

The Bar and the Competition Commission

Glenn Turner, Johannesburg Bar

On 26 April 2001, Roos J delivered his judgment in the application brought by the General Council of the Bar of South Africa and its various constituent Bars against the Commissioner of the Competition Commission (as the first respondent) and the Minister for Justice and Constitutional Development (as the second respondent) (*The General Council of the Bar of South Africa v The Commissioner of the Competition Commission* case no 30345/2000, 26 April 2001, unreported).

In order to understand the import and significance of the judgment, it is important to appreciate certain background facts and circumstances giving rise to the application.

Background

On 27 October 1999 the Commissioner of the Competition Commission (the Commissioner) addressed a letter to the General Council of the Bar of South Africa (the GCB) stating that the Commissioner had received a complaint from the Independent Association of Advocates (the IAA) about certain of the professional rules of the GCB which may be "anti-competitive."

On 26 November 1999 the GCB responded to the complaints raised by the IAA and, simultaneously, filed an application on behalf of the GCB and its constituent Bars, for exemption of the professional rules of each of the constituent Bars in terms of section 3(1)(c) of the Competition Act 89 of 1998 (the Act).

Section 3(1)(c) of the Act, read with the provisions of schedule 1, effectively provides that professional bodies (such as those controlling attorneys and advocates in South Africa) may apply for their professional rules to be exempted from the provisions of the Act. If the exemption is granted, then the Act, and its rules concerning anti-competitive behaviour, simply do not apply to the professional rules thus exempted.

On 8 November 2000 the Commissioner addressed a letter to the chairman of the GCB in which reference was made to the application for an exemption in terms of schedule 1 of the Act. The Commissioner informed the chairman of the GCB that the Competition Commission had granted an exemption for the

rules of the Professional Association but, however, made the exemption subject to certain "conditions" which were listed on an attached sheet.

Certain of the "conditions" to which the exemption was subject were, in effect, non-exemptions of those particular rules.

Moreover, the Commissioner purported to grant the conditional exemption in terms of section 10(2)(b) of the Act – which is simply inapplicable to the application for exemption made by the GCB and its constituent Bars.

During the course of the Commissioner's assessment of the Bars' application for exemption, the Minister of Justice was consulted by the Commissioner. The minister furnished a written response to the application for exemption in which objection was made to certain of the professional rules. The Commissioner then, without giving the Bars an opportunity to comment on the minister's response, reached his decision which was then communicated to the GCB.

In his answering affidavit, the Commissioner conceded that it was unfair of him not to have made available the minister's response to the Bars' application for exemption. The Commissioner accordingly conceded that the Bars' application for the setting aside of his decision should succeed and tendered to pay the Bars' costs up to that date.

The Commissioner adopted the attitude that the Bars' application for exemption should, in its totality, be remitted back to him for fresh consideration.

The Bars, however, refused to accept this and set out detailed factual averments from which the conclusion was drawn that the Commissioner was both incompetent in the application of the relevant law and biased against the Bars.

The Bars accordingly requested the court to itself grant an exemption of their rules and not to remit any issue back to the Commissioner for fresh consideration. It was this issue which effectively formed the subject of the hearing before Roos J.

The judgment

In his judgment Roos J held that the evidence before him established that the Commissioner was both biased against

the Bars and incompetent in his application of the law and hence found himself free to substitute his own decision for that of the Commissioner provided that the court was in as good a position as the Commissioner was in, in arriving at such a decision.

Roos J made it clear that the starting point was that the decision of the Commissioner was set aside and that the question which he addressed related simply to the issue as to whether the court should substitute its own order instead of referring the decision back to the Commissioner for reconsideration and, if so, whether the court should substitute its order in respect of all of the rules which the Commissioner had refused to exempt or only certain of those rules.

The court indicated that in relation to those rules in respect of which the court did not itself grant an exemption, the Bars could re-draft and/or negotiate with the Commissioner in respect of those rules not so exempted by the court.¹ This approach arose as a result of exchanges between counsel and the court during argument, the court expressing doubt in relation to some rules as to whether exemption was necessary, and in relation to others whether it was appropriate for it to do so.

The court then considered each of the rules which the Commissioner had refused to exempt and held that the court would substitute its own decision in granting an exemption of the following rules:

- (1) The prohibition on a member accepting a brief from any person other than an attorney (the so-called "referral profession rule").
- (2) The prohibition of accepting a brief to work together with an admitted advocate who is not a member of the constituent Bar.
- (3) The rule regarding contingency fees.²

The court declined to substitute its own decision and to exempt the following rules:

(1) The two counsel rule

The court refused to grant an exemption in respect of this rule since it was common cause at the hearing that this rule had, since 1986, changed from a compulsory rule to a recommended rule.³ In essence, for the court this was not in reality a rule.

(2) The prohibition on partnerships with other members of the Bar

The court held that it was not in as good a position as the Commissioner to make a

decision concerning this rule and hence declined to exempt the rule. Accordingly, this rule would fall within the category of those rules which could be re-drafted and/or negotiated between the Bars and the Commissioner.⁴ This rule was not referred back to the Commissioner for reconsideration.

(3) The defaulters' list

The court agreed with certain submissions made by the minister concerning this rule as restricting access to specialist services on the part of clients whose attorneys have previously defaulted, even if the default was in respect of another client. The court accordingly refused to itself grant exemption from this rule and did not refer it back to the Commissioner.

(4) Advertising

The court did not itself grant an exemption of this rule⁵ and did not refer it back to the Commissioner.

(5) Tariff of fees

The Bars did not ask for the exemption of the rule regarding recommended fees. The court agreed that the Bars were justified in stating that the recommended rules were merely guidelines and did not constitute a species of price maintenance. Since the fees are only recommended fees, the court saw no reason why the rule would need to be exempted.⁶ Thus, essentially the same reasoning applied as that in relation to (1) above.

(6) Location of premises

In relation to the rule requiring that all advocates be located at certain approved premises, the court held that there was no reason for this rule to be exempted or not

exempted. The rule is not a hard and fast rule and the various constituent Bars have associated members who practice in rural areas and who are simply not bound by the rule. The court thus held that the rule deserved "no further attention":⁷ it was again, in the court's evident perception, not a rule such as required its exemption.

In summary, the court granted the relief sought in terms of prayer 2.2 of the notice of motion directing that the rules of the Bars are exempted in terms of schedule 1 of the Act and, in addition, itself specifically exempted certain of the rules which had not been exempted by the Commissioner. The rules which were not specifically exempted by the court were not referred back to the Commissioner for further decision, but fell into two categories: those which the court found it unnecessary to exempt as rules (because they are not hard and fast), and those which it left for the Bars to re-draft and/or negotiate with the Commissioner. Rules (1), (5) and (2) fell into the former category, and (2), (3) and (4) into the latter. (Rules (3) and (4) have in any event been under review by the GCB over the past year.)

The Commissioner was ordered to pay the costs of the application, including the costs of two counsel.

The effect of the judgment is, the Bars believe, that the Bars' foundational rules are exempted and that they are thus not subject to the provisions of the Competition Act. In respect of those rules which the court did not itself exempt, and which were not referred back to the Commissioner, consideration will be given to the question whether and to what extent redrafting and discussion with the

Commissioner is either necessary or appropriate.

In this regard, there are two overall curious features of the judgment to be noted. The first is that, having found bias and incompetence on the part of the Commissioner such as to persuade the court not to refer any issue back to him, the court nonetheless contemplated a possible future process between the Bars and the Commissioner. The second is that the effect of the court's order, by granting the central prayer 2.2, is to exempt the rules of the Bars: in effect, the conditions the Commissioner tried to impose fall away.

On 16 May 2001, the Bars were informed that the Commissioner has delivered a notice of application for leave to appeal against the judgment of Roos J. At the time of writing this note, the Bars have not had sight of this notice (which is substantially out of time in any event).

Glenn Turner was a member of the team which represented the GCB and its constituent Bars in the application against the Competition Commission. The other counsel were Schalk Burger SC and Hamilton Maenetje, instructed by Aslam Moosajee of Deney's Reitz.

Endnotes

- 1 Judgment p 22.
- 2 Judgment p 52; Order 1(a)-(c).
- 3 Judgment p 37.
- 4 Judgment p 22.
- 5 Judgment p 46.
- 6 Judgment p 48.
- 7 Judgment p 51.



Namibian Bar to be prosecuted?

Contributed by a member of the Namibian Bar

The judge president of the Namibian high court, Judge Pio Teek, earlier this year laid charges against the Namibian Bar for contempt of court. He did so by referring a press release of the Namibian Bar Council to the prosecutor-general of Namibia for prosecution for contempt of court. The Bar had in that statement criticised the judge president for his handling of a detainee release application. The Bar Council's statement was issued on 29 November last year. It arose after proceedings to commit the Namibian

Minister of Home Affairs for contempt of court had been instituted following his failure to immediately release a detainee in terms of a court order dating back to October 2000.

The Minister of Home Affairs was called upon to show cause on 10 November 2000 why he should not be committed for contempt of court. After hearing full argument in the matter the judge president extended the rule until 20 November when, he indicated, a ruling on the contempt application would be

given. This did unfortunately not occur on that date and Judge Teek further extended the rule to 29 November 2000 to give a ruling on the contempt.

On 29 November the judge president once again did not give a ruling on the contempt and yet again extended the rule to 12 January 2001 for the purpose of giving a ruling. It was understood that the reason for this yet further long delay was for the judge president to attend a foreign conference and then to go on holiday. Counsel in court reported that the detainee remained in detention, notwithstanding the unambiguous terms of the court order. The judge president was

Continued on page 44