THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 659/2013

Reportable

In the matter between:

Grant Logan Wishart	**First Appellant**
Malcolm Grant Wishart	**Second Appellant**
Shabier Bhayat	**Third Appellant**

and

The Honourable Mr Justice P Blieden NO	**First Respondent**
Advocate John M Suttner SC	**Second Respondent**
Advocate Allan J Eyles	**Third Respondent**
Attorney Mr Wessel J J Badenhorst	**Fourth Respondent**
BHP Billiton Energy Coal South Africa Limited	**Fifth Respondent**
Neil McHardy NO	**Sixth Respondent**
The Master of the High Court, Pietermaritzburg	**Seventh Respondent**

Neutral Citation: *Wishart v Justice P Blieden NO* 659/13 [2014] ZASCA 120 (19 September 2014)

Coram: Lewis, Maya, Willis, Swain JJA and Mocumie AJA

Heard: 25 August 2014

Delivered: 19 September 2014

Summary: The common law does not recognize a right of an individual to restrain a lawyer from acting against him or her where the individual has never been a client of the lawyer and where the lawyer does not have confidential information in respect of that individual. The application by the appellants to restrain three of the respondents (lawyers) from examining them in an insolvency inquiry was not supported by the facts and this was not a case in which to develop the common law.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Gorven J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel where so employed.

JUDGMENT

Lewis JA (Maya, Willis and Swain JJA and Mocumie AJA concurring)

[1] The appellants in this matter argued in the high court and in this court that we should develop the law in relation to legal practitioners acting against former clients. The high court (Gorven J in the Kwazulu-Natal High Court, Pietermaritzburg) declined to do so as the facts did not support the application of the principles they contended it should adopt. It dismissed their application for an interdict restraining the respondents from examining them in an insolvency inquiry. The high court nonetheless gave them leave to appeal to this court.

[2] By the time the appeal was heard the first appellant, Mr Grant Wishart (Wishart), had been sequestrated. The trustees of his estate have elected not to participate in the appeal and abide the decision of this court. Counsel for the appellants argued that Wishart still had a residual interest in pursuing the appeal, a matter to which I shall turn after dealing with the merits of the appeal.

The history

[3] The appellants, Wishart, his father Mr Malcolm Wishart (Wishart Snr), and Mr Shabier Bhayat are directors and officers of a number of companies owned by the

Wishart family through a number of trusts. I shall refer to each of them by name, or as 'the appellants' collectively. They applied to the high court for an order restraining the respondents, Mr W Badenhorst, an attorney, Mr John Suttner SC and Mr Alan Eyles, the latter two being advocates practising at the Johannesburg Bar, from interrogating the appellants at an inquiry into the business and affairs of Avstar Aviation (Pty) Ltd (Avstar) in terms of ss 417 and 418 of the Companies Act 61 of 1973. I shall refer to the attorney and counsel collectively as 'the lawyers'.

[4] A retired judge, P Blieden J, was appointed to preside over the inquiry. At the instance of BHP Billiton Energy Coal South Africa Ltd (Billiton) he issued a summons against Wishart to appear at the inquiry and disclose specified documents. Subpoenas were also issued against Wishart Snr and Bhayat. At the commencement of the inquiry on 20 July 2007, an attorney representing the appellants, Mr P J Schoerie, appeared on behalf of the Wisharts and Bhayat and advised that they refused to be interrogated by Suttner and Eyles since they, and Badenhorst who had instructed them, had previously acted for companies of which they were directors or in which they had interests.

[5] After much discussion Judge Blieden ordered that the inquiry continue: he had not been advised of the precise nature of the appellants' complaints; he was appointed only to see that the inquiry was conducted fairly; privilege was not a factor that he was required to take into account and the purpose of the inquiry under ss 417 and 418 was to obtain a full explanation about Avstar's activities, but not to make any finding in that regard.

[6] The order prompted the application to the high court the following day for an interdict (and other relief that is not now relevant) against the lawyers, restraining them from examining any of the appellants at the inquiry. Judge Blieden was cited as the first respondent, in his capacity as commissioner. Billiton was also cited as a respondent as was the master of the high court. Only the lawyers have participated in the appeal against the order of the high court that they not be so restrained. As I have said, the high court refused the relief sought.

[7] The appellants were not ever clients of any of the lawyers. But, they argued, they had interests in and were variously directors of companies that had instructed Badenhorst, who had in turn instructed Suttner and later Eyles, on certain matters pertaining to the companies. That, they argued, had made them 'quasi-clients' or 'informal clients', who were entitled to object to the lawyers acting against them on the basis that they had a conflict of interest. It is necessary to set out the facts that underlie these claims before determining the legal principles.

The companies which had instructed the lawyers

[8] The companies in which the appellants had interests or which they directed are, first, Avstar, into which the inquiry was instituted after its liquidation; second, Eurocoal (Pty) Ltd (Eurocoal), which was a holding company of entities that held coal mining rights; third, Rietspruit Crushers (Pty) Ltd (Rietspruit) which had a quarry and stone crushing business and fourth, Colt Mining (Pty) Ltd (Colt), a mining company.

[9] Billiton, which Badenhorst had represented over a period of over seven years, is a member of a multi-national group of companies that have mining interests and other businesses. It had launched arbitration proceedings against Eurocoal in February 2007 in respect of Eurocoal's repudiation of a long-term coal supply agreement. The claim for damages against Eurocoal was for some R240 million, and Billiton has not succeeded in recovering this sum despite an arbitration award against Eurocoal and obtaining orders for the liquidation of both Eurocoal and Avstar.

[10] The lawyers have had minimal interaction with any of the companies other than Billiton whom they represented in the arbitration against Eurocoal. The facts are largely common cause, and Gorven J's factual findings in the high court are accepted by the appellants on appeal. The precise relationship between the Wisharts and Bhayat, on the one hand, and the companies which they claim were the clients of the lawyers, on the other, is not important for the purpose of the appeal. Suffice it to say that they claim to have been intimately involved with the running of these companies although their holding in certain instances is indirect.

The instructions to the lawyers by the various companies

The settlement meeting

[11] Badenhorst had acted as Billiton's attorney over a lengthy period and at all times against Eurocoal in the arbitration. Wishart was present throughout the arbitration proceedings. The legal manager of the various Wishart companies, Mr Rory Loader, suggested a meeting between Wishart and Badenhorst to discuss a possible settlement. Loader, during a period when he was an advocate practising at the Johannesburg Bar, had come to know Badenhorst when he was previously serving his articles of clerkship as an attorney. Wishart, Loader and Badenhorst met on 7 March 2008 to discuss settlement. Wishart made a settlement proposal to Billiton. Badenhorst said that Billiton would consider the proposal but signaled to Wishart that, if Eurocoal did not honour its commitment to deliver coal, Billiton would pursue a substantial damages claim. And if it could not satisfy the claim, Billiton would apply to wind-up Eurocoal and would pursue a claim under s 424 of the Companies Act against Wishart personally. Wishart claimed subsequently that he had no recollection of this meeting, but Loader did have, and said that he had advised that a damages claim was unlikely to yield any commercial benefit to Billiton. Billiton did not, in the end, accept the settlement proposal.

[12] Shortly after the meeting to discuss settlement, Badenhorst, on behalf of Billiton, briefed Suttner to advise on the dispute with Eurocoal. They decided to pursue an application for the winding-up of Eurocoal as a strategy to force it to honour the arbitration award. Eyles was briefed to assist Suttner with the drafting of the application. The application was met with a legal defence and Billiton then claimed only the costs in the arbitration against Eurocoal.

The Avstar instruction

[13] On 21 March 2008, Loader and Wishart, representing Avstar, briefed Badenhorst on a dispute between Avstar and 1Time airlines. Loader asked Badenhorst to assist and assured him that there would be no difficulty with a conflict of interest as the matters were unrelated. Badenhorst accepted the instruction and briefed Suttner in the matter. Loader said, in his affidavit in a different application brought before the South Gauteng High Court (attached to Badenhorst's answering affidavit in the application before the high court in this matter), that the reason he had

approached Badenhorst was to afford Wishart access to Badenhorst, as the Billiton attorney, in an effort to settle the matter between Billiton and Eurocoal. The other lawyers were not briefed in this matter although Badenhorst did discuss it with Suttner informally.

[14] Badenhorst received copies of contracts between Avstar and 1Time and met twice with Loader and the managing director of Avstar. It was agreed that Loader would attempt to settle the dispute with 1Time and Badenhorst had nothing further to do in connection with this dispute.

The Colt and Rietspruit instructions

[15] Loader again contacted Badenhorst and advised that Colt and Rietspruit had a dispute with Safair (Pty) Ltd (Safair) and that Safair was claiming more than R37 million from each in respect of the purchase of aircraft. Letters sent to Colt and Rietspruit by Safair on 26 March 2008 suggested that it would bring liquidation applications against them. This dispute, like the Safair one, had nothing to do with the Billiton and Eurocoal matter. But the Wisharts were involved in both companies.

[16] Badenhorst agreed to represent Colt and Rietspruit, having received the assurance from Loader that there was no conflict of interest, and in turn briefed Suttner to act. The lawyers decided to call for documents relating to the dispute with Safair, including Colt and Rietfontein's most recent financial statements. They drafted a letter to Safair pointing out that both companies were solvent, and requesting an undertaking that no liquidation proceedings would be instituted. In the event that the undertaking was not given, Suttner suggested that he and Badenhorst meet Loader, which in fact happened on 7 May 2008.

[17] Badenhorst and Suttner then drafted applications for Colt and Rietspruit to forestall liquidation proceedings. They consulted several times with Loader and on two occasions with Wishart. Wishart advised Suttner that his father had authorized the applications but should not be involved in the litigation. The lawyers received the financial statements of Colt and Rietspruit, referred to them in the papers and annexed them to the founding affidavits. Urgent applications were launched and an

interim order was obtained on 9 May 2008. Eyles was briefed to assist in the applications subsequently.

[18] After Safair had filed its answering affidavits, Suttner and Eyles prepared replying affidavits for Colt and Rietspruit, consulting Loader for this purpose but not Wishart. They also prepared heads of argument. The urgent applications were set down on 3 June 2008 but the parties agreed to submit their disputes to arbitration instead. Suttner and Eyles started to prepare the statements of claim for Colt and Rietspruit in June.

The lawyers' withdrawal

[19] Once the matters were referred to arbitration it became clear to the lawyers that in the Rietspruit dispute with Safair, Wishart would have to give evidence. They realized that this might result in a situation of conflict, since if the liquidation of Eurocoal was pursued by Billiton, they would have to interrogate Wishart at the anticipated inquiry. They thus decided to withdraw from the Rietspruit and Colt arbitrations and as the lawyers for the two companies.

[20] Suttner and Eyles completed the statements of claim on 29 September 2008 and returned all the papers they had been given for that purpose to Badenhorst. And on 24 November 2008 Badenhorst wrote to Loader advising of his withdrawal as attorney for Colt and Rietspruit. Loader responded that he saw no conflict in acting for Billiton in the Eurocoal dispute, and against Safair in the Colt and Rietspruit disputes. He was disappointed at the lawyers' withdrawal.

[21] At no time did any of the lawyers meet Wishart Snr or Bhayat. And the finding of the high court that no confidential material was ever given to any of the lawyers is not disputed on appeal.

The Eurocoal Inquiry

[22] In June 2008 Billiton cancelled the coal supply agreement with Eurocoal. And in February 2009 it applied to the South Gauteng High Court for the winding-up of Eurocoal based on its claim for damages for some R240 million. Billiton was again

represented by the lawyers. Eurocoal's defence was that the claim was invalid. The high court held that the defence was not bona fide and granted the winding-up order.

[23] On 10 July 2009 the master of the high court authorized an inquiry into the affairs of Eurocoal. The lawyers continued to act for Billiton and Wishart was summoned to give evidence, which he did without objection. He did, however, ask his then legal representatives to advise him on the propriety of his being interrogated by the lawyers. His advisers considered that there was nothing improper about it and the interrogation continued.

[24] As a result of the evidence that emerged from Wishart's interrogation, the lawyers, on behalf of the liquidators of Eurocoal, instituted action against Wishart and Wishart Snr, the latter as the trustee of a family trust. Again, there was no complaint about the lawyers' involvement. But when Wishart was summoned to give evidence in the Eurocoal Inquiry, Mr Dennis Fine SC being the commissioner, Wishart, now represented by Schoerie (for the first time), did object to being interrogated by the lawyers on the basis that they had previously acted for Colt, Rietspruit and Avstar.

[25] The commissioner refused to rule that the inquiry could not go ahead and that evidence relating to any of those companies be struck from the record. He said that he had repeatedly pointed out during the course of the inquiry that the lawyers were not privy to any confidential information such that a conflict of interest might arise.

[26] In April 2011 Wishart, Colt and Rietspruit applied to the South Gauteng High Court for an interdict restraining the lawyers from participating in the inquiry. That application has yet to be determined.

The Avstar proceedings

[27] In March 2011, Wishart Snr, acting on behalf of another company in the Wishart group, applied on an urgent basis to the KwaZulu-Natal High Court, Pietermaritzburg, for Avstar to be placed under judicial management, although not contending that Avstar was insolvent. Billiton and the liquidators of Eurocoal intervened and sought orders setting aside the provisional judicial management

order and for the winding-up of Avstar. The high court granted these orders and placed Avstar in provisional liquidation, and later final liquidation on 30 June 2011. And as I have already said, it subsequently granted the application by Billiton for an inquiry into Avstar's affairs in terms of ss 417 and 418 of the Companies Act.

[28] It was the lawyers' participation in this inquiry to which the appellants objected. As I indicated earlier, Judge Blieden refused the request to excuse the Wisharts and Bhayat from giving evidence in the inquiry when Schoerie complained that they had previously acted for companies in the Wishart group and thus had a conflict of interest. And thus the application presently under consideration was launched.

The original cause of action

[29] The appellants sought a final interdict precluding the lawyers from examining them in the Avstar inquiry on the ground that confidential information in respect of companies in the Wishart group had been given to them when they previously represented Avstar, Colt and Rietspruit. The high court found that the information (primarily the financial statements of Colt and Rietspruit) was not confidential. The appellants do not contest this finding and so no more need be said about the matter.

[30] The high court found also that none of the appellants had ever been a client of any of the lawyers. It was the various companies in which they had interests which had given very limited instructions to the lawyers. Badenhorst and Suttner had met Wishart and Loader to take instructions but had encountered Wishart only briefly. Wishart had had very limited personal contact with any of the lawyers. This too is no longer in issue.

[31] The appellants assert, however, that they had been 'quasi-clients' or 'informal clients' of the lawyers and were thus entitled to an order interdicting them from participating in the inquiry. To this end they asked the high court to develop the common law so as to protect former quasi-clients of legal representatives from being faced with adversarial litigation conducted by former legal representatives.

The principle that the appellants now wish to rely upon

[32] The appellants argued on appeal that they should be treated as clients, and thus receive the same protection that they would have been afforded had they been direct clients of the lawyers. Their interests, they contended, closely converge with the companies that had previously instructed the lawyers in several matters. It is trite that our law affords protection to the former client of a legal practitioner such that he or she will be precluded from acting against a former client where the practitioner has confidential information about the former client that may be misused. The principle is clearly set out by Wessels JA in *Robinson v Van Hulsteyn Feltham and Ford*,[1] to which I shall return.

[33] Recognizing that the lawyers had no such confidential information, as the high court found, the appellants argued nonetheless that this court should develop the common law so as to ensure that as a matter of public policy, and in the interests of the administration of justice, it is improper for a legal practitioner to act against a person who had an interest in an entity for whom the practitioner had previously acted. They contended that this court should follow the development of the law in other jurisdictions which have recognized the principle that a lawyer should not act against a person who has had a close connection, or close convergence of interests, with a former client of the lawyer.

The high court's approach to the development of the law

[34] Gorven J pointed out that although South African courts have followed the English approach to restraining lawyers from acting against former clients, this has been confined to situations where the lawyer was in possession of confidential information. (That is also the clear implication in *Robinson*.) While it is now accepted that the lawyers in this matter did not have access to confidential information in respect of the appellants, it is worth noting the English law which has been followed in several jurisdictions. The high court cited the locus classicus in this

[1] *Robinson v Van Hulsteyn Feltham and Ford* 1925 AD 12 at 21.

respect: *Prince Jefri Bolkiah v KPMG (a firm)*[2] where, after discussing a lawyer's duty to a current client, Lord Millett said:

'Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.'

[35] The high court found, and again this is not contested on appeal, that the appellants did not meet the *Bolkiah* threshold requirements. But it referred to different approaches in other jurisdictions where a test of perception of impropriety has been adopted in different guises. In essence, where a lawyer acts against a former client, in the absence of the possession of confidential information, a court may restrain such conduct where it undermines the administration of justice.

Restraint in the interest of the administration of justice

[36] The approach adopted in the United States Court of Appeals, where a lawyer is no longer in possession of confidential information, is different from the English approach.[3] The courts do not ask whether confidential information has actually been revealed, but whether the subject matters of the representations (for different clients) are substantially related. This principle has not been adopted in Canada[4] but in Australia the courts have adopted a principle that the court has an inherent jurisdiction to restrain lawyers from acting where it is necessary for the administration

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[2] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 (HL) at 235C-E. *Bolkiah* was referred to with approval by the Competition Appeal Court in *American Natural Soda Ash Corp & another v Botswana Ash (Pty) Ltd & others* [2007] 1 CPLR 1 (CAC).

[3] *Analytica Incorporated v NPD Research Inc* (Seventh Circuit) (1983) 708 F 2d 1263 (US Court of Appeals).

[4] *McDonald Estate v Martin* [1990] 3 SCR 1235 at 28.

of justice. The principle was expressed thus by Brereton J in *Kallinicos & another v Hunt & others*:[5]

'The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice . . . .

The jurisdiction is to be regarded as exceptional and is to be exercised with caution. . . .

Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause . . . .'

[37] In the leading English work on conflicts of interest, Charles Hollander QC and Simon Salzedo *Conflicts of Interest*,[6] the authors state that although *Bolkiah* is silent on the question of the court's inherent jurisdiction in so far as the administration of justice is concerned, it could not have been the intention of the court to abolish it, and the test to be applied 'is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting'.

[38] That jurisdiction should be exercised with circumspection, however, as Brereton J said in *Kallinicos*. And the countervailing considerations relating to a client's right to choose his or her legal practitioner and the latter's right to choose a client, are important factors to be taken into account. That principle is endorsed by the Chancery Division of the Queen's Bench in England: in *Halewood International v Addleshaw Booth & Co*[7] Neuberger J, after referring to a client's right to impart information confident that it shall remain confidential, and not be used against him subsequently, said:

'It is wrong not to overlook the countervailing factors, however. There are the rights of the professional adviser to act subsequently for whatever party chooses to instruct him, and the right of third parties to instruct whatever professional advisers they choose.

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[5] *Kallinicos & another v Hunt & others* [2005] NSWSC 1181 para 76.
[6] Fourth edition (2011) pp 103-104.
[7] [2000] PNLR 788 at 791.

These countervailing rights also have a public interest dimension, as does the right of the former client.'

[39] Hollander and Salzedo point out[8] that the inherent jurisdiction to restrain lawyers from acting in the interest of the administration of justice in England has been limited to cases 'where the lawyer has had a longstanding professional relationship with one party but then seeks to act on the other side, where the lawyer will or may be a material witness, or where he is acting against one of two former joint clients on a matter related to the joint retainer'.

[40] In this matter, however, even if we were to find that our law has such an inherent jurisdiction, we are still dealing with parties who were not themselves clients of the lawyers. And so the appellants' cause of action is yet one more step removed.

Convergence of interest and quasi-clients

[41] The appellants argued that the convergence of interest between the Wisharts, on the one hand, and Avstar, Rietspruit and Colt on the other, was such that any protection offered to the former clients, Avstar, and Rietspruit and Colt, should be extended to their shareholders and directors. Wishart, for example, was the sole director of Eurocoal and Avstar. It is not necessary, in my view, to consider the details of shareholding by family-controlled trusts for there has been no case made out for piercing the corporate veil. That is what would need to be done in order to find that the real client was the shareholder or director, and not the company. That much is made clear by a case on which the appellants sought to rely: *Gainers Inc v Pocklington,*[9] a decision of the Court of Appeal, Alberta, Canada which considered the rights of 'near clients'. There Justice Coté said that while a court should look at 'more than just whose name was on the law firm's file cover' as the client, it should not ignore the existence of companies and 'pretend that they are all unincorporated associations of their shareholders, officers and directors'. *Gainers* does not, in my view, assist the appellants.

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[8] Page 110.
[9] *Gainers Inc v Pocklington* 1995 ABCA 177 (CanLII).

[42] So too, *Re a Firm Solicitors*[10] does not support the appellants' request for relief. In that case the parties had agreed that two associated companies of the client would co-operate with the solicitors and give confidential information to the firm even if it might be used against the client. The court held there that because of the nature of the agreement and the confidential information imparted, the companies were 'as good as their clients' and should be treated accordingly. The facts in this case are not comparable. The information in *Solicitors* was given in confidence to the knowledge of all concerned.

[43] Moreover, the argument that the appellants deserved the same protection as did the companies in which they had interests is met by the countervailing considerations that were discussed in *Kallinicos* and *Halewood*, cited above. In the end, what is really at issue is whether the administration of justice would be impaired if the lawyers were not restrained from interrogating Wishart and the other appellants.

[44] What the law seeks to do in these situations is to protect a former client of a lawyer from being prejudiced by having that representative, in whom trust has been reposed, and who is armed with information about that client, act against him or her. That is hardly in issue in this matter. The lawyers' client was Billiton, not the appellants. Billiton claims it will suffer serious prejudice if the lawyers who have been conducting its litigation against Eurocoal for several years, and in whom it has 'invested' millions of rands, is denied their continued representation.

[45] It will be recalled, moreover, that when Loader approached Badenhorst to act for Avstar, he did so precisely because Badenhorst acted for Billiton and Loader believed that that might facilitate a settlement between Eurocoal and Billiton. Badenhorst was at all material times Billiton's attorney. And he had in turn briefed Suttner and Eyles in Billiton matters.

[46] The submission for the appellants that the lawyers had become familiar with the Wisharts is also without merit. None of them had ever met Wishart Snr

[10] *Re a Firm of Solicitors* [1992] 1 All ER 353.

or Bhayat. Badenhorst met with Wishart, as did Suttner, on few occasions and in respect of matters that had nothing to do with Billiton. They had not known him at any personal level. Moreover, the claim that they knew what kind of witness he would be, as argued by the appellants, was without foundation. Badenhorst and Suttner had met him briefly to take instructions on other matters before the Eurocoal inquiry commenced. It was from his examination there that they would have gleaned any personal information about him, and that commenced long after they had withdrawn as the lawyers for Colt and Rietspruit. The facts simply do not warrant the application of the principles contended for by the appellants.

Conclusion

[47] The claim to be entitled to protection against being interrogated by Suttner and Eyles is, as I see it, made all the more unjustified by the fact that Wishart raised no objection to being examined by the lawyers in the Eurocoal inquiry. He accepted his counsel's advice that there was nothing to object to. It was cynical to raise the objection some two years later in the Avstar inquiry.

[48] As the lawyers argued, the heart of a client's right to be protected against a former legal representative taking the other side is the possible misuse of confidential information. In *Robinson v Van Hulsteyn, Feltham and Ford*[11] Wessels JA said the following:

'According to our law a solicitor is an officer of the Court; the Court exercises a jurisdiction over him and will see that in the conduct of his professional work he displays towards the Court and towards his clients a very high standard of conduct. In order to advise a client as to his legal position the solicitor must know all the circumstances of his client's case, and therefore a client is often compelled to reveal to his solicitor the most intimate circumstances of his life. The solicitor may thus become the repository of the most vital secrets of the client. These confidences reposed in him he may not divulge, and if he does the Court will punish him for his breach of duty towards his client. If a solicitor who in the course of advising a client has become possessed of his client's secrets is engaged by another person to act against his former client, his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavor to do his duty to his new client without revealing the secrets of his old client, yet he may find himself in an

[11] *Robinson v Van Hulsteyn, Feltham and Ford* 1925 AD 12 at 21.

invidious position and his knowledge of the secrets of his former client may unconsciously affect him in doing his duty towards the other. In order to avoid such a dilemma the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such a client where it is made clear to the Court in the words of Cozens-Hardy M R [in *Rakusen v Munday & Clarke* (1912 1 Ch D 831, 835)], "that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act".'

[49] In this matter, the appellants were not clients of the lawyers and they had not disclosed any confidential information – any secrets – to the lawyers. There was no possibility, let alone probability, that the lawyers could use their secrets against them.

[50] Even if the court were to recognize the principle that there should not be even a reasonable perception that the administration of justice may be impaired, this is not a case where such a principle would have any application. And as the high court said, where an attorney-client relationship has come to an end, the basis for protecting the misuse of confidential information would lie in delict.[12] It is accordingly not necessary, in this case, to find that the common law should be extended in the manner suggested by the appellants.

[51] The high court correctly found that the application for the interdict against the lawyers had to fail. The appellants, then applicants, had shown no clear right nor proved any injury committed or reasonably apprehended.

Wishart's present standing

[52] As I said at the outset, Wishart has been sequestrated and the trustees of his estate have elected not to participate in the appeal. Counsel for the appellants nonetheless contended that Wishart has a residual interest in the appeal and remains a party. Section 23 of the Insolvency Act 24 of 1936 deals with the rights and obligations of an insolvent during sequestration. Subsection 6 reads: 'The insolvent may sue or be sued in his own name without reference to the trustee of his

[12] The court relied in this regard on *Meter Systems Holdings Ltd v Venter & another* 1993 (1) SA 409 (W) which dealt with unlawful competition.

estate *in any matter relating to status or any right in so far as it does not affect his estate* . . . .' (My emphasis.)

The appellants argued that Wishart's application for an interdict against the lawyers was one that related to his status: it affected his rights to dignity, freedom of speech and freedom and security of person. His objection to the lawyers examining him was based on the proposition that the compulsive examination would be invasive and might result in him being criminally charged or held liable under s 424 of the Companies Act.

[53] However, as the lawyers argued, any examination would relate only to the assets and liabilities of Avstar. It would have nothing to do with Wishart's status or his personality rights. Accordingly, given the view of the trustees of his estate, Wishart is no longer a party to this appeal. The order that is made will be in respect of the remaining two appellants.

The conduct of the appellants

[54] I think it necessary to say something about the conduct of the appellants. They have alleged impropriety on the part of members of the legal profession and cast a shadow on their professional conduct. They have done so without any foundation. The lawyers, Badenhorst, Suttner SC and Eyles, did nothing improper. When they anticipated a possible conflict of interest they very properly withdrew from acting for Colt and Rietspruit. They did not act against former clients and they did not have, let alone use, confidential information. The appellants' objection to their interrogation under ss 418 and 418 of the Companies Act was made some two years after Eurocoal was liquidated. Their strategy was to delay the ascertainment of the truth about Avstar and the other companies. The litigation has been vexatious. Had they succeeded in the application for the interdict they would have undermined the administration of justice.

[55] Accordingly the appeal is dismissed with costs including the costs of two counsel where so employed.

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C H Lewis
Judge of Appeal

APPEARANCES

For Appellants:	C J Hartzenberg SC and L E Combrinck
Instructed by:	Venns Attorneys, Pietermaritzburg
	Phatsoane Henney Inc, Bloemfontein
For Second to Fifth Respondents:	W Trengove SC
Instructed by:	Norton Rose Fulbright, Sandton
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