IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No: J4779/99

In the matter between:

Applicant

and

1st Respondent

2nd Respondent
HOLDINGS (PTY) LTD

3rd Respondent

and in the matter between:

Case no: J421/99

Applicant

and

Respondent

JUDGMENT

Landman J:

1.May attorneys who close their practice, surrender their Fidelity Fund certificate and takes down their shingle, later dust off their gowns and appear and practice as an attorney in the Labour Court? Two such attorneys, one

currently a partner in a multi-disciplinary firm of accountants and lawyers and the other, an employee or director of a private limited company, practise in the Labour Court. They were separately required by this court to justify their right to practise in the Labour Court.

2.The right of an attorney on, what is colloquially called, the non-practising roll of attorneys to practice in the Labour Court, enjoyed the attention of this court in **National Union of Metalworkers of SA & Others v Comark Holdings (Pty) Ltd** (1997) 18 *ILJ* (LC). There Mlambo J held at 518B that:

"It follows that my view is that in proceedings in this court advocates have to be briefed by practising attorneys to enjoy the right of audience in this court. Similarly, attorneys have to be practising attorneys under the jurisdiction of the law society in question. I have come across nothing to indicate that this view is not in line with what the Act envisages."

3.Mlambo J was dealing with the case of an advocate who appeared in this court on behalf of a lay client without a brief from an attorney. To this extent the remarks of the judge were obiter. But the writing was on the wall. An attorney who was not possessed of a trust account and a Fidelity Fund certificate was, at the very least, warned that this court was of the opinion that he or she was not entitled to appear and practice in this court.

DeLoitte and Touche - Mr M Dicks

4.I propose to deal first with the facts pertaining to this issue in Case No J4779/99 where Mr Murray Dicks represented a client and thereafter with Case No J421/99 where Mr Ross Alcock represented a client. I use the word client loosely for in both cases the client appears not to have been the personal client of the attorneys in question but that of their partnership or company respectively. The correct relationship is not of any consequence for purposes of this judgment.

5.Mr Dicks holds a Bachelor of Business Science (1986) and a Bachelor of Laws (1988) degrees from the University of Cape Town. He did his articles of clerkship with Rooth & Wessels in Pretoria (1990 and 1991) and was admitted as an attorney on 25 February 1992 in the Supreme Court (Transvaal Provincial Division). Subsequent to being admitted, he practised as an attorney with Rooth & Wessels. He joined MacRobert, De Villiers, Lunnon and Tindall Inc in 1994 and became a partner of that firm during 1997. He has specialised in the field of employment law since 1992 and has acted on behalf of clients in all the courts, including the Labour Court

and Labour Appeal Court, on numerous occasions. During 1998, he was approached to start up an Employment Law Unit for Deloitte & Touche ("the firm"). He joined the firm's Business Law Solutions division ("BLS") on 1 December 1998. The Employment Law Unit has since inception grown to four attorneys and further expansion is expected during 2001.

5.Mr Dicks is a partner in the firm which is a professional services firm with offices in about 140 countries. The firm provides a wide range of professional services to corporate clients. The South African firm is part of the global firm and is one of the country's leading professional services firms with some 3000 personnel, including 220 partners, in more than 11 offices in Southern Africa.

6.The traditional nature of the firm as an auditing firm has changed dramatically over the past few years. The firm has, together with the other "big five" international professional services firms, over the last few years strategically aligned itself to provide a wide range of professional services to corporate clients. This trend is in line with the international move towards providing professional services as a multi-disciplinary practice. This alignment is also in line with the trend towards globalisation and the needs of their clients to receive a wide range of professional services globally.

7.The services offered by the firm include some of the following: corporate finance, human capital and management consulting services, recruitment services, outsourcing services, taxation services, e-commerce services, information technology and risk advisory services, forensic services, legal services and a wide range of other financial services. The range of professional services has expanded to the extent that income derived from pure auditing services has declined significantly in relative proportion to the firm's turnover. The firm therefore operates as a multi-disciplinary practise and its clients are said to derive significant benefits from this approach.

8.The firm is in the process of establishing a global legal business. The legal business in South Africa was started approximately three years ago and is situated in the firm's BLS. The South African firm employs some 120 lawyers, although the majority practise in other disciplines such as tax or forensics. BLS currently employs some 25 admitted attorneys based in all the major centres. All these attorneys, including Mr Dicks, have previously practised as attorneys in private practice. They have, as required by the current relevant law society rules, all removed themselves from the practising roll of attorneys.

9.BLS does not provide services defined as reserved work in terms of the Attorneys Act 53 of 1979. Such work is currently referred to practising attorneys. Mr Dicks states that notwithstanding the fact that the current law society rules prevent the firm's attorneys from attending to reserved work, the firm requires each of their practitioners at all times to conduct themselves within the parameters of the attorneys profession. The firm is in regular discussions with the relevant Law Societies and have made it clear that they believe in the concept and benefits of multi-disciplinary practices. The firm has also proposed that their attorneys would prefer to remain within the regulated profession. Mr Dicks says that various developments relating to multi-disciplinary practices in South Africa and in other jurisdictions seem to indicate that the barriers and resistance to multi-disciplinary practices are crumbling. Mr Dicks believes that the advantages of this form of practice totally outweigh the disadvantages or potential pitfalls.

10.BLS currently provides the following services to the firm's clients: commercial and corporate law, employment law, environmental law and electronic law.

11.The firm is comprehensively insured in United States dollars in respect of any liability arising from all professional services rendered. The insurance cover in this regard, according to Mr Dicks, exceeds any cover that he may have had in respect of any Fidelity Fund certificate issued to him.

12.The Employment Law Unit provides a complete range of employment law services to corporate, public service and parastatal clients. These services are provided in conjunction with other professional consulting services offered by the firm to its clients, with the result that clients receive a comprehensive range of specialised services. The Employment Law Unit works particularly closely with the tax, forensics and human capital consulting divisions of the firm, and assist our clients in providing complete human capital solutions. Their focus is to institute systems and procedures which assist their clients in becoming employers of choice and which will therefore reduce employment disputes. However, they do advise their clients in dispute resolution if and when disputes arise in the workplace.

13.On 4 October 2000 I directed that matter J4779/99 not be enrolled for trial until this court rules on the validity of the documentation filed and signed by a member of a firm of chartered accountants. The documentation was signed by Mr Dicks.

14.Mr Dicks filed an affidavit during January 2001. The applicant's attorney filed an answering affidavit on 6 April. The applicant's attorneys addressed letters to the Registrar on 15 May, 29 May, 15 June, 20 June, 10 July, 21 July, 4 August, 31 August and 18 September 2000. These letters requested the registrar to enroll the matter for hearing on the point raised by this court. In 2001 further letters in similar vein were addressed on 29 May, 31 July and 16 August. The registrar apparently did not reply to any of these letters. In September the file came to my attention and I directed that I would hear the matter in the recess. It was argued on 11 October 2001.

15.The delay is regrettable and prejudicial to the applicant. The matter will be referred to the Judge President. No doubt the applicant will consider claiming compensation for his loss.

Edward Nathan and Friedland (Pty) Ltd - Mr Ross Alcock

16.Mr Ross Alcock was a partner or director of Edward Nathan & Friedland Inc. In October 1999, the corporate commercial business (including the labour law business) of Edward Nathan & Friedland Inc, a firm of attorneys incorporated as such in accordance with the provisions of the Attorneys Act 53 of 1979 was purchased by Nedcor Investment Bank. The effective date of the transaction was 1 January 2000. The firm in effect ceased to exist on 31 December 1999. On 1 January 2000 Edward Nathan & Friedland (Pty) Ltd came into existence. This company is not a professional company as contemplated in the Attorneys Act. The company commenced trading as corporate law advisors and consultants and not as attorneys, notaries or conveyancers as contemplated by the Attorneys Act.

17.The company examined the Labour Relations Act 66 of 1995 (the LRA) as to whether admitted attorneys, employed by the company in its labour law business, were entitled to continue signing pleadings and appear in the Labour Court and Labour Appeal Court. Mr Alcock says that the company formed the opinion that the admitted attorneys employed in the department could continue to sign pleadings and appear in the Labour Courts. Consequently, these attorneys have continued to sign pleadings and appear in the Labour Court and the Labour Appeal Court in the name of the company on its clients' behalf.

18.On 10 March 2000, a pre-trial conference was conducted in matter J 421/99. Mr Alcock represented the respondent and Mr Jafta Mphahlani represented the applicant. On 6 June 2000, the first pre-trial minute in this matter was filed at the Labour Court. It was signed by Mr Mphahlani and Mr Alcock in his capacity as a director of the company.

19.On 17 August 2001 I caused a letter to be sent to the representative of the respondent, Mr Alcock of the compnay. Mr Alcock was asked:

"1. Is Edward Nathan and Friedland (Pty) Ltd a professional company as contemplated in the Attorneys Act 53 of 1979?

2. If not, was this company represented by its employee or director entitled to represent the Respondent?

3. Was a valid pre-trial conference held?

4. Is the company's employee or director entitled to appear in the Labour Court?"

20.On 31 August Mr Alcock sent a letter to my associate stating that settlement talks were in progress and that if they came to naught his company would withdraw as legal practitioners. No answer was tendered to my queries. On 10 September I caused a letter to be sent to Edward Nathan Friedland (Pty) Ltd stating that in view of their failure to reply to my directive the matter would be enrolled in the motion court. This did not elicit a response. On 18 September 2001 Knowles Husain Inc came on record as attorneys for the respondent. On 27 September the parties were informed that the matter would be heard on 11 October 2001.

21.On 1 October 2001 Knowles Husain Inc informed my associate, inter alia, that:

"We have endeavoured to arrange a Pre-Trial Conference with the attorney representing the Applicant but as yet a time and date has not been arranged...

Please note that as a precaution and to the extent that it is necessary, this firm will be refiling all of the pleadings filed by our client together with a condonation application dealing with, inter alia, ENF's representation of our client."

22.On 4 October Knowles Husain Inc informed my associate that:

"We draw to your attention that the Applicant' representative, Mr Jafta Mphahlani was not (and is not) entitled to represent the Applicant as he does not comply with the provisions of Section 161 of the Labour Relations Act 66 of 1995 and request that this particular feature be investigated further.
We have made enquiries from the Law Society who have advised that although Mr Mphahlani completed his articles, he never applied for admission and further if one has regard to his letterheads, he conducts business as Jafta Mphahlani & Associates Professional Consultants CC (CK 98/19095/23)."

This letter does not indicate that it was copied to Mr Mphahlani.

23.On 10 October Mr Alcock filed an affidavit. He says:

"On or about 27 October 2000, the company received a document from the Labour Court which, inter alia, appeared to question the validity of the respondent's pleadings filed of record in this matter."

This may be the query which I had directed to the company. But as I have not found a copy of my associate's letter I cannot say that this is so. But the company says it proffered no reply.

24.Mr Alcock explains why the company did not reply to the query made on 17 August 2001. He says:

"All the pleadings in this matter had, however, been filed by the firm on behalf of the respondent prior to the termination of the firm's operations, except for the pre-trial minute as aforementioned.
After receiving conflicting opinions from Counsel with regard to the company's right to sign pleadings and represent clients in the Labour Courts, the company decided that it would be prudent to have the pre-trial minute signed by the respondent itself. This was done and the pre-trial minute was re-filed at the Labour Court.
The re-filed pre-trial minute does, however, make specific reference to the fact that I represented the respondent and Mphahlani represented the applicant at the pre-trial conference.
On or about 17 August 2001 and consequent to the re-filing of the pre-trial minute as aforementioned, the company received a directive from the Honourable Judge Landman which contained specific queries relating, inter alia, to the company's status and questioning its ability to represent the respondent at the pre-trial conference in this matter.

In these circumstances, the company took a policy decision not to prejudice or risk prejudicing the respondent's case in the light of the aforementioned queries by Judge Landman. Accordingly, the company considered it prudent, rather than involving the respondent in a dispute regarding the company's ability to represent and sign pleadings in the Labour Courts, to inform Judge Landman that the company intended withdrawing as representatives of record in this matter.

On 31 August 2001 and within the 10 (ten) day period prescribed in Judge Landman's directive, I faxed a letter to judge Landman's associate informing him of the company's aforementioned intention.

In these circumstances, the company was of the bona fide view that in the light of its intention to withdraw as representative of record, it was not required to answer the specific questions contained in Judge Landman's directive. "

25.No explanation was offered as regards the query of 27 October 2000. The company's explanation for its decision not to answer my directive of 17 August 2001 is that it did not wish to prejudice its client. I accept that this true but it does not excuse Mr Alcock from answering the query. It appears from Mr Alcock's affidavit that Edward Nathan Friedland (Pty) Ltd were nevertheless intent on continuing to practise in this court. And they are doing so.

26.Edward Nathan Friedland (Pty) Ltd and Mr Alcock's withdrawal was simply a tactical withdrawal to avoid this court deciding on their right to practise in this court. It was discourteous to this court in the extreme and unbecoming an officer of the High Court.

27.Mr Jammy, who appeared on behalf of Mr Alcock, contended that there was nothing to answer as the minutes had been refilled. Nevertheless, Mr Jammy was content to rely on the submissions presented in case no J 449/99 on behalf of Mr Dicks.

The submissions

28.Mr Dicks, in an affidavit, sets out various reasons why he is of the opinion that he is entitled to practice in this court. There reasons were amplified by Mr Jammy who appeared for him.

29.It is Mr Dicks's view that the question whether or not persons who are admitted as attorneys but are not in

possession of Fidelity Fund certificates are entitled to appear before the Labour Court and the Labour Appeal Court, depends on whether or not the words "admitted to practice" mean "entitled to practise" or merely "admitted and enrolled" as envisaged in s 15(1) of the Attorneys Act. He points out that the definition of "attorney" in the rules of the High Court applies to attorneys who are "admitted, enrolled and entitled to practise as such in the division concerned."

30.Mr Dicks submitted that s 161 of the LRA, read with the definition in s 213 of "legal practitioner", confers upon all person "admitted to practise" the right to appear on behalf of others before the Labour Court and, by virtue of s 178, in the Labour Appeal Court. Given the background of the other laws referred to above, a simple literal interpretation of the definition means that a person who has been admitted as an attorney is entitled to act on behalf of clients and appear in the Labour Court and Labour Appeal Court. Had the legislature wished to reserve this work for practising attorneys only, it would have said so clearly in line with the wording already used in previous legislation, such as for example the definition in the High Court Rules.

31.He submits that the basis of employment law lends itself to the informal regulation of labour disputes. It is for this reason that the legislature saw fit in s 161 of the LRA to allow persons other than legal practitioners (directors, employees, agents of councils, trade union officials, etc) to appear on behalf of others in the Labour Court. There is clearly no intention here, as there is for instance in the case of the High Court, to reserve this work for attorneys and advocates only. He submits that he is certainly, from a legal perspective, better qualified and more experienced than the majority of these "other persons" to represent clients in the dispute resolution proceedings. I may add that I can vouch for this by reason of my personal knowledge of Mr Dick's ability.

32.Mr Dicks submits that he is entitled to represent clients in the Labour Court and Labour Appeal Court since this is not work which has specifically been reserved for practising attorneys only. In addition, he has been admitted to practise and therefore complies with the definition as set out in s 213.

An attorneys' right to practise in the Labour Court

33.I turn to examine whether these submissions are correct. A litigant who is a natural person may appear in the Labour Court in person or be represented by:

1.a legal practitioner;

2.a director or employee of the party;
3.any member, office-bearer or official of that party's registered trade union or registered employers' organisation;
4.a designated agent of a council; or
5.an official of the Department of Labour.

See s 161 of the LRA.

34.In terms of s 178 of the LRA the same persons may appear in the Labour Appeal Court.

35.A legal practitioner is defined in s 213 of the LRA, as meaning "any person admitted to practice as an advocate or an attorney in the Republic." The term "attorney" is not defined in the LRA. There can, however, be no doubt that currently one must look to the Attorneys Act to determine who is an attorney.

36.Who qualifies as an "attorney admitted to practice"? Mr Dicks and Mr Alcock say that this refers to an attorney who has been admitted by the High Court (or its predecessor) and enrolled as an attorney. They contend that this is all that is required. These attorneys are not, as are attorneys eg who practise in the High Court, required to have a trust account and a Fidelity Fund certificate.

37.The crucial phrase is the phrase "any person admitted to practice as an attorney in the Republic". This phrase has long been in use in the countries which contributed to our judicial heritage and has been used in this country from at least the 19th century.

38.Van Blommestein **Professional Practice for Attorneys** (1965) 15 reproduces Van Zyl's **Brief History of the Law of Attorneys so far as South Africa is Concerned**. An extract of the Plakaat of Charles V of 20 August, 1551 (Van Zyl's translation) reads:

"No one shall in future be admitted as an advocate or an attorney to practise daily in court unless he has the necessary qualifications and has obtained permission from the court to practise there ...."

39. The South Africa Act of 1909 used the phrase "attorney admitted to practice" in s 115(1) of the Act. The Act provided that the laws regulating the admission of advocates and attorneys to practice before any Superior Court of any of the Colonies shall, mutatis mutandis, apply to the admission of advocates and attorneys to

practice in the corresponding division of the Supreme Court.

40.The Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 dealt with the admission and enrollment of an Attorney in s 4 and defined an "attorney" in s 1 as "any person duly admitted to practise as an attorney-at-law within any part of the Union".

41.The Admission of Advocates Act 74 of 1964 also speaks of the power of any division of the Supreme Court to "admit to practice and authorize to be enrolled as any advocate" any person who upon application made by him or her satisfies the court about certain matters. See s 3(1) of the Act.

42.The Attorneys Act 53 of 1979 provides that unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with the Act, "admit and enroll" any person as an attorney if certain requirements are met. See s 15. See also s 2(1)(a) of the State Attorney Act 56 of 1957. An enrolled attorney may be removed from the roll if the attorney is not a fit and proper person "to continue to practice as an attorney." See s 22(1)(d) of the Attorneys Act.

43.There can be no doubt that the phrase "attorney admitted to practice", occurring in legislation, is the historic phrase employed to describe an attorney admitted and enrolled by a superior court (the Supreme Court or the High Court) to practice before the court.

44.This being so, it is clear to me that s 161(a) of the LRA contemplates, as a minimum, a person who has been admitted to practice as an attorney and enrolled as such.

45.But in addition there is at least one implied qualification. Although this was not canvassed during argument, it must be beyond doubt that the attorney must still be on the roll kept by the registrar of the Superior Court. Attorneys who have been struck off or removed by own request or suspended would not be embraced in s 213 of the LRA even though they had been "admitted to practise". The definition of "legal representative" in s 1 of the Labour Relations Act 28 of 1956 seemed, if the definition is taken literally, to allow for this.

46.Are there other requirements? To decide this it is useful to consider what happens after an attorney is admitted to practice and enroled. Once this has occurred and the attorney has been sworn in the attorney was entitled to practice his (and from 1923 her) profession within the territorial jurisdiction of the Superior Court. An attorney

admitted to practice is not obliged to practice the profession of an attorney. An attorney admitted to practice could decide not to practice for various reasons. Often an articled clerk (now a candidate attorney) applied for admission to avoid the lapsing of his or her service of articles of clerkship with would ensue if the clerk did not apply for admission as an attorney within the prescribed period.

47. However, an attorney who wished to pursue the right to practice which had been obtained by being admitted and enrolled as attorney, was in addition required as from 1 January 1942 to apply for and be issued with a Fidelity Fund certificate. This requirement (now contained in s 41 of the Attorneys Act) impinges on the freedom to practice an attorney's profession. It was introduced by Parliament in the public interest to protect the clients from those of their numbers who were unscrupulous in their dealing with their clients' money. See the observation in **Society of Advocates of Natal v De Freitas and another** 1997 (4) SA (N) 1134 at 1158C-F:

"Section 26 provides that a purpose of the fund is to compensate persons who have suffered loss as a result of theft by an attorney of money entrusted to him in the course of his practice. Section 41 provides that no attorney may act as such unless he is in possession of a Fidelity Fund certificate which is issued annually on compliance by the attorney with all lawful requirements of the Law Society. All these provisions have been enacted to ensure that an attorney keeps a proper account- in the form of books of account- of all moneys paid to him or held by him or paid by him on account of any person. The further object is to safeguard moneys held by an attorney on behalf of any person from theft by the attorney and also against claims of the attorney's creditors and to compensate a person who has suffered loss as a result of theft of moneys held by an attorney on his behalf. These provisions, so carefully structured for the protection of the client against the knavishness if not the greed of the attorney, have no application to the advocate- not because he is more honest but because he does not handle trust money in the ordinary course of his practice."

48. It would seem to follow that an attorney admitted to practise and who wishes to practise in the Labour Court must have a Fidelity Fund certificate. The LRA does not add the requirement that the attorney should have a trust account and a valid Fidelity Fund certificate. Of what significance is this? There was in my view no need to say anything specific. Once the LRA speaks of an attorney admitted to practice, it follows beyond a shadow of a doubt that the principal law governing the practice of attorneys would govern the situation as it does the practice of attorneys generally. If the legislature wished to exempt an attorney from certain fundamental provisions of the Attorneys Act it would have said so. The contrary submission is at odds with the integrated nature of our legal system.

49. Although s 210 of the LRA provides that this Act trumps any other Act in the event of a conflict I am of the view that there is no conflict between the Attorneys Act and s 161 of the LRA. See **Sethobsa v Kya-Sands Services Centre** [2001] 3 All SA 379 (LC).

50. It becomes necessary to examine whether the attorneys in question, on the facts before me, practice the profession of an attorney. The meaning of the phrase "to practise as an attorney" has been considered in **R v Zeiss** 1961 (1) SA 610 (T) 613D. It was decided, with reference to **R v Cornelius** 1945 TPD 258, that this phrase means "doing acts pertaining to the profession of an attorney and it means doing them, that is for fee, gain or reward." These decisions were applied in **General Council of the Bar of South Africa v Van Der Spuy** 1999 (1) SA 577 (T).

51. Ebrahim J in **Lake v Law Society, Zimbabwe** 1987 (2) SA 459 (Z) held at 470C-G:

"The difficulties experienced in interpreting the word "practise" have revolved around the question of whether it is necessary to prove a series of acts of a similar nature to prove a practice or whether an isolated instance would suffice. Cases decided around the turn of the century seemed to suggest that "to practise" implied a habitual or continual course of conduct (see eg *R v Hannah* 1913 AD 484 and *Apothecaries Company v Jones* [1893] 1 QB 89. In *R v Weitz* 1930 EDL 311, the conviction of an attorney for practising or carrying on business without a licence was sustained on the basis that he had performed a series of acts which could be performed only by an attorney. His defence was that he was merely finishing a matter which arose before he ceased practice. The Judge observed that:

'A single case, if of sufficient magnitude, or if sufficiently protracted, might take so much time, and the conduct thereof might constitute such a continuous series of acts that no one would hesitate to say that the attorney who acted in that case was "practising" or "carrying on his profession" notwithstanding the fact that it was the only matter in which he was engaged...' (At 315)

In *Bowker v Registar of Deeds* 1939 AD 401 at 408, De Wet JA held that, in regard to practice as a notary:

'It may not be necessary to establish a series of acts to show that the appellant practises in the province within the meaning of the Act, but if reliance is placed on one act it must be of such a nature that if it was repeated the series would undoubtedly constitute "practising" in a continuous sense.'

And at 471F-H:

"In South Africa it has been held that 'whatever is normally part of an attorney's practice is part of his profession'. (*Ellert v Commissioner for Inland Revenue* 1957 (1) SA 483 (A) at 490B.) It will be remembered that in South Africa attorneys' practice consists of much extra-legal work. With due respect to Centilivres CJ, I do not think this wide interpretation is justified. It seems to me that the view of Hoexter JA as expressed at 491G is more tenable:
'the words "when acting in his professional capacity" mean "when he carries on any business in which his legal knowledge and experience give him advantage over the ordinary layman".'

And at 472G-I:

"It is right and proper that the parameters of the profession should be defined and practitioners subject to control and discipline but one cannot lose sight of the fact that areas do exist where the profession of necessity intermingles with the rest of society. No field of endeavour is discrete. This becomes increasingly obvious with the passage of time. It is necessary to adapt ways and means to changing circumstances, preserving the essence of experience while adopting new forms, where appropriate."

52.I assume that if Mr Dicks and Mr Alcock "practise" in this court they do so for gain for gain.

53.Mr Dicks submits that an attorney admitted to practice may, I use the neutral word "operate", in the Labour Court because representing clients in the Labour Court is not attorneys work. He bases this on the following:

(a) A distinction needs to be drawn between work:

(i) which has in terms of the law specifically been reserved for admitted attorneys who are also entitled to practise because they are on the practising roll and in possession of a Fidelity Fund certificate; and

(ii) which any legally qualified person is entitled to do.

(b) An example of work which falls into the former category would be High Court litigation. Work which falls into the latter category, would be general legal advice, opinion work and the drafting of commercial agreements

excluding partnership agreements.

(c) A person does not practise as an attorney unless he does work which is reserved for an attorney. It is not sufficient that he does work which attorneys perform but which members of the public may also perform.

(d) Work that has been reserved for practising attorneys only is clearly spelt out in the Attorneys Act. The Minister has not availed himself of the right to designated proceedings before the Labour Court or the Labour Appeal Court under s 83(3) of the Attorneys Act reserved work.

54.Section 83(8)(a) of the Attorneys Act provides some guidance as to what is "legal work". It provides that:

"Any person, except a practising practitioner, who for or in expectation of any fee, gain or reward, direct or indirect, to himself or to any other person, draws up or causes to be drawn up or prepared any of the following documents, namely. . .

(v)any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic

shall be guilty of an offence and on conviction liable in respect of each offence to a fine not exceeding R2 000 and in default of payment thereof to imprisonment not exceeding six months."

The Labour Court is a court of civil jurisdiction. That the LRA allows certain other person to do the same work does not detract from the fact that this is attorney's work par excellence.

21.It is rather astonishing to be told that an attorney who practices in a superior court of law regards the work as not being "legal work". It is true that a variety of other persons may appear in the Labour Court. But they, unlike an attorney, may not represent the general public. A director of a company may only represent the company employing him or her. An official of a registered trade union may only represent the union or a member of the union and likewise an official of an employers' organisation. Officials of the Department of Labour or Bargaining Council represents their institutions.

22.An attorney and an advocate may appear in the Magistrates' Court. So too may an officer appear on behalf of a local authority, company or other incorporated body eg a registered trade union. See rule 52(1)(b) of the Magistrates' Courts Rules of Court. If Mr Dicks is correct then he can appear in the Magistrates' Court without

a Fidelity Fund certificate because he would not be engaged in "legal work".

23.Bearing in mind the passage in the **Lake v Law Society, Zimbabwe** at 472G-I that one must examine the concept of practising law in the context of each case, I am of the fixed opinion that the act of representing a client for reward in the Labour Court constitutes practising as an attorney. This being so the attorney must be in possession of a Fidelity Fund certificate.

24.I may add that if s 161 is to be interpreted so as not to require adherence to the fundamentals of the Attorneys Act then it follows that similarly worded statutes should be interpreted in the same way ie without limitations on the Fidelity Fund certificate rule, or in the case of Advocates the referral rule.

25.Section s 3(1) of the Right of Appearance in Courts Act 62 of 1995 reads:

"Any attorney shall have the right to appear on behalf of any person in any court in the Republic, except the Supreme Court and the Constitutional Court."

26.An attorney is defined as:

"Any person duly admitted and enrolled as an attorney in terms of-

a)the Attorneys Act, 1979 (Act No 53 of 1979); or

b)any law providing for the admission of attorneys in any area in the Republic which remained in force by virtue of section 229 of the Constitution."

See s 1 of the Act. This wording corresponds to a great extent with s 161 of the LRA. I leave out of account the provisions of the Act regarding the right of certain attorneys to appear in the High Court.

61.In **Society of Advocates of Natal v De Freitas and another** 1997 (4) SA 1134 (N) at 1158C-F the respondent submitted that s 2 of the Act meant that he now had a right to practise in any court unencumbered by the referral rule. The court held at 1171E-H:

"Before the enactment of this Act, advocates had the right to appear on behalf of any person and in any court in the Republic. (See in this regard s 6 of Act 74 of 1964.) There may of course be circumstances which would

make it unethical for an advocate to appear for a particular client in a particular case and that would still be the case despite the provisions of s 2.

So, what then was the object of the Legislature in enacting s 2? Counsel for the respondents submitted that the intention could only have been to invalidate the rule of conduct of the Society of Advocates in terms of which an advocate may only accept instructions from an attorney and not directly from a client. One need only state this proposition to realise that it is untenable. If the Legislature wanted to invalidate the rule it would certainly have used a less obscure way of expressing its intention."

62.The **De Freitas** decision was upheld on appeal. See **De Freitas and another v Society of Advocates of Natal** 2001 (3) SA 750 (SCA). The **De Freitas** decision was also followed in **General Council of the Bar of South Africa v Van Der Spuy** at 605D-F.

63.The Right of Appearance in Courts Act of 1995 was held not to override a provision in the Patents Act 57 of 1978 position of attorneys vis-á-vis this Act in **Bekker v Steyn** [1998] 2 All SA 275 (CP).

64.The rules of the Constitutional Court draw a distinction between person who may appear in the court and those who may otherwise practice in that court. The latter includes a legal representative as defined in rule 1. A "'legal representative` means an advocate admitted in terms of section 3 of the Admission of Advocates Act, 1964,(Act 74 of 1964), or an attorney admitted in terms of section 15 of the Attorneys Act, 1979 (act 53 of 1979)". If the contentions of Mr Dicks and Mr Alcock are correct they may practice in the Constitutional Court without a trust account and a Fidelity Fund certificate.

65.I find that Mr Dicks and Mr Alcock do not have the right to practice in this court. It is unnecessary, for purposes of this finding for me to investigate any other matters such as the fee structures and the like.

66. Their purported acts are null and void. See **Van Wyk v Dando & Van Wyk Print (Pty) Ltd; Taylor v Dando & Van Wyk Print (Pty) Ltd** (1997) 18 *ILJ* (LC).

67.I make the following orders:

A. In the matter of **JOHANN PHILIP MARX v STALCOR and others** J497/99:

1. It is declared that the Mr Murray Dicks, a partner of Deloitte & Touche, is not entitled to practice for gain in the Labour Court unless he complies with s 41 (1) of the Attorneys Act 53 of 1979.
2. The pleadings, documentation and pre-trial minute signed by Mr Dicks is declared null and void.

3. The respondent may file pleadings and a pre-trial minute prepared and signed by a legal practitioner who has complied with s 41 of the Attorneys Act or another representative referred to in s 161 of the Labour Relations Act 66 of 1995 within 10 days of this order.

4. If the applicant does not object to the re-filing of the documents the matter is enrolled for trial on 19 November 2001.

5. Mr Dicks, as a partner of Deloitte & Touche, is ordered to pay the costs of the hearing on 11 October 2001 and the wasted costs incurred by the applicant on an attorney and client scale.

er of **JUAN REYNALDO GLAUBITZ v PRESTON ANDERSON CC** J421/97:

1. It is declared that the Mr Alcock, a director of Edward Nathan Friedland (Pty) Ltd, is not entitled to practice in the Labour Court for gain unless he complies with s 41 (1) of the Attorneys Act 53 of 1979.

2. The pre-trial minute signed by Mr Alcock, date stamped by the registrar 9 June 2000, is declared null and void.

3. Mr Jafta Mphahlani is called upon to show cause in motion court on 4 December 2001 why

a. he is entitled to practice in this court;
b. whether the pleadings and pre-trial minute are valid.

4. The registrar is directed to send a copy of this judgment to Mr Mphahlani and to Mr Glaubitz.

C.The registrar is directed to refer a copy of the judgment to the Transvaal Law Society.

Signed and dated at BRAAMFONTEIN this 22nd day of October 2001.

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A A Landman

Judge of the Labour Court of South Africa

J4779/99

11 October 2001

22 October 2001

Adv R Strydom instructed by *Marais Botha Inc.*

Adv P Jammy instructed by *Knowles Husain Inc.*

J421/99

11 October 2001

22 October 2001

No appearance.

Adv P Jammy instructed by *Knowles Husain Inc.*