Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(Cape of Good Hope Provincial Division)

Case No: 3475/04

In the matter between

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE Applicant

and

ANDRé LOUIS NESBITT BERRANGé

Respondent

JUDGMENT DELIVERED on Thursday 9 June 2005

DESAI J:

The respondent has been practising as an attorney since 1976 and is currently the director of a law firm in Cape Town. He is also a notary. The applicant law society seeks in these proceedings his suspension from practice for a specified period. Essentially the complaint against him is that he entered into a scheme to secure for his firm professional work solicited by unqualified persons. It appears that a great deal of conveyancing work was referred to the respondent, or his firm, by certain estate agents who from time to time received payments from the respondent's firm.

These payments are not in dispute. The respondent, however, contends that the payments were effected for a lawful purpose and not in breach of the rules of applicant society.

Initially internal disciplinary proceedings were instituted against the respondent but subsequent to certain admissions made by the respondent the applicant resolved, as it was authorized to do in terms of section 72 (6)(a) of the Attorneys Act No. 53 of 1979, ("the Attorneys Act") to discontinue the internal hearing and to pursue disciplinary proceedings in this court. This procedure was not faulted by respondent's counsel.

The events leading up to the institution of these proceedings commenced in and during 2000 when an independent firm of auditors was appointed by the applicant to inspect the books and accounting records of the respondent's firm and to investigate whether payments had been made, or other benefits offered, to estate agents by the said firm for conveyancing work referred to them. The investigation was undertaken with the consent of respondent's firm and it appears to have been precipitated by persistent rumours that they were "buying work".

In or about October 2000 the applicant received a report from the auditors. This report was not made available to the court as it apparently contains information confidential to respondent's firm. It is in any event not disputed that the auditors found no evidence of any "kickbacks" but made reference to "marketing agreements" concluded by the respondent's firm and certain estate agents. The applicant thereafter instructed the auditors to obtain a copy of the so-called marketing agreements. This was done. The letter from the auditors containing a copy of the agreement also referred to an amount of R52 000,00 allegedly paid to Seeff, an estate agency, and debited in the management account of the respondent's firm for "marketing and advertising".

In the aforementioned circumstances the applicant elected to investigate the matter further and asked the respondent to furnish more information and documentation with regard to the "marketing agreements". It is apparent from respondent's response that on 16 December 1999 a "marketing agreement" was concluded with Seeff Residential Properties ("Seeff") and on 9 February 2000 another such agreement was concluded with Pam Golding Properties ("Pam Golding"). The agreements signed by the respondent on behalf of his firm ostensibly relate to a "suitable consideration … calculated on commercial principles" to be paid by the respondent's firm to the estate agencies for promoting and marketing the respondent's firm.

Respondent's response enclosing copies of the agreements, included a schedule of payments reflecting the amounts he alleges were paid by the respondent's firm to the estate agencies. Thus on his own version an amount of R237 000,00 (excluding value added tax) was paid to Seeff and an amount of R271 500,00 was similarly paid to Pam Golding. Supporting invoices in respect of these payments were also furnished. I shall revert to the invoices in due course.

The disclosure of the above information led to the applicant instituting internal disciplinary proceedings against the respondent. He was confronted with two charges of unprofessional conduct, it being alleged that he contravened applicant's rules (Rule 14.6.1.1) by paying various amounts to Seeff and Pam Golding respectively for the purpose of securing the benefit of conveyancing work solicited by them. The respondent was invited to admit any of the facts relating to the charges which were not in dispute. In his response the respondent did not place in issue several key aspects of the case against him: the conclusion of the agreements with the estate agencies; the substantial amounts paid by the respondent's firm to the estate agencies after the agreements were concluded; the significant number of property sales brokered by Seeff and Pam Golding in which the respondent's firm was appointed as the conveyancing attorneys; the lists of property transactions forwarded by Seeff to respondent's firm in which they had been appointed

conveyancers; and the fact that the number of sales brokered by Seeff in which respondent's firm was the conveyancing attorney was to be a yardstick for gauging the marketing and promotional support received by the said firm.

The applicant considered the undisputed facts and came to the conclusion that the respondent was guilty of contravening the provisions of Rule 14.6.1.1. It viewed the respondent's conduct in a serious light and elected to discontinue the hearing, as already indicated above, and to bring the matter to the attention of this court.

This court must decide upon the papers filed by the parties whether the respondent has conducted himself unprofessionally and, if so, what sanction to impose. The court is not bound by the views of the applicant. On the other hand it is not an ordinary litigant. It brings this application in its capacity as the custodian of the status and dignity of the profession and seeks to protect the interests of the public in their dealings with attorneys. The applicant's views should accordingly be given proper weight (see ***Law Society, Cape v Koch 1985 (4) SA 379 (C) at 386G)***. However, it is the court which is the ultimate repository of disciplinary jurisdiction over attorneys. It has inherent disciplinary powers to strike off or suspend an attorney from practice by reason of unprofessional conduct (See ***Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) at 639C***). Furthermore, the court's powers have been supplemented by statute. Section 22(1)(d) of the Attorneys Act, ***supra***, as amended by section 9(c) of Act No.108 of 1984 provides as follows:

> ***"22(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practices –***
>
> ***a) ...***
>
> b) …
>
> c) …
>
> ***d) if he, in the discretion of the court, is not a fit and***

proper person to continue to practice as an attorney;

...

e) ..."

In terms of the aforementioned section the decision whether an attorney is a fit and proper person to continue practising, involves the exercise of a discretion by the court.

Applications of this kind envisage three separate inquiries. These are set out in ***Jassat v Natal Law Society 2000 (3) SA 44 (SCA) at 51C-I).*** The court must in the first instance decide whether, on the available evidence, the alleged misconduct has been established on a preponderance of probabilities. The court must thereafter exercise its discretion as envisaged in section 22(1)(d) of the Attorneys Act, ***supra***, in order to determine whether the respondent is a fit and proper person to continue practising as an attorney. Finally, the court must consider whether the respondent should be struck off the roll of attorneys or merely suspended from practice for a specific period. In the present instance the applicant has not sought respondent's striking off. The court, however, is called upon to exercise its discretion to decide for what period the respondent should be suspended, if at all, and whether the suspension itself should be suspended as argued by respondent's counsel.

Central to the applicant's case against the respondent are the alleged contraventions of Rule 14.6.1.1. The said Rule provides as follows:

"14.6 Sharing of fees

14.6.1 A member shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation, the result or potential result whereof is –

14.6.1.1 to secure for the member professional work solicited by an unqualified person; ..."

The Rule is limited to professional work ***solicited*** by an unqualified person. The word

"solicit" bears its ordinary dictionary meaning of:

> ***"seek assiduously to obtain business, a favour, ask earnestly or persistently for, request, invite" (The New Shorter Oxford English Dictionary, Volume 2, p2940)***

or

> "… ***ask for or try to obtain (something) from someone … " (Concise Oxford English Dictionary, 2001, p1366)***

The applicant submits that a recommendation by an estate agent to purchasers to use respondent's firm as conveyancers in respect of property transactions brokered by their agency pursuant to a marketing arrangement, amounts to the "soliciting" of professional work as contemplated by the aforementioned Rule. Whether the marketing agreements in question resulted in, or had the "potential" to result in such recommendations being made by estate agents is a factual issue to be determined on the evidence before this court.

An important concession is made by the respondent which supports to some extent the argument advanced by the applicant. The respondent acknowledges that the most "obvious and tangible" measure of the amount of payments to be made by respondent's firm in terms of the marketing agreements was the volume of conveyancing work referred to it by the respective estate agencies. By referring purchasers to the respondent's firm, the estate agencies would increase the volume of conveyancing work referred to them, thereby also maximizing the "marketing fee" payable in terms of the agreements. This is a likely or potential result which may be sufficient to make the marketing agreements fall foul of the prohibition contained in Rule 14.6.1.1.

The invoices are probably the more important items of evidence in applicant's endeavour to establish, on a balance of probabilities, that the respondent is guilty of unprofessional conduct in respect of the charges levelled against him.

In the case of Pam Golding an amount of R250 000,00 was paid for "promotional work" for a period of approximately 14 months. The somewhat cryptic invoice marked for the attention of the respondent reads as follows:

> "***To consideration due by Buchanan Boyes for services rendered to you in terms of our Marketing Agreement, which includes, inter alia, the ongoing promotion of Buchanan Boyes by PGP, the display of information brochures in our offices, general advertising, provision of lecture facilities and opportunities to your professional staff, marketing opportunities throughout the year 2000, which includes workshops, strategic meetings held and December year end promotions.***
>
> ***R250000,00***
>
> ***R 35000,00***
>
> ***R285000,00"***

The respondent contends that the invoices from the estate agencies were accepted by respondent's firm as fair and reasonable remuneration for the services rendered. It seems unlikely that a prudent business person, let alone an attorney, would easily part with R250 000,00 upon receipt of an invoice with such limited detail. The applicant does not have any information with regard to the actual number of conveyancing transactions referred to respondent's firm by Pam Golding. The respondent concedes that it is a significant number. The inference is irresistible that the predominant factor which influenced the payment of R250 000,00 to the estate agency was the large volume of conveyancing referrals to the respondent's firm from the time the marketing agreement was concluded until April 2001, when the invoice was forwarded to the respondent. There is little, if any, evidence adduced by the respondent to support the conclusion that Pam Golding provided such substantial marketing services that it warranted the payment of the amount actually paid by the respondent or his firm.

The invoices emanating from Seeff are even more telling.

An invoice dated 15 September 2000 apparently refers to the payment of R1 000 per conveyancing transaction. The invoice is headed **Marketing Contribution** and refers to the Constantia and Cavendish offices of Seeff. It cites the quantity as 15, a "unit price" of R1 000,00 and the total payable, excluding vat, of R15 000,00. The unit price was probably indicated in error.

Though the other invoices are not presented in the same format, there appears to be some correlation between the number of transfers referred to respondent's firm and the payment sought. The schedules prepared by an employee of Seeff at its instance are included in the papers and the schedules show the property transfers referred by Seeff to respondent's firm, for it to attend to the conveyancing work. The invoices do not indicate any quantity or unit price but each invoice reflects an amount and the following description of the work done is furnished:

> ***"To consideration due by Buchanan Boyes for marketing, advertising and promoting your services, particularly in the Southern Suburbs which includes, inter alia, on going promotion of your firm by Seeff, display of information brochures, provision of lecture facilities, general advertising and marketing opportunities for the period May 2000 to July 2000."***

The correlation between the number of transfers and the payment sought are illustrated by the following:

1. An invoice dated 6 December 2000 refers to "marketing" done by Seeff in the Southern Suburbs for September 2000. The payment sought, excluding vat, is R13 000,00. The schedule for the same period reflects 13 transfers, incidently all in the Southern Suburbs, referred by Seeff to respondent's firm.
2. A similar invoice also dated 6 December 2000 refers to marketing done by Seeff in the Southern Suburbs for the period November 2000. The payment sought, excluding vat, is R10 000,00. The schedule for the same period reflects 10 transfers of property in the Southern Suburbs referred by Seeff to

respondent's firm.

There are several other examples. It seems that R1 000 was paid for each transfer, or rather that the money payable in the terms of the so-called marketing agreements was clearly based upon the actual number of transfers referred to respondent's firm. If that is correct then the description of the work done on the invoices displays collusion on the part of both parties to disguise the true nature of the payments.

Besides the invoices, there is also other evidence which supports the conclusion that the respondent was effecting payments to estate agencies for conveyancing work. In different proceedings in this court against an entity controlled by the respondent, a **Brenda Joyce Dickinson** deposes to an affidavit in which she refers *"to vast numbers of conveyancing transactions"* referred by Seeff and its licensees to the respondent. She attaches to her affidavit a copy of a letter dated 1 August 2001 from Seeff to the respondent. It is apparent from the said letter than in quantifying the amounts due to Seeff the schedules of property transactions referred by them to the respondent were to be taken into account. Mrs Dickinson's affidavit and the aforementioned annexure form part of the applicant's founding papers. Despite the inference that Seeff was being rewarded for the conveyancing work it referred to the respondent's firm, the respondent elected not to furnish any explanation for the allegations contained in Mrs Dickinson's affidavit.

Respondent's counsel decided not to pursue in this court the various "technical" defences raised against the admissibility of certain evidentiary material introduced by the applicant. The said defences, broad denials and other evasive answers resulted in key aspects of the applicant's case against the respondent being unanswered. It also meant that the respondent failed to deal pertinently or fully, as he was obliged to do, with the applicant's allegations against him. These are ***sui generis*** disciplinary proceedings and the following comments by Van Dijkhorst J in ***Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 853G*** are equally applicable in the circumstances of this case:

"Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie."

There is no clear and unequivocal response from the respondent with regard to whether Seeff charged the respondent for referring particular transactions to it and whether the quantum of payment to Pam Golding was influenced by the number of conveyancing transactions it referred to respondent's firm. Respondent's failure to properly deal with such allegations reflects poorly upon his candour in these proceedings.

It was contended on behalf of the respondent that for the purposes of Rule 14.6.1.1 there is in principle no distinction between the "marketing agreements" concluded by the respondent and the type of agreement or "business relationship" previously authorized by the applicant. A party to the latter agreement was a Mr Philip Steyn ("Steyn") who is currently a director of respondent's firm. The respondent alleges that in 1996 applicant's then Director of Professional Affairs, Ms Susan Aird ("Aird"), expressly authorized Steyn to enter into a "business relationship" with estate agencies. It appears that Steyn met with Aird and, subsequent to that, on 10 September 1996, a member of his firm forwarded to applicant a letter in the following terms:

"Dear Susan

PROFESSIONAL CONDUCT / ADVERTISING

Thank you for taking the time to chat to Philip and I last Thursday on the issue of advertising and professional conduct in general.

As discussed we confirm your advice that provided we adhere to general principles of professional conduct we may contribute to the monthly

advertising costs of an existing client on the following basis:

a) Our firm's name will feature in our client's advertisements;

b) Our contribution to the cost of such advertising will be arrived at on a commercial basis, will relate to the volume of work referred to us by our client and will be negotiated with our client from time to time;

c) Our advertising will also take the form of informative brochures on the topic of property and conveyancing. These brochures will be placed in designated areas in our client's offices at an agreed rental;

d) Our firm's name and possibly the professional services which our firm renders may also feature in directories published and circulated by our client.

Kind regards

Yours sincerely
ARNOT GRIFFITHS RABIE & STEYN

<u>PAUL GRIFFITHS</u>"

Aird responded on 10 October 1996 as follows:

"Dear Mr Griffiths

Professional Conduct/Advertising

We acknowledge receipt of your letter of 10 September 1996 and write to confirm that the relationship contemplated between you and your client, with regard to advertising costs, is a business relationship and that the cost of any such advertising will not be included in disbursement accounts rendered in respect of individual conveyancing transactions.

Yours faithfully

SUSAN AIRD
DIRECTOR PROFESSIONAL AFFAIRS"

Respondent's counsel aver that it is against the background of Aird's aforementioned authorization that the respondent concluded the agreements with Seeff and Pam Golding. Respondent believed at the time, so it is alleged, that the terms of the marketing agreements were within the applicant's then interpretation of the Rules as communicated by Aird in her correspondence with Steyn's firm.

In the affidavit filed by Aird in these proceedings she admits agreeing that the extent of the contribution towards marketing could *"… be determined with reference to the amount of work referred by the estate agency (to the attorney)". However, she adds:*

> ***"I did not convey to either Mr Griffiths or Mr Steyn that it was permissible for an attorney to conclude an agreement with an estate agent in terms of which the estate agent would advertise the services of an attorney on the basis that the fee paid to the estate agent would be calculated by reference to the extent to which the estate agent successfully referred clients to the attorney. I would never have said that such an arrangement was permitted by the Rules or by other ethical considerations. It was never during my term of office suggested by anyone that such an arrangement would be countenanced."***

The letters exchanged between Steyn's firm and Aird were not in my view intended to mean that attorneys were at liberty to pay estate agents for conveyancing work referred to them. In any event, applicant's Rules govern the professional conduct of its members. They also determine the propriety or otherwise of the respondent's agreements with the estate agencies, and not Aird's advice to some other firm of attorneys.

Furthermore, Rule 14.6.1.1 was amended in April 1998. The effect of the amendment was to extend the ambit of the prohibition to a certain extent. It now also prohibited agreements which have the **potential result** of securing work solicited by an unqualified person. The respondent does not advance any explanation why he

continued to rely upon Aird's alleged interpretation of the Rule when the Rule had become more stringent prior to him concluding the marketing agreements with Seeff and Pam Golding.

In addition to the Rules, the applicant also issued certain Guidelines with regard to advertising which were in force at the time respondent concluded the said agreements. The Guidelines cite as a *"fundamental principle … that marketing should not involve the direct or indirect giving or offering of any monetary or other incentive to procure work."* They conclude with what is described as a guiding principle: *"advertise, don't incentivise."*

It seems unlikely that respondent could reasonably have believed that the joint advertising with clients envisaged by Aird also covered the type of agreement he entered into with the estate agencies, especially in the light of the relevant Rules and Guidelines. His reliance in these proceedings upon Aird's communication with another firm in different circumstances appears somewhat opportunistic.

Counsel for the applicant have submitted that at the very least the respondent should have checked with the applicant whether his agreements were also covered by the situation envisaged by Aird in her dealings with Steyn. I agree. His failure to do so impacts adversely upon his credibility. It raises considerable doubt as to whether he genuinely believed that his agreements were permissible in terms of the Rules.

The principal argument advanced on behalf of the respondent is premised upon the submission that the applicant's case against him is limited to the two alleged contraventions of Rule 14.6.1.1, namely, the conclusion of the marketing agreements. In other words, the complaint is a specific one and relates solely to the question of whether the respondent contravened the said Rule by concluding the agreements with Seeff and Pam Golding. The payment of money to them or the receipt of professional work by respondent's firm does not ***per se*** render the agreements

objectionable. The enquiry, it was argued, is whether the applicant has established that the two agreements fall within the prohibition contemplated in the Rule by having the actual or potential result of securing for the respondent's firm *"professional work solicited by an unqualified person."* Respondent's counsel contended that in the absence of any evidence that respondent's firm in fact secured work **solicited** by an unqualified person as a **result** of the two agreements, a conclusion that the agreements have such a potential result would be speculative.

It is correct that the applicant has not adduced any direct evidence of soliciting. Despite the large number of identified property transactions, no seller or buyer has deposed to the fact that he or she was persuaded or prevailed upon by either Seeff or Pam Golding to employ the services of respondent's firm. The applicant's case is essentially based on inference and this court is required to infer from the available evidence that the agreements have in fact resulted in the respondent's firm securing professional work solicited by the said agencies.

The two agreements are in identical terms and read as follows:

"1. The Agency shall, inter alia,:

1.1 permit Buchanan Boyes to incorporate its name in certain appropriate advertisements placed by the Agency on behalf of clients;

1.2 display and distribute Buchanan Boyes' Information brochures on property and conveyancing related topics;

1.3 permit Buchanan Boyes to host Training Sessions and to arrange lectures for the Agents employed by the Agency from time to time and/or its clients;

1.4 where possible and if so requested incorporate the name of Buchanan Boyes in directories and or other Marketing material distributed to it's clients.

2. Buchanan Boyes shall:

2.1 In consideration for the promotion and marketing of their professional services, disburse to the Agency a suitable

consideration plus VAT to cover the cost of the services and facilities provided above, which disbursements shall be calculated on commercial principles and shall relate to the support received by Buchanan Boyes, as well as the market exposure enjoyed by Buchanan Boyes both directly and indirectly as a result of the services/facilities referred to in 1 above.

2.2 reach agreement as to the consideration paid in terms of 2.1 above with the Agency from time to time.

As respondent's counsel have pointed out the agreements do not impose any obligation on the estate agency to **solicit** work. Nor do the agreements impose any obligation on respondent's firm to pay for any work **solicited** by the estate agencies. In any event, it is not the applicant's case that the agreements impose any such obligations.

The respondent's counsel contended that there are no objective facts from which to infer that the result or potential result of the agreements was to secure for respondent's firm professional work solicited by the estate agencies. Several arguments were advanced to rebut the facts and inferences relied upon by the applicant in support of its case. It was argued, ***inter alia***, that the agreements impose clear and unambiguous obligations on the estate agencies, none of which can be construed as imposing an obligation to solicit professional work. While conceding that the promotion of respondent's firm would maximize the consideration payable to them under the agreements, it does not follow, counsel argued, that the estate agencies were likely to do so by soliciting work for the respondent's firm. Respondent's counsel also argued that there was no evidence of the number of transactions brokered by the agencies during the relevant periods and there was no evidence to suggest that respondent's firm was favoured with more transactions than any other firm. In respect of Dickinson's allegation of conveyancing transactions "successfully referred" by Seeff to respondent's firm, it was contended that the phrase "succeeded in referring to" is broad enough to encompass conduct on the part of

Seeff which falls short of soliciting. With regard to the correlation between the volume of work obtained and the amounts paid to Seeff, respondent's counsel argued that this does not justify the inference that any of the transactions detailed in the schedules was a transaction in respect of which respondent's firm was instructed as a result of the agreement with them or that the transaction was solicited by an "unqualified person".

In effect it was argued that there could be an innocent explanation for the referral of the conveyancing transactions to respondent's firm, especially as there was no direct evidence that the estate agencies in fact recommended respondent's firm to their clients. In the absence of any evidence of solicitation, respondent's counsel argued, there was no duty on the respondent to adduce evidence to the effect that the payments made by it under the agreements were **not** consideration for the soliciting of work and, furthermore, no adverse inference can be drawn from any such omission.

It is not in dispute that notwithstanding the ***sui generis*** nature of these proceedings, the ordinary civil ***onus*** is applicable herein. This means that the applicant bears the ***onus*** of proving its case on a balance of probabilities. However, it is suggested that if there is an innocent explanation for the conveyancing transactions being referred to the respondent's firm then an adverse finding cannot be made against him in this regard, irrespective of the probabilities. Though this approach may be correct in criminal matters, it appears to be the wrong test for drawing inferences in a civil matter. The different tests for drawing inferences in criminal and civil cases are set out by **Zulman JA** in ***Cooper and Another NNO v Merchant Trade Finance Ltd 2000(3) SA 1009(SCA) at 1027F-1028A*** as follows:

> "***In a criminal case, one of the 'two cardinal rules of logic' referred to by Watermeyer JA in R v Blom is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there***

must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment."

Applying the said test, this court must consider the inferences suggested by the parties and determine which of the possible inferences constitute the "most plausible" explanation of the evidence, viewed in its totality, and are to be preferred herein.

Respondent's counsel grossly oversimplify the applicant's case against their client by arguing that it rests solely on the marketing agreements. From the outset it was based on the totality of the schemes devised and implemented by the respondent. The charges at the internal disciplinary hearing in fact mirrored the wide formulation of Rule 14.6.1.1 and were intended to cover a "scheme of operation" which resulted in conveyancing work actually being solicited by Seeff and Pam Golding for the respondent or which had the "potential result" to do so. The case against the respondent in applicant's founding papers was quite clearly not confined to the marketing agreements. It included the implementation and effect of the arrangements made by the respondent with Seeff and Pam Golding. The schedules of property transfers, the relevant invoices and other similar evidence led the applicant to conclude that "there was an understanding" between the estate agencies and the respondent that the question of conveyancing matters referred to the respondent's firm would determine the amount of the payment made in terms of the marketing agreements. There is also compelling evidence of a direct correlation between the number of transfers referred by Seeff to respondent's firm in certain months and the marketing fee payable for that month, indicating an amount of R1 000 per transfer.

The suggestion that the agreement cannot be said to contravene the prohibition contained in Rule 14.6.1.1 as it does not contain any express provision with regard to payment for conveyancing work, is also not correct. The marketing agreements are not and were not intended to be self-contained. They envisage further agreements

with regard to the payments to be made by respondent's firm. The respondent in any event admits a secondary agreement with regard to payment. In his answering affidavit he states the following:

> ***The agreements do not, it is submitted, impose, either expressly or by necessary implication, an obligation on the estate agency to solicit work within the meaning of the word "solicit". In any event, this does not appear to be the Applicant's case.***
>
> ***The agreements also do not, it is submitted, impose, either expressly or by necessary implication, an obligation on Respondent's firm to pay the estate agency for work solicited by it within the meaning of the word "solicit". This also does not appear to be the Applicant's case."***

The manner in which the payments to the agencies were to be calculated is an important aspect of the applicant's case against the respondent. This incentivised the agencies to recommend the respondent's firm so as to maximize the payments to themselves.

Rule 14.6.1.1 is couched in very wide terms. A member is prohibited from "directlly" or "indirectly" entering into "an arrangement" or "scheme of operation" resulting in the securing of professional work solicited by an unqualified person. It is also directed at the manner in which the arrangement or schemes are implemented. Agreements or schemes which in fact have the prohibited result or have the potential to have the prohibited result are proscribed. Any enquiry with regard to whether a particular agreement contravenes the Rule would involve an analysis of both the actual and potential effect of the agreement. For the purposes of this application the applicant is not required to show that the marketing agreement in fact resulted in the solicitation of conveyancing work. It is sufficient for the applicant to show that the agreements had the "potential" of incentivising the estate agencies to refer work to respondent's firm. The purpose of the widened Rule is clearly to prohibit any scheme or arrangement

which could possibly incentivise the referral of professional work by an unqualified person.

The most plausible explanation of the evidence, viewed in its totality, is that the conveyancing work referred to respondent's firm from Seeff and Pam Golding was generated as a result of the agencies inviting their clients to refer their conveyancing work to respondent's firm. The amount of money paid to them must have been a very strong inducement to the agencies to recommend the services of respondent's firm to their clients. Dickinson's letters constitute strong ***prima facie*** evidence that Seeff was in fact remunerated for conveyancing it succeeded in referring to respondent's firm. The respondent elected not to deal with this aspect. Respondent also failed to explain and to deal with the property schedules from Seeff and the applicant's computation in the founding affidavit of the correlation between the number of transfers referred to respondent's firm in one month and the amount payable by respondent's firm to Seeff in that month. The most plausible explanation is that the schedules were prepared to substantiate the claim for payment at the rate of R1 000 per transaction. The respondent furthermore does not disclose fully to the court precisely what "promotional services" Seeff or Pam Golding provided for the considerable fees that they charged respondent's firm and which were in fact paid to them pursuant to very cryptic invoices. In the absence of any further explanation the most probable inference on the evidence is that the respondent devised and implemented a scheme in terms of which his firm rewarded the estate agencies for the referral of conveyancing work. Taken as a whole, the evidence establishes on a clear balance of probabilities that the respondent **in fact** secured conveyancing work that was solicited by the agencies as a result of their marketing agreements and the understanding with regard to payment. This clearly constitutes the "soliciting" of professional work within the meaning of Rule 14.6.1.1. The respondent accordingly breached the said Rule and is guilty of unprofessional conduct in respect of both the charges leveled against him.

It is not necessary for this court to find that the respondent's unprofessional conduct renders him unfit to practice, in order to impose the sanction of suspension from practice (see: ***Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) at 638/639***). Applicant's counsel suggested that a suspension from practice was the appropriate sanction in this matter. They submitted on applicant's behalf that while respondent's transgressions do not justify the drastic step of his removal from the roll, the offences are sufficiently serious to warrant a more severe penalty than a reprimand or a suspended suspension. The serious nature of respondent's conduct appears, ***interalia***, from the reasons set out in applicant's founding affidavit.

The applicant, less than a year before the respondent concluded his agreements with Seeff and Pam Golding, addressed a letter to all its members, including the respondent, making it abundantly clear that any payment by attorneys to estate agents for the referral of conveyancing work constituted improper conduct. Applicant contends that for several years payments as a reward to estate agents for the referral of conveyancing work have been a matter of grave concern to the profession. In applicant's view the payments improperly influenced estate agents to refer work to a particular attorney and this practice, in effect, underminded the freedom of a client to appoint the attorney of his or her choice. While recommendations may be made concerning the choice of an attorney by the estate agent, it should be done without undue influence from an attorney who has promised a reward to that estate agent.

Applicant's counsel submitted that respondent's transgression is akin to touting. I agree with this submission.

The scheme implemented by the respondent was a way of touting for business and displays a high level of disloyalty to other members of the profession. The practice of touting by legal practitioners is a serious contravention "which should be eradicated" (see ***Cirota & Another v Law Society, Transvaal 1979 (1) SA 172 (A) at 192A-D)***.

Furthermore, the respondent does not have an unblemished professional career. He

previously paid amounts to people employed by the Registrar of Deeds in order to influence them in the performance of their official duties. On 22 May 1995 this resulted in applicant finding him guilty of unprofessional conduct. On that occasion respondent had to pay a fine of R7 500,00.

Several arguments were raised by respondent's counsel with regard to the differences between respondent's transgressions and the offence of touting. The findings herein illustrate the extent to which this matter is distinguishable from matters involving touting. On the other hand, there are similarities which confirm the gravity of respondent's conduct.

Respondent's counsel also suggested that as respondent's transgressions fell within the parameters of the conduct authorized by Aird in 1996, the sanction sought by the applicant was not justified. The Aird letter affords the respondent little assistance as indicated in the course of this judgment.

The applicant seeks the respondent's suspension from practice for a period of three years. It is the "watchdog" of the profession and due regard must be given to its view. However, considering the respondent's conduct and transgressions in their totality, I am of the view that suspension for a lesser period would be more appropriate.

In the result, I make the following order:

1. **The respondent is suspended from practising for his own account, or as a director of a professional company contemplated in section 23 of the Attorneys Act, No 53 of 1979, as amended, or as a professional assistant in the employ of an attorney, or otherwise as a practitioner, for a period of two years from the date of the granting of this order.**

2. **The respondent is directed to pay the costs of this application on**

the scale between attorney and client.

DESAI J

I agree.

(H.J) ERASMUS J