a statutory mandate where the challenge is based on the provisions of the Act, not the Constitution.

22. This argument was not pursued further in oral argument, but because it was unclear if it had been abandoned, we have dealt with it. We go on to consider in greater detail an argument advanced by both the CLS and LSSA about the application of section 4(1) which was pursued by both in oral argument.

DOES SECTION 4(1) APPLY TO RULES OF A LAW SOCIETY?

23. The further argument about application advanced by the LSSA and the CLS is a narrower one.[17] They do not suggest that the Act does not apply to rules made by Law Societies pursuant to the Attorneys Act, as did the previous argument of the CLS.[18] Rather, they argue that only section 4(1) – at least insofar as it is relied upon by Venter in this case – is not of application.

24. To follow the argument we must first examine the text of section 4(1) of the Act.

25. Section 4(1) prohibits two forms of horizontal conduct, sometimes referred to as the *per se* offence and the *rule of reason* offence.[19]

26. The Law Societies argue, correctly, that the essential prerequisite for either contravention is that the horizontal practice subject to challenge must take the form of an agreement, a concerted practice *or a decision by an association of firms*.

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[17] For convenience when they take a common approach we will refer to them as the "Law Societies".
[18] The LSSA indicated that it made no submissions on what it termed the concurrent jurisdiction issue. See LSSA's supplementary heads of argument, paragraph 2.
[19] Section 4(1)(a) of the Act is the rule of reason offence as it permits a defence of justification whilst section 4(1)(b) of the Act, once its requirements are established, does not.

27. Venter alleges that the rule is a rule of the CLS and since it is an association of competitor firms, the rule subject to challenge, constitutes a decision of an association of firms.[20]

28. The Law Societies argue that the rules of a law society, made pursuant to the empowering provisions of the Attorneys Act, do not constitute a decision of an association of firms.

29. They offer several reasons for this argument. In the first place, the rules are not decisions as they are made pursuant to a statutory mandate. The Law Society is given regulatory powers over its members by an Act of Parliament and this confers on its rules a public character that renders them something akin to regulation, not decisions of an industry association.

30. Section 58(a) of the Attorneys Act gives the Law Society the power to "... *regulate the exercise of the profession*". More specifically, in terms of section 74 of the Attorneys Act, which according to the CLS is the statutory source of rule 14.6.1, the Law Society is empowered to make rules as to (inter alia) "*(a) conduct which on the part of any practitioner ... shall constitute unprofessional or dishonourable or unworthy conduct".*

31. The Law Societies argue that the claim for the public character of the rules is further enhanced by the fact that the Attorneys Act requires that the rule contemplated above *"...shall be made with the approval of the Chief Justice of South Africa, and if the Chief Justice is of the opinion that the interests of justice of the public would be adversely affected by the provisions of any such rule, with the approval of the State President."*

32. Since the Chief Justice is neither a competitor nor a member of the association of firms, his approval of the rules, without which they would lack legal effect, transforms what may have been a decision of an association of firms, to rules approved by a judicial officer charged with protecting the public interest.

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[20] See paragraph 10 of Venter's heads of argument. Venter also argues that it could constitute an agreement.

33. We now examine the various components to this argument.

If something is public regulation does that mean it cannot be a decision?

34. The Act defines the terms 'public regulation' and 'regulatory authority'.

> *"Public regulation means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority; and*
>
> *"regulatory authority means an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry.*[21]

35. Even if we accept that in terms of the Act, the rules are made by a regulatory authority (viz. a Law Society) and that they constitute 'public regulation', this does not exclude them from, at the same time, constituting a decision of an association of firms, as the two notions are not mutually exclusive.

36. The Law Societies argument suggests they must be but this approach is not supported by the text of the Act.

37. There are two clear indications that the legislature intended public regulation of this kind to be subject to the provisions of the Act.

38. The first is a question of statutory interpretation that relies on inference. Prior to its amendment in 2000, as noted above, the Act exempted *"...acts subject or authorised by public regulation"*. The import of this was that but for their express exclusion, these acts would otherwise have been subject to the Act. Once the exclusion was deleted, acts subject to or authorised by public regulation fell within the Act's purview.

[21] See sections 1(1)(xxv) and 1(1)(xxviii) of the Act respectively.

39. The second, and even clearer indication, is to be found in Schedule 1 of the Act, which deals with the manner in which professional bodies can get their rules exempt from the Act.

40. Most notably in the Act, Schedule 1 provides in item 1 and 2 that:

> *"(1)A professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in a market may apply in the* prescribed *manner to the Competition Commission for an exemption in terms of item 2.*
>
> *(2) The Competition Commission may exempt all or part of the rules of a professional association from the provisions of Part A of Chapter 2 of this Act for a specified period, if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain –*
>
> > *(a) professional standards; or*
> > *(b) the ordinary function of the profession."*

41. In item 9 of Schedule 1, we find the following definitions.

> *"In this Schedule –*
> *'professional association' means an association referred to in Part B of this Schedule;*
> *'professional rules' means rules regulating a professional association that are binding on its members;*
> *'rules' includes public regulations, codes of practice and statements of principle."* (Our emphasis)

42. The Attorneys Act is then listed in Part B. Thus it is quite clear that the legislature intended that rules of a professional association were intended to be subject to the Act, that the Attorneys Act was one of the associations contemplated, and

that further it was contemplated that these rules could include public regulation. It is because the Act recognises that professional rules might contain restrictions on competition that could be justified on wider public interest grounds that they were given separate treatment for the purpose of exemption. The implication is clear. The rules are subject to the Act notwithstanding their character as public regulation. But because they might constitute public regulation, they were given their own dispensation for exemption, most importantly by granting a qualified public interest test for exemption not found elsewhere in the body of the Act; i.e. not in any of the purely economic defences permitted in Chapter 2 of the Act nor in the other categories for exemption set out in section 10 of the Act.[22]

43. It is quite clear then that the Act applies to the rules of Law Societies. True, the Schedule does not state in express terms that it applies to section 4(1). It speaks more generally about exemption from the operation of the Act. But it is hard to conceive of any other section of the Act that would apply to professional rules other than section 4(1).

44. Of the three types of prohibited practices in the Act, section 5 applies to firms in a vertical relationship – and hence would not apply to attorneys, whose relationship to one another is horizontal, whilst sections 8 and 9, apply only to dominant firms i.e. to unilateral conduct by single firms, not to co-ordinated conduct by associations of competing firms. In any event the exemption only applies to Part A of Chapter 2, thus sections 4 and 5, and not Part B, which refers to sections 8 and 9. Thus if the Act is to apply to Law Societies' rules, the only relevant provision would be section 4(1) – it would be impossible to house its application anywhere else.

45. Therefore the fact that the rules of Law Societies might also constitute public regulation, as defined in the Act, does not, for that reason alone, mean that they are not also decisions of an association of firms in terms of the Act.

[22] See item 2(a) and (b) cited earlier.

Is the Act expressly or impliedly ousted at common law?

46. The only way remaining to support an argument that section 4(1) does not apply, is to contend that the Act is ousted in this respect as a matter of statutory interpretation to avoid a conflict of law. The argument of conflict of laws was raised in the CLS's heads of argument and for this reason we need to deal with it.[23]

47. There is certainly no express ouster. As for an implied ouster, the argument made at one stage was that this was a case of a 'hard conflict' of two laws. Attorneys haplessly have to comply with both, so the terms of the more specific law should override the general law.[24] But there is no hard conflict. The empowering provision of section 74 of the Attorneys Act provides for rules that prevent dishonourable conduct by persons practicing as attorneys. In implementing this statutory mandate, the Law Society is not compelled to draft rules that conflict with the Competition Act. Thus there is no hard conflict.

48. The next argument is whether there may be an implied ouster because of a 'soft conflict'. To use the language of the now repealed section 3(1)(d), an act otherwise anticompetitive might be authorised by public regulation. However, the soft conflict problem is expressly provided for in Schedule 1 of the Act. We noted earlier that the grounds for exemption provided in the Schedule contemplate public interest criteria peculiar to the issues faced by professions in regulating their members conduct. These criteria as we noted are not found elsewhere in the Act. The implication of this is clear. The legislature contemplated that conflicts between the goal of promoting competition and regulating professions in the public interest could be balanced through the exemption regime created by the Schedule.

Are rules decisions by an association of firms?

49. Section 4(1)'s reference to a decision by an association of firms mirrors the language of Article 101(1) of the Treaty on the Functioning of the European

[23] See CLS' heads of argument, paragraphs 29 -30.
[24] Ibid paragraph 30.

Union ("TFEU"). That section prohibits forms of conduct that restrict competition. In defining the forms that conduct might take, it refers as well to agreements, concerted practices and "... *decisions by associations of undertakings...*"[25]

50. Whilst we must be mindful of blindly following foreign jurisprudence on issues of jurisdiction, given the similarity of language it is worth considering the approach taken in the European Union to similar arguments raised in this matter by the Law Societies.

51. According to one leading work on European competition law,

> "*The concept of a 'decision' includes the rules of the association in question, decisions binding upon the members and recommendations, and in fact anything which accurately reflects the association's desire to coordinate its members' conduct in accordance with its statutes. Agreements implemented within the framework of the association concerned may be analysed either as 'decisions' of that association or 'agreements' between the members.*"[26]

52. We see no reason to find any differently. Schedule 1 as discussed earlier would seem to confirm that this interpretation would apply to our Act as well. Clearly professional rules were contemplated within the meaning of decisions of associations of firms.

Does the concurrence of the Chief Justice render the rules not decisions of an association of firms?

53. It does not make any difference that another officer of state might have to approve rules. In enacting the schedule, the legislature can be presumed to have been aware of the provisions of the enabling statutes of those professions whose rules might require the approval of another state functionary. That, in the view of the legislature, did not remove them from the Act's remit. For instance, in terms of

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[25] The one linguistic difference is that in Article 101(1), the reference is to "*undertakings*", whilst our Act uses the term "*firm*".

[26] See Roth, P. Ed. 2001. *Bellamy and Child - European Community Law of Competition.* 5th ed.London: Sweet and Maxwell. 59, paragraph 2-032.

the Schedule, provision is made for consultation with the *"...responsible Minister or member of the Executive Council concerning the application..."*[27]

54. The reason is perfectly logical. Given that competition enforcement is entrusted under the Act to the Commission this is not a task another functionary who may serve some role in approving professional rules can or can be expected to fulfil.

55. There is nothing in the Attorneys Act which suggests that the public interest which the Chief Justice must safeguard, includes ensuring the competitiveness of the profession. The Attorneys Act, the rules made pursuant thereto, preceded the commencement of the Act, so this could hardly have been what the legislature had intended at the time. Moreover as the SCA held in *Telkom*:

> *"(36)...where specialist structures have been designed for the effective and speedy resolution of particular disputes it is preferable to use that system...*
>
> *(37)...determining whether a matter involves a contravention of Chapter 2 may be complex and technical. The Tribunal should not be lightly deprived of the authority to decide whether the complaints referred to involve such contraventions."* [28]

56. Furthermore the fact that a non-competitor may approve or be required to approve a decision of an association of firms, does not insulate the decision from Competition Act scrutiny, otherwise this would become a simple vehicle to evade the statute. The rules are in effect a decision taken by competitors which constrain them in their behaviour. They do not seek to bind anyone else other than competitors.

57. That is precisely what the ambit of section 4(1) seeks to regulate; to avoid possible anticompetitive agreements coming into operation between competitors under the guise of professional associations. As Whish and Bailey point out in their work, it is precisely because professional rules are made binding on all their

[27] Schedule item 3(c) and 4.
[28] See Telkom, supra.

members, who typically in a profession are numerous, that they constitute a most effective mechanism for effecting collusive arrangements.[29] Cartels are typically vulnerable to problems such as reaching agreements, communicating their terms, monitoring their enforcement and punishing non-compliance. The rules of a professional association effectively resolve all these problems.

58. This approach is also followed, it is instructive to note, in European law. Again, as Whish and Bailey note:

> *"A decision does not acquire immunity because it is subsequently approved and extended in scope by a public authority, nor does a trade association fall outside of Article 101(1) because it is given statutory functions or because its members are appointed by the Government. The Court of Justice has specifically stated that the public law status of a national body (for example an association of customs agents) does not preclude the application of Article 101(1)."*[30]

59. In the United States, courts, whilst being respectful of the policy considerations underlying restraints on competition that might exist in professional rules, have nevertheless held that professional rules are not immunised from consideration under the antitrust laws.[31]

60. We thus find that the rules of the CLS constitute decisions of an association of firms and are thus subject to the provisions of section 4(1) of the Act.[32]

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[29] See Whish R.&Bailey D. 2012. *Competition Law.* 7th ed. New York: Oxford University Press. 110 - 111.

[30] See ibid, page 92, as well the cases the authors cite in the footnote in support of this proposition.

[31] See Fox, E.M. *Cases and Materials on U.S. Antitrust in Global Context.* Third ed. New York: West. 76 and 110. Fox cites as authority for the application point, *Goldfarb v Virginia State Bar,* 421 US 773 (1975)

[32] This approach accords with the conclusion to an issue that was similarly argued in the leading case on the point in the EU. In the case of *JCJWouters vAlgemene Raad van de Nederlandse Orde van Advocaten* Case C-309/99 [2002] ECR I-1577,which dealt with the validity of a rule that prohibited multidisciplinary partnerships, the Dutch Bar association argued that it was not an association of the type contemplated in Article 101(1) as it was exercising regulatory functions conferred by statute. The Court rejected this and found that was an association for the purpose of Article 101. The Court held the position might have been different if the majority of its members had been appointed by the state and if the state had specified the public interest criteria to be taken into account by the Bar Council. Nevertheless the Court held that the rule was reasonable.

WHICH PROVISION OF SECTION 4(1) APPLIES?

61. In his complaint referral Venter relies on both the provisions of sections 4(1)(a) and 4(1)(b) of the Act.[33]

62. The essence of the complaint is this. The relevant market is alleged to be the market for legal services in connection with RAF claims within the jurisdiction of the Western Cape High Court.[34]

63. Venter alleges that the rule binds all attorneys who practice in the Western Cape. The effect of the rule he alleges is that attorneys are precluded from making use of the most efficient form of soliciting for that particular person. As a result of this prohibition he contends attorneys cannot compete with one another on an unfettered basis and this results "*...into making prices of the said service rigid and/or stable and/inflexible and or/more firm.*"[35]

64. In a request for further particulars from the CLS, Venter was asked to expand on this contention. His reply was that *"rules that limit the marketing activities of firms result in the consequences referred to by the respondent [CLS].*"[36]

65. His conclusion is that Rule 14.6.1 contravenes either section 4(1)(a) or 4(1)(b) or both.

DOES THE RULE CONTRAVENE 4(1)(b)(i)

66. Section 4(1)(b) as we noted earlier is the per se provision. In oral argument, Venter's counsel indicated that he relies specifically on section 4(1)(b)(i) of the Act.[37] That sub-paragraph reads:

> "*4(1) An agreement between or concerted practice by firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*
>
> *(a) .....*

[33] See paragraph 16 of the complaint referral which is framed in terms of an *and/or* proposition.
[34] Paragraph 12 of the complaint referral supra.
[35] Paragraph 15 of the complaint referral.
[36] See Complainant's reply to request for further particulars, record page 52, paragraph 2.
[37] Venter's heads of argument deal only with issues of jurisdiction and application.

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition.(Our emphasis)"

67. Counsel for Venter contended that the restriction on soliciting in Rule 14.6.1 constituted a 'trading condition' and hence 4(1)(b)(i) applied. Whilst the term 'trading condition' is susceptible to a wide range of meanings, we would suggest that it must be interpreted both in its context and with an appreciation of the need to interpret the restrictions in section 4(1)(b) of the Act narrowly, given that they admit of no defence, unlike section 4(1)(a) of the Act. The term 'trading condition' is the last phrase in a sub-paragraph that deals with price collusion. Whilst the term is intended to be broader than price, one must be cautious in interpreting it in a manner that is so wide that any restriction that competitors may impose on one another's conduct becomes a trading condition.

68. As we previously held in *Patensie*:

> *"In our view the range of trading conditions hit by this sub-section is limited by the contextual cobbling together of price fixing and the fixing of 'any other trading condition', which, in our view, points to aspects of a particular trade/ transaction that are intimately related to price, i.e. quantity and quality. Hence for a 'trading condition' to be hit by this section of the Act it should be part of the price-quantity-quality nexus of the concerned transactions/trade."*[38]

69. The use of the qualifier "other" that precedes 'trading condition' suggests, at the very least, it is in some way similar, albeit not identical, to the notion of price. At its very least it must constitute a term on which a firm trades or offers to trade with its customers or refuses to offer as a term to customers. The prohibition contained in the rule is of no such kind. It is a prohibition on the use of a certain class of person to perform a certain function. That is not a trading term in some nature akin to price.

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[38] See *The Competition Commission v Patensie Sitrus Beherend Beperk,* Tribunal case no. 37/CR/Jun01, para 35.

70. Thus Rule 14.6.1 is not a trading condition and hence does not contravene the provisions of section 4(1)(b) of the Act.

DOES THE RULE CONTRAVENE SECTION 4(1)(a)?

71. It remains for us to consider whether the Rule contravenes section 4(1)(a) of the Act. This provision requires the complainant to allege that the practice has *"... the effect of substantially preventing, or lessening, competition in a market...."*[39] (As a convenient short hand we will refer to this phrase as the "anticompetitive effect requirement").The practice in this case of course is Rule 14.6.1.

72. Beyond the injunction to 'characterise', our case law on the application of section 4(1) is not well developed.[40] The characterisation exercise was to establish whether conduct complained of properly fits the description of the conduct described in section 4(1)(b). United States law on horizontal restraints recognises that certain conduct is treated under the *per se* rule and others under the 'rule of reason'. In this way, although not located in separate sections of the statute as ours is, the approach to horizontal restrictive practices is similar.

73. Restraints characterised under the *per se* rule, are those considered presumptively harmful and no evidence that they may not be, is permitted. In US law, those restraints on conduct treated in this way have developed over the years by way of case law so that a core of certainty has developed. In our Act we do not have to rely on case law - the forms of conduct to be analysed as *per se* contraventions are set out expressly in section 4(1)(b).

74. In US law, in contrast to those restraints examined under the *per se* rule, those analysed under a rule of reason, are those *"...whose competitive effects can only be evaluated by analysing the facts particular to the business, the history of the restraint, and the reason why it was imposed."* [41]

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[39] The sub-section goes on to provide *"...unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect."*

[40] See *American Natural Soda Ash Corporation and Another v Competition Commission and others [2005] 3 All SA (SCA) at paragraphs 44-52.*

[41] *National Society of Professional Engineers* 435 U.S. 679, at 692.

75. But recent US cases suggest that the approach to rule of reason analysis has become more nuanced. This is possibly because of a recognition that cases judged under this standard may become bogged down in interminable disputes over the effect of a practice. As one US commentator has succinctly put it:

> *"When everything is relevant nothing is dispositive... Litigation costs are the product of vague rules combined with high stakes and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason."*[42]

76. Apparently mindful of this concern, courts in the US have, even when restraints in question fell within a rule of reason standard, nevertheless taken an approach that this so-called "full-blown" approach to evidence was not required. Rather the courts have favoured an approach, where they have eschewed an approach to elaborate industry analysis, where some intermediate enquiry demonstrates the anticompetitive nature of the agreement. This has been dubbed by some commentators as "the quick look approach". Doctrinal disputes in US law over whether this has created some third category of analysis to horizontal restraints need not concern us given our statute's construction. What is useful however is its approach to a more subtle issue over evidential onus. It is possible on this approach, that a restraint that should be decided under the rule of reason, or in our Act one that falls to be analysed under 4(1)(a), could, by its nature, be so facially anticompetitive that once its terms have been established, an evidential burden may shift to the respondent to rebut. This is not to be confused with the second leg of 4(1)(a), where the onus shifts to the respondent to justify the restraint. Here the initial debate between the complainant and the respondent is solely about the anticompetitive effect.

77. In what circumstances might such an evidential shift in a 4(1)(a) enquiry move from the complainant to the respondent regarding the existence or otherwise of an anticompetitive effect? Well, if we follow US law as instructive on this point, it

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[42] Easterbrook, F.H. 1984. *The Limits of Antitrust.* 63 Texas Law Review 1, 12-13. Passage cited in decision of the court in *Polygram Incorporated v Federal Trade Commission*. 416 F.3d 29) (D.C.Cir 2005).

might be when from the terms of the restraint, the anticompetitive effect was prima facie apparent or where from prior experience of that practice or from economic learning it had such effects.

78. Several American cases recognise this. For instance in *California Dental Association*, Souter J, described this as a circumstance where one could draw an *"...intuitively obvious inference of an anticompetitive effect..."* – although he cautioned that there were no categorical lines to identify this circumstance from those requiring the full-blown analysis. [43]

79. Applying this approach to the present facts, we ask if the ban on direct solicitation by non-attorneys would be susceptible to this 'quick look' approach.[44] If it does, then an evidential burden would shift to the CLS, and if not, it would remain with Venter.

80. It is by no means obvious that the prevention of one form of marketing entails a substantial lessening or prevention of competition. The pro-competitive aspect of advertising that is generally recognised is that it provides information to consumers about who can provide a service and their price and quality so that consumers are enabled to make informed decisions about their choices.

81. US decisions are again instructive as several cases have involved some restriction on professional advertising. In *Bates,* the court held:

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[43] See *California Dental Association v FTC* 526 US 756 (1999) In that case the court split on the facts over whether the restraint in question a ban on various forms of advertising for dentists by their professional association, fell within this intuitively obvious category. The majority held that it did not the minority held it did. Writing for the minority in that case, Breyer J expressed his views forthrightly. *"But why should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price ..."*

[44] Perhaps the best rendition of this for our purposes it to be found in a district court decision by Judge Ginsburg in *Polygram* where he explained it in this way:
"If based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful, and in order to avoid liability the defendant, must either identify some reason the restrain is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm." See *Polygram* supra, footnote 41.

"Advertising" serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system."[45]

82. Important to this notion of the pro-competitive benefit of advertising is that consumers are able to make an informed decision. In that way they are able to make, or at least begin to make, a more informed choice about the price or quality or availability of a particular service.

83. Direct solicitation does not necessarily have these elements to it. Put differently it does not exhibit the intuitively obvious anticompetitive characteristic that a ban on advertising one's services might have. Indeed, direct solicitation, might well act contrary to the pro-competitive aspect of the consumer coming to an informed decision, because in direct solicitation the consumer is informed of one service – that of the solicitor's principal, and then induced at the same time to give the instruction. This suggests that the decision of the consumer in those circumstances is more likely to result in an uninformed one, as the ability to compare services offered or prices with other offers is not present. Transparency is an essential component of the pro-competitive aspect of advertising, because consumers can make an informed choice about the offering and if possible compare it to others, whilst no less importantly, competitors can react.

84. It is thus not intuitively obvious that the restriction imposed by Rule 14.6.1 has an anticompetitive effect. Nor do we have any experience that such a rule would obviously have such an effect. On a quick look approach the evidential burden thus remains with Venter.

85. We therefore have to consider the rule on a full-blown rule of reason analysis. We now consider if we have such evidence before us on the present record.

86. In his referral, Venter, as we noted earlier, is very brief on this aspect.[46] He states that the rule prevents attorneys from competing in the manner most efficient for

[45] *Bates v State Bar of Arizona*, 433 US 350, at 364

them. This theme was further developed in evidence by the expert witness for the CLS, namely Professor Terblanche. The essence of his testimony was that firms need to utilise the most appropriate forms of marketing opportunities available to them; restrictions on forms of marketing fetter firms ability to be competitive. But he could not advance Venter's case beyond this general proposition.

87. He did not claim to have any particular knowledge of the legal service industry.[47] He did not know about whether word of mouth marketing was having a big impact in places such as the United Kingdom, even when asked by his own counsel.[48] Nor did he claim to be an economist "*in the true sense.*"[49] When asked pertinently if he could comment on why the rule might lead to the effects contended for, he was frank that he could not understand exactly what was meant by it, and that he would rather refrain from guessing.[50]

88. The most he could add to Venter's case is contained in the following passage from his testimony. It was put to him by Venter's counsel that:

> "*Mr Pretorius: Now, if you consider the mix of the smaller firm, and let's consider that direct marketing like payment for referrals is one of the – one of the elements in this mix, if you should prohibit that, would that affect his ability to compete?*
>
> *Professor Terblanche: Definitely, because I think specifically your smaller firms, for them to break through what we call the "clutter" in the market place of advertising and other communications, they're just* [not] *in a position to afford those very expensive media. So they have to rely on the more one-on-*

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[46] The CLS notes this in its answering affidavit and complains, fairly so, that " *Mr Venter does not base the arguments raised in his affidavit on any evidence or facts, nor does he explain how the enforcement of the Rule can have the effect of preventing or lessening competition or fixing prices, or other trading conditions. It is not possible to deal, in answer, with the arguments he raises in the absence of the facts upon which such arguments are based."* See answering affidavit record pages 35-6 paragraph 43.

[47] See page 34 of the transcript of proceedings (14 November 2012).

[48] See pages 19-20 of the transcript of proceedings (14 November 2012).

[49] See page 36 of the transcript of proceedings (14 November 2012).

[50] See pages 45-6 of the transcript of proceedings (14 November 2012). The question to which the answer is given appears on page 44.

one sort-of customer communication means. And if that is not the case, in my view you can't have competitive rivalry." [51]

89. What Professor Terblanche has proposed at most, is that smaller firms need to focus their marketing. They therefore have to rely more on a direct marketing relationship with a customer. If they were not allowed to do so, this would affect competitive rivalry. When asked by counsel for Venter the most important question for the purpose of the 4(1)(a) case – how big the restriction on competition would be – Professor Terblanche gives an equivocal answer:

"Professor Terblanche: Well, if it's – it's very difficult to judge the extent, you know, because I think all the firms have different client bases, etc. But I think any – in any event, if such a means is not – or such a sort-of marketing channel is not available to somebody, it can in some instances be severe."

90. The extent of this evidence goes no further than to state that for some firms who provide RAF services, a form of direct marketing may be foreclosed as a result of the rule. But even if this is so, we have no evidence at all on its impact.

91. We do not know how many firms might be affected, why they don't have other alternatives for low cost marketing that do not infringe the rule, how so-called touts are rewarded and whether this cost is passed on to the consumer or absorbed by the practitioner, whether firms employing touts are more cost competitive than firms who don't, and the most important question whether the foreclosure of this channel has an effect on their fees in the manner alleged.

92. Venter himself would have been a more relevant witness given that he runs a practice suffering this alleged disability to compete; yet he did not testify nor did he call anyone else similarly placed. Whilst Professor Terblanche fairly answered questions put to him, he was not in a position to comment on the essential issue for Venter – why the restriction on this particular form of marketing would have an anticompetitive effect on firms competing in the market for the provision of RAF legal services.

[51] See pages 18-19 of the transcript of proceedings (14 November 2012).

93. Without such evidence or even a prima facie case on this for the CLS to rebut, Venter has failed to make out his case under section 4(1)(a) of the Act regarding the requirement of anticompetitive effect. It is not necessary for this reason for us to comment on whether the CLS has properly justified the existence of this rule.[52]

QUESTION OF WHETHER THE RULE IS OVERBROAD

94. The Commission has suggested, as has Venter, that the Rule is too broad to meet its stated objective.[53] We do not need to decide this issue now, as we are not dealing with an application for the exemption of the Rule, where a concern that a rule is too broadly framed to meet its legitimate objective, might well be a proper consideration for denying it exempt status.

CONCLUSION

95. Since Venter has failed to make out a case under sections 4(1)(a) or 4(1)(b) of the Act, his referral is unsuccessful.

96. On the evidence of the case before us we cannot find that the rule contravenes the Competition Act.

COSTS

97. Although Venter has ultimately been unsuccessful in this matter, at least half the costs of the litigation were incurred as a result of unsuccessful challenges raised by the CLS. We have therefore decided to award it only half of its costs.

GENERAL COMMENT

98. This decision is limited in scope. It has not served to immunise this rule, or its analogue in other Law Societies' books, from future challenge in terms of the Act. It has done no more than decide its validity on the evidence presented. We cannot speculate whether the finding might have been different, if better evidence

[52] Much of Professor Sutherland's evidence went to this aspect and hence we have not needed to consider it.
[53] See the Commission's heads of argument, paragraph 8.3.

of the anticompetitive effects may have been presented. Nor should the decision in anyway influence the fate of the exemption application before the Commission, which regrettably since April 2012 seems to have reached a stalemate.[54]

99. The LSSA and its affiliates owe it to their profession and the clients whom they seek to protect to bring that issue to certainty. Without certainty those more cautious in their interpretation may fail to market themselves more aggressively, in a manner the societies may not consider objectionable, whilst those less scrupulous, may seek to take advantage of an uncertain regulatory regime, to behave in a manner the societies could legitimately claim is unacceptable.

ORDER

100. The referral is dismissed

101. The Respondent is awarded the half the costs of this application on party and party scale, such costs to be paid by the Complainant.

102. No costs are awarded in respect of the First and Second Third Parties' costs.

NORMAN MANOIM

14 October 2013
DATE

Andreas Wessels and Takalani Madima concurring

[54] The LSSA as we noted earlier had applied in 2004 for the exemption of the rules of its member associations. In May 2010 the Commission announced that it had refused the exemption. This process has resulted in a stalemate. The Commission indicated that some of the rules did not qualify for exemption and should be reformulated; amongst those falling in this category were rules prohibiting touting, similar it appears in intent, to the rule in question in this case. This outcome created confusion for the profession. As a result the LSSA and the Commission decided on 17 April 2012 to put out a press statement to clarify the issue. In the press statement the Commission acknowledged that whilst some rules restricted competition and could not be exempted, the rules could not be dispensed with until new ones were promulgated. Both parties indicated practical difficulties with formulating new rules; the Attorneys Act was the problem as well as the pending Legal Practice Bill. In the meantime on the subject of touting rules, it was suggested that they would continue to apply except that any restriction on advertising would be lifted provided the advertising was truthful and not misleading. The path going forward from this was unclear. Both parties undertook to work with one another and the Department of Justice.

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