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 rule[5] 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 Maenetjie, instructed by Aslam Moosajee of Deneys 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

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The work would therefore be useful to advocates practising in both the Labour Court and in the high court.

Volume 2 (Collective Bargaining) in the series has not yet been published. Volume 3 (Commentary on the Labour Relations Act) – still to be reviewed in this journal – contains the full text of the Act and a clause by clause commentary thereon. It contains all schedules to the Act, codes and circulars and the rules of the Labour Court and the CCMA. 📖

MA Crowe
Cape Bar

Namibian Bar to be prosecuted?

Continued from page 26

requested to direct that the detainee be released pending the outcome of the main application. He however refused to direct that the detainee be released and also refused leave to appeal against this refusal. No reasons were given by him for either ruling.

The Bar Council of the Society of Advocates of Namibia then issued a statement deploring the failure of the judge president to direct the release of the detainee in those circumstances. The Bar Council pointed out that there was a clear order to that effect and until it were set aside or discharged, effect should be given to it. The Bar Council was at pains to point out that directing compliance with the order was quite apart and separate from the issue as to whether the minister had the requisite intention to commit contempt of court (which had been raised in the contempt application). The Bar Council expressly made no comment on that issue.

It further stated:

"The failure of the Judge President to direct compliance with a clear order of the High Court, particularly when that order involves the release of a detainee who is detained without trial, amounts to a travesty of justice and serves to seriously undermine the rule of law and, with it, constitutional governance in Namibia.

The Constitution of Namibia is premised upon the rule of law and upon the separation of powers. The ruling by the Judge President is tantamount to condoning disobedience of a court order and to exempt Government officials from complying with the law. This negates the entire notion of the rule of law. It presupposes that everyone is equal before the law and that the laws of the country are to be obeyed by all, even by the highest authorities.

It is for this reason that the Society of Advocates, whose members have taken oath to uphold the Constitution, voice their gravest concern at this disturbing decision of the High Court which can only serve to undermine the Constitution and the rule of law."

The Bar Council further stressed that the pending ruling on contempt had nothing whatsoever to do with the release order of 24 October and that the continued incarceration of the detainee was completely unacceptable, compounded by the failure of the judge president to supply any reasons for his ruling (not to direct compliance with the order).

Following the issuing of the statement, Namibia's two leading daily newspapers, the *Namibian* and *Die Republikein* also criticised Judge Teek in editorials in the ensuing days.

When the contempt application was called in court on the return date on 12 January 2001, Judge Teek again postponed the matter to 15 January. Instead of dealing with the contempt, he then handed down a lengthy judgment recusing himself from the case because of the criticism levelled against him by both the Bar and the media. Judge Teek then extended the return date of the application to 1 February 2001 for argument before another court.

In the meantime, the detainee remained in detention.

The contempt application was then fully argued on 1 February 2001 before two other judges, Judges Sylvester Mainga and Elton Hoff, both of whom had been recently appointed. They handed down a detailed judgment the following week committing the minister for contempt of court. This resulted in the immediate release of the detainee – some three and a half months after his initial realease had been ordered.

After delivering his recusal judgment, Judge Teek referred the Bar Council and the editors of two newspapers for prosecution for contempt of court to the prosecutor-general, requesting the latter to prosecute the relevant institutions and "*their accomplices*" for their contempt. He characterised the Bar Council's statement as being "*a scurrilous scandalisation*" and constituting a "*gross and direct interference and intimidation of the incumbent court*". He also asked the prosecutor-general to ensure that "*exemplary*" and "*deterrent*" sentences would be sought against the Bar and the editors.

The Namibian Police has since approached both the editors and the present chairperson of the Bar Council for statements, after warning them in terms of the Criminal Procedure Act. The Bar Council and the newspaper editors are presently awaiting the decision of the prosecutor-general whether he is to prosecute.

The Society of Advocates continues to exist as a voluntary association (and has in fact grown in membership) following the adoption of the Legal Practitioners Act in 1995 which brought about a fused profession. 📖