REPORTABLE

CASE NO: A 212/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WITVLEI MEAT (PTY) LTD	**1st APPLICANT**
ATLANTIC MEAT MARKET (PTY) LTD	**2nd APPLICANT**
MARKETLINK NAMIBIA (PTY) LTD	**3rd APPLICANT**
MARKETLINK INVESTMENTS (PTY) LTD	**4th APPLICANT**
M-INVESTMENTS (PTY) LTD	**5th APPLICANT**
FRANS HENDRIK BADENHORST	**6th APPLICANT**

and

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS	**1st RESPONDENT**
KOEP & PARTNERS	**2nd RESPONDENT**
THE LAW SOCIETY OF Republic of Namibia	**3rd RESPONDENT**
THE MINISTER OF JUSTICE	**4th RESPONDENT**
FATLAND JAEREN AS	**5th RESPONDENT**
BRODR MICHELSEN AS	**6th RESPONDENT**

CORAM: **Smuts, J**

Heard on: 23 January 2012

Delivered on: 20 February 2012

JUDGMENT

Smuts, J

[1]

[2] This application concerns a complaint made by the applicants (with the exception of the other applicants) against Koep & Partners, a firm of legal practitioners with offices in Windhoek and Swakopmund, cited as the 2nd respondent in these proceedings. The applicants, in essence, complained that Koep & Partners should not have accepted an instruction from 5th and 6th respondents in litigation against the 1st applicant because they say it amounted to a material conflict of interest between clients of that firm.

[3] The first applicant is Witvlei Meat (Pty) Ltd ("Witvlei Meat"). The shareholders of Witvlei Meat include the 5th and 6th respondents each owning 6.667% of the shares. The sixth respondent, Mr. F.H. Badenhorst sates in his founding affidavit that the 5th applicant, described in the papers as M-Investments (Pty) Ltd ("M-Investments") has 22.667% of the Witvlei Meat shares with a Badenhorst family trust

owing 10% and the remaining shares are held by other unspecified entities.

[4]

[5] The 3rd applicant is said to own 63% and the Sidney Martin Family Trust 30% of the shares in the second applicant, Atlantic Meat Market, and the remaining 7% being held by a certain Mr Robert Keller. The third applicant, Marketlink Namibia (Pty) Ltd is said to have two shareholders being the 4th applicant (Marketlink Investments (Pty) Ltd) which owns 49% of the shares and the remaining shareholding owned by the Sidney Martin Family Trust.

[6]

[7] The 6th applicant, Mr FH Badenhorst is the Managing Director of Witvlei Meat. He owns 46% of the shares in the 4th applicant with his brother, Mr AH Badenhorst also holding 46% and A Badenhorst Estate holding 5%. The 5th applicant (M-Investments) is said by the deponent of the founding affidavit, Mr FH Badenhorst, to be owned 100% by the Sidney Martin Family Trust.

[8] The applicants (excluding the 5th applicant) as well as Mr Sidney Martin lodged a complaint against Koep & Partners with the Law Society of Namibia, which referred the complaint to the Disciplinary Committee for Legal Practitioners established under the Legal Practitioners Act, 15 of 1995 ("the Act") (after consideration by its Ethics Sub-Committee).

[9] The applicants, in their complaint, referred to themselves as existing clients of Koep & Partners. They contended that the firm in question created an impermissible conflict of their interests by accepting a new instruction from two new clients, namely the 5th and 6th respondents because the firm would be obliged to act against them as existing clients and should have refused the instructions from the 5th and 6th respondents.

[10] The Disciplinary Committee (1st respondent in these proceedings) found that the applicants' complaint did not make out a *prima facie* case of dishonourable, unprofessional or unworthy conduct on the part of Koep and Partners. The applicants then launched these proceedings for an order declaring that their complaint discloses a *prima facie* case of unprofessional, dishonourable or unworthy conduct on the part of Koep & Partners, the 2nd respondent. They do so in the form of an appeal under s 35(3) of the Act.

[11] In addition, the applicants seek an order compelling the Disciplinary Committee to hear the complaint brought against the 2nd respondent under s 35 of the Act. The applicants also seek an interdict against the 2nd respondent pending the finalisation of disciplinary proceedings under s 35 of the Act with effect of interdicting and restraining them from:

"(a) Accepting instructions from any person or legal entity wherein advice of any nature whatsoever is required to be rendered against the interests of the applicants as the 2nd respondent's existing clients;

(b) Accepting instructions from any person or legal entity wherein legal proceedings of any nature whatsoever are to be instituted against the applicants as the 2nd respondent's existing clients."

[12] The applicants also sought costs against any of the respondents opposing the application.

[13] The 1st respondent (the Disciplinary Committee) initially opposed the application but subsequently withdrew its notice of opposition. The application was opposed by the 2nd, 5th and 6th respondents. The 3rd and 4th respondents, the Law Society and Minister of Justice respectively, have not opposed this application.

[14] In the 2nd respondent's answering affidavit, the draft financial statements of the Sidney Martin Family Trust ("the Trust") were attached to refute an allegation made in the founding papers concerning the Trust's alleged shareholding in the applicants as attested under oath by the 6th applicant and confirmed under oath Mr Martin. This gave rise to an application for intervention by the

trustees of the Trust. The purpose of that intervention application is essentially to enter the fray to apply to strike the draft financial statements together with other resolutions and documentation of the Trust on the grounds that these infringe upon attorney and client privilege and upon the rights of the Trust to privacy, protected under Article 13 of the Constitution.

[15]

[16] The application for intervention was not opposed by the 2nd respondent, except in respect of the costs order sought against Koep and Partners. That firm provided an answering affidavit to it. The 2nd respondent thus opposes the costs order sought in the intervention application. Mr Heathcote who appeared on its behalf together with Mr R Maasdorp, submitted that it was in my discretion whether or not to grant that application. But the 2nd respondent did in argument before me as well as in the answering affidavit oppose the application to strike the documentation in question sought in that application.

[17]

[18] In its opposition to the main application, the 2nd respondent raised certain preliminary points. I propose to deal with those first. I next turn to the main application and then to the intervention application and the notice to strike brought by the applicants to intervene. The 2nd respondent also filed an application to strike large portions of the replying affidavit on the grounds that impermissible new material was raised as well as on the grounds that certain matter being inadmissible hearsay or irrelevant. I refer to that notice to

strike out in the course of dealing with the application itself.

Preliminary points

Non-service

[19] The first preliminary point raised on behalf of the 2nd respondent is that the 1st respondent, the Disciplinary Committee, was never served with the application. The application had in fact been served on the Government Attorney. It was contended by Mr Heathcote that Rule 4(9) would not permit service of the application on the Government Attorney. In support of this point, he referred to Knouwds NO v Josea and another [1] where Damaseb, JP held in paragraph 23:

> *"[23] If short service is fatal, a fortiori, non-service cannot be otherwise. Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it."*

[20] Mr Heathcote submitted that service upon the Chairperson of

[1] 2007(2) NR 792 (HC)

the Committee was required by Rule 4 and that the failure to do so and mere service on the Government Attorney's office would not constitute valid service. He submitted that the absence of valid service is fatal and not capable of being condoned. When I raised with him that the 1st respondent had in fact filed a notice to oppose – through the Government Attorney – which was subsequently withdrawn, Mr Heathcote submitted that this would not assist the applicants because the requirements of Rule 4 had not been met.

[21]

[22] I have considered the Knouwds-matter referred to by him. It would seem to me to be distinguishable by reason of the fact that the matter was an application concerning the status of a party. The Rule requires personal service in such an event. In that matter, there was no service and a rule nisi was granted on an ex parte basis. All that was then served was the rule nisi, and not the full application. The rule nisi itself was not even personally served on the first respondent. The court then discharged the rule even though the respondents were represented. The holding in that case is in my view to be confined to the facts of that case and does not find application to this matter.

[23] The present circumstances are different and distinguishable. There was service on the Government Attorney in respect of a committee whose secretary is an employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the Committee. The

fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where that the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import.)

[24] It would follow in my view that the point taken concerning service must fail.

Incomplete record

[25] A further point taken by the 2nd respondent was that the record of proceedings before the Disciplinary Committee had not been placed before this Court. In the absence of the record, there could be no question of an appeal, so Mr Heathcote contended, and the relief sought in paragraph 1 could not granted for this reason alone.

[26] In support of this contention, Mr Heathcote referred to the rules governing the procedure of the Committee which requires the Committee to keep a proper record of the proceedings before it, as well as all rulings given by it. No reasons had been provided by the Committee. The applicants did not however compel the Committee to

do so. The applicants would certainly have been entitled to its reasons. In that sense, it is clear that the full record is not before this Court, as well as not having any record of the deliberations except for the outcome.

[27]

[28] [21] It is not disputed however that the complaint before the Disciplinary Committee forms part of the proceedings as well as the affidavits by the partners of the 2nd respondent dealing with the complaint. Mr Corbett, on behalf of the applicants, made it clear that the declaratory relief in paragraph 1 of the notice of motion amounts to an appeal under s 35(3) of the Act. Such an appeal would in my view be an appeal in the ordinary sense, as described in Health Professions Council of SA v de Bruin [2] as "*entailing a rehearing on the merits but limited to evidence or information on which the decision under appeal was given and in which the only determination is whether the decision was right or wrong*".

[29]

[30] I accept that an appeal under s 35(3) would thus constitute such an appeal in the sense that it would amount to a rehearing of the merits but limited to the evidence or information on which the decision under the appeal was given, even though the powers of the Court under the Act differed from the legislation in that matter. This is of importance in addressing this preliminary point and the matter on

[2] 2004(4) All SA 392 (SCA) at par 23 following Thuketana v Health Professions Council of SA 2003(2) SA 628 (T) at 634 and De la Rouviere v SA Medical and Dental Council 1977(1) SA 85 (N) at 93-94.

the merits.

[31] The 2nd respondent did not refer to any other portions of record in the form of material upon which the decision was based, apart from the reasons, which were not placed before me. Whilst it would plainly have been preferable for the reasons to be provided and such deliberations as may have formed part of the record, a rehearing on the merits is limited to the evidence and information on which the decision was given and can in my view proceed even in the absence of the reasons for the decision. It is after all the decision and order which is appealed against and not the reasons for it.

[32] It would follow that the second point raised concerning the absence of the full record would also not succeed.

[33] The third preliminary point was related to the second. It was contended that the declaratory relief could not be granted in the absence of an appeal succeeding and the Committee's decision being set aside. It was submitted by Mr Heathcote that in the absence of being in possession of the full record, the Court would not exercise its discretion to grant the declaratory relief. As I have indicated, the declaratory relief is in the form of an appeal, as is expressly stated in the founding affidavits and confirmed in his submissions by Mr Corbett. For the reasons I have given in respect of the second preliminary point, this point would also not succeed.

[34] **Formulation of the interdictory relief**

[35]

[36] The fourth point concerns the interdictory relief sought in paragraphs 3.1 and 3.2. Mr Heathcote submitted that this relief was so widely worded and sweeping that it would be a nullity and would not resolve disputes but rather give rise to further disputes. This point having been taken in his heads of argument, Mr Corbett moved for an amendment to confine the interdictory relief to the following:

[37]

[38] *"In which the second respondent would be interdicted and restrained from:*

(a) continuing to act for the 5th and 6th respondents in litigious matters against the 1st respondent, as the 2nd respondent's former client;

(b) accepting new instructions from any client in a litigious matter to be brought against the 2nd to 5th applicants as the 2nd respondent's existing clients,

pending the finalisation of the disciplinary proceedings in this matter as envisaged in terms of s 35 of the Act."

[39] Mr Heathcote is in my view correct in his submission that the

relief sought in paragraphs 2 and 3, with the latter being the interdict in its amended form, would depend upon success by the applicants in their appeal against the decision of the Disciplinary Committee, as sought in paragraph 1 of the notice of motion. I thus consider the question of that appeal first before dealing with the other relief sought in this application.

Appeal under s 35(3)

[40] The applicants make it clear that the purpose of this application is to seek the declaratory relief by way of an appeal in terms of s 35(3) of the Act.

[41] The provisions of s 35(3) are to be construed in the context of Part IV of the Act relating to discipline and removal and restoration from the roll of legal practitioners.

[42] The Committee is constituted under s 34. It comprises four legal practitioners appointed by the Council of the Law Society and one person appointed by the Minister of Justice who acts as secretary of the Committee. The Committee is to elect its chairperson from its number and enjoys a term of two years in office.

[43] Section 35 provides for the powers and procedure of the Committee. The Council of the Law Society or a person affected by

the conduct of a legal practitioner may apply to the Committee to require a practitioner to answer allegations of alleged unprofessional or dishonourable or unworthy conduct. Under s 35(2), where in the opinion of the Disciplinary Committee, an application made under s 35(1) does not disclose a *prima facie* case of unprofessional or dishonourable or unworthy conduct on the part of the legal practitioner in question, the Committee may summarily dismiss the application without requiring the practitioner to answer the allegations and without hearing the application.

[44] It is common cause that the applicants made an application (through the Law Society) to the Committee to require the 2nd respondent law firm to answer allegations of unprofessional or dishonourable or unworthy conduct. It is also common cause that the Committee formed an opinion that the application did not disclose a *prima facie* case of such conduct and summarily dismissed the application. The Committee then decided to dismiss the claim without hearing the application (under s 35(4)).

[45] Sub-section 35(3) provides:

> *"(3) An applicant who is aggrieved by the decision of the Disciplinary Committee under subsection (2) may appeal to the Court against that decision, and the Court may either confirm the decision of the Disciplinary Committee or order the*

Disciplinary Committee to hear the application and deal with it in accordance with subsection (4).”

[46]

[47] The stated purpose of this application, as I have said, is to appeal against the Committee’s decision to dismiss the application without hearing it.

[48] The further provisions in s 35 deal with the hearing of an application by the Committee where it is of the opinion that the complaint does disclose a *prima facie* case of such conduct. The hearing is of a formal nature. The Committee is vested with the power to appoint a practitioner to lead evidence and to cross-examine the legal practitioners in question and for witnesses to be called and for the presentation of argument. An impugned legal practitioner is entitled to legal representation at the hearing.

[49] At the conclusion of the hearing, the Committee may dismiss the application if satisfied that a case of such conduct has not been made out or, if satisfied that a practitioner is guilty of such conduct, apply to this Court for the striking of the practitioners’ name from the roll or to suspend him or her from practice if the conduct justifies such an application. If the conduct in question does not justify an application to this Court, the Committee may reprimand the practitioner or reprimand him or her and impose a penalty not exceeding N$10,000.00.

[50] I have referred to this section in some detail to demonstrate the central role of the Committee with regard to the disciplining of legal practitioners. Whilst Mr Corbett correctly submits that this Court remains vested with its inherent power to discipline practitioners, the legislature has established the Committee, composed of members of the profession, to perform the primary function of investigating allegations of dishonourable, unworthy or improper conduct on the part of practitioners and, after its investigation, to refer the matter to this Court, if justified. This is also accepted by the applicants in the relief which they seek of overturning the decision of the Committee and seeking an order in paragraph 2 of the notice of motion to direct that the Committee hear the application and deal with it in accordance with s 35(4) of the Act.

[51]

[52] Mr Corbett submitted that an appeal under s 35(3) is not an appeal of the kind referred to in the *De Bruin* matter. He pointed out that the *De Bruin* matter differed by virtue of the fact that the Court could impose its own sanction whereas under s 35(3) only two options are open to the Court, namely of confirming the Committee's decision or ordering the Committee to hear the application and deal with it in accordance with s 35(4). This difference is in my view of little consequence in the context of the fundamental principle enunciated in that decision, namely that an appeal in the ordinary sense contemplates a rehearing on the merits but limited to the evidence or

information upon which the decision, which is the subject of that appeal, was given and in which the essential determination is whether the decision in question was right or wrong. That fundamental principle applies with equal force to an appeal under s 35(3). The difference is in respect of the consequences of upholding an appeal and not in respect of the nature of the appeal itself.

[53]

[54] This issue is referred to at the outset is because it determines what is relevant to this appeal, an aspect which the applicants in this matter have overlooked. This Court, in determining this appeal is limited to the evidence or information upon which the decision under appeal was given and then determines whether or not that decision was right or wrong. The factual disputes which have arisen in this matter and the considerable further material which the applicants have seen fit to introduce in the replying affidavit (and even in the founding affidavit) beyond the issues and matter raised in the complaint which served before the Committee are to be seen in this context. As it is my function to rehear the merits of the application under s 35(1), limited to the evidence or information which served before the Committee, the further material placed before me which never served before the Committee would not in my view be relevant and should thus not be regarded in determining whether the Committee was right or wrong in its decision.

[55] The complaint in the form of the application by the applicants

to the Committee is attached to the founding affidavit. I refer to that application to the committee as the complaint for the sale of clarity. Although seven complainants are referred to, the 6th applicant, Mr FH Badenhorst, refers to himself twice, namely in his personal capacity and secondly in his representative capacity as managing director of the 1st applicant and a director of the 2nd applicant (Atlantic Meat Market) and of the 3rd and 4th applicants. The 5th applicant (M Investments) was not a party to that complaint. Mr Sidney Martin is however cited as a complainant even though he is not one of the applicants in the main application. He is however an applicant in the application to intervene in his capacity as a trustee of the Sidney Martin Family Trust ("the Trust").

[56] The complaint is set out in an affidavit by Mr FH Badenhorst together with annexures. He refers to all the complainants as "*existing clients*" by way of introduction and subsequently explains the relationships relied upon in support of the complaint of an impermissible conflict of interest.

[57] The complaint is essentially set out in paragraphs 1.1 and 1.2 of Mr Badenhorst's affidavit where he states:

> *"1.1 Koep & Partners attorneys created a conflict of interest with the aforesaid existing clients by having accepted a new instruction from two new clients namely FATLAND*

and BRODREN MICHELSEN (herein further referred to as 'new clients') in terms of which it is highly unlikely that Koep & Partners as legal representative for the said new clients, will not be placed in a position where the firm, Koep & Partners is obliged to act against existing clients in order to diligently protect the new clients' best interests.

1.2 This inevitably constitutes a conflict of interest with the existing clients' legal representative relationship with Koep & Partners".

[58]

[59] The complaint then proceeds to set out what are referred to as the existing clients' attorney client relationships with the firm. These are set out in paragraph 2 of the affidavit which I quote in full:

[60]

"2.1 Koep and Partners has an uninterrupted professional legal representative relationship since 2004/5 with inter alia Frans Hendrik Badenhorst who is also the Managing Director of the company against whom Koep & Partners has to act against in representing the new clients.

2.2 Koep and Partners likewise has an uninterrupted professional legal representative relationship since 2004 with Atlantic Meat Market (Pty) Ltd, Marketlink Namibia

(Pty) Ltd and Marketlink Investments (Pty) Ltd, all companies against whom Koep & Partners is likely to have to act against in order to diligently protect the new clients' best interests.

2.3 Koep and Partners likewise has an uninterrupted professional legal representative relationship since 2004 with the Directors of Atlantic Meat Market, Marketlink Namibia and Marketlink Investments inter alia Frans Hendrik Badenhorst and Sidney Martin, of which Frans Hendrik Badenhorst and Sidney Martin similarly represent the company against whom Koep & Partners has to act against.

2.4 Kindly find a letter dated 05 August 2009 from Koep & Partners annexed hereto marked "A and B" in confirmation of the existence of the abovementioned relationships ever since 2004." (sic)

[61] The complaint then proceeds to contend that in the new relationship Koep & Partners may be obliged to act against the existing clients thus explained, in order to diligently protect the new clients' best interests. Reference is then made to correspondence which Mr Koep of the 2nd respondent addressed to Witvlei Meat on behalf of the 5th and 6th respondents (as shareholders of Witvlei Meat) to complain of how that company was being managed and to record

an instruction on their behalf to launch an investigation into such matters. In pursuing that investigation, Mr Koep asked to be supplied with the names and "shareholders of a company called Marketlink which apparently purchased large amounts of meat from Witvlei Meat" and enquired as to "the status of debtors and creditors against Witvlei Meat from Atlantic Meat Market and to obtain reconciliation of amounts outstanding and paid including invoices issued against Atlantic Meat Market".

[62] The complaint then refers to the association of Koep & Partners, through its partner Mr Richard Mueller, in acting for Atlantic Meat Market and the 3rd and 4th applicants from 2004 in litigation against Standard Bank Namibia Ltd. The complaint further refers to a letter addressed by Mr Koep to Witvlei Meat on behalf of the 5th and 6th respondents for the attention of the 6th applicant alleging a breach of their shareholders' agreement, contending and that the actions of the 6th applicant could lead to a damages claim against him personally.

[63]

[64] The complaint thus contends that Koep & Partners intend to take action against the 6th applicant personally, an existing client of that firm, if accepting a new instruction from the 5th and 6th respondents (as well as acting against Witvlei Meat).

[65]

[66] The complaint also refers to a request he directed to Koep & Partners to act on behalf of Witvlei Meat. Mr Mueller on behalf of the

firm responded by advising Witvlei Meat that he could not act on behalf of that company by virtue of the fact that his partner, Mr Koep, acts for the 5th respondent. The complaint also states that Witvlei Meat objected to Koep & Partners' representation of the 5th and 6th respondents (against it) by reason of their firm's *"uninterrupted involvement to act for Atlantic Meat Market, Marketlink Namibia and Marketlink Investments since 2004 in several cases and still acts for the mentioned companies as attorney of record and which companies belong to the owners that hold the majority share in Witvlei … "*. It was thus contended that by accepting an instruction to act on behalf of the 5th and 6th respondents would constitute an impermissible conflict of interest by acting against Witvlei Meat.

[67]

[68] This complaint was raised in correspondence in September 2008. The 2nd respondent responded by stating that they "*do not foresee a conflict of interest in one of the partners acting for Atlantic Meat Market, Marketlink Namibia and Marketlink Investments*."

[69]

[70] Following this exchange of correspondence, the complaint refers to an email addressed to Koep & Partners by the 6th applicant on behalf of Witvlei Meat stating that Witvlei Meat *"will not entertain any further correspondence with you or your firm in this regard, however your 'clients' are welcome to direct enquiries to me alternatively through another firm"*.

[71] Despite this correspondence, the complaint states that Koep & Partners continued to represent the 5th and 6th respondents in dealings with Witvlei Meat. The complaint accordingly submits that by representing these new clients, Koep & Partners create a conflict of interest with those termed as existing clients and that this is in conflict with the duty upon them as attorneys to act in the best of their existing clients. The alleged misconduct on the part of Koep & Partners is amplified in 10 subparagraphs essentially relating to a conflict and a breach of attorney client relationship. The complaint further states in paragraph 4.15:

> *"Koep & Partners further enjoys an advantaged position in terms of advice to the new clients in terms of Witvlei Meat (Pty) Ltd as well as the directors in Witvlei Meat which would not have existed was there no involvement with the existing clients herein mentioned."* (sic)

[72] The complaint concludes to contend an "*obvious conflict*" which should preclude Koep & Partners from being able to act for the 5th and 6th respondents. That is the extent of the complaint which served before the Committee. There is no evidence before me of any further matter provided to the Committee apart from the complaint comprising the affidavit and its annexures (even though the latter were not even attached to the affidavit comprising the complaint but had to be traced elsewhere as other annexures to the founding

affidavit).

[73] In their response to the complaint, two of the partners of Koep & Partners, namely Mr R Mueller and Mr P Koep, each deposed to affidavits which served before the Committee.

[74]

[75] In his affidavit, Mr Mueller explained his professional relationship with the 2nd, 3rd and 4th applicants namely Atlantic Meat Market, Marketlink Namibia and Marketlink Investments. He pointed out that the litigation between these entities and Standard Bank arose from actions taken by Standard Bank during 2003 until April 2004 in which it is contended that Standard Bank honoured cheques of Atlantic Meat Market and Marketlink Namibia which they contend should not have been honoured. That bank then proceeded against those entities as well as Marketlink Investments and Mr FH Badenhorst and his brother Mr AH Badenhorst as sureties to recover amounts arising from such cheques or relating to them.

[76]

[77] Mr Mueller pointed out that Mr Martin was not a party to that action. He further pointed out that, in representing those entities, his firm acts as a correspondent for South African attorneys in those actions and that the counsel engaged in them is also based in South Africa. He further stated in his affidavit that he had in his possession copies of draft financial statements of Atlantic Meat Market and Martetlink Namibia, relevant to those actions but dating back to 2004

and before that time. He stated that these draft statements do not disclose particulars of the directors of the complainants or details of any dealings between them and Witvlei Meat. He pointed out that the documents, which pertained to the litigation against Standard Bank, are unrelated to any dealings between the complainants and Witvlei Meat and denies that they could in any way be prejudicial as the Standard Bank litigation relates to events which occurred in 2003/2004.

[78]

[79] Mr Mueller further pointed out that, in acting as a correspondent, his firm was only provided with documentation which the South African attorneys deemed necessary to forward to him. He further denied that, being privy to any confidential information pertaining to those applicants, except for matters relevant to the litigation against Standard Bank which arose in 2003/2004. He pointed out that he has acted for Mr Martin and continues to act for him in other matters but they do not relate to any of the applicants or respondents and that there is no conflict of interest between them and Mr Koep's representation of the 5th and 6th respondents against Witvlei Meat.

[80] Mr Mueller specifically stated that he was not sure as to what information was in the possession of his firm which could cause any prejudice to the complainants and made the point that this issue was not specified at all in the complaint. He denied that the action

between certain of the complainants and Standard Bank would be compromised by the firm acting for the 5th and 6th respondents against Witvlei Meat. He stated that he had never been privy to any financial statements of Witvlei Meat and had no knowledge of its internal procedures. He stated that he did not foresee that he would come into possession of any such knowledge by virtue of acting for certain of the complainants against Standard Bank in respect of a dispute about cheques in 2003/2004 and also failed to see the relevance of the action between Standard Bank and certain of the complainants with regard to the representation of the 5th and 6th respondents against Witvlei Meat.

[81] Mr Koep's affidavit confirmed what was stated by Mr Mueller. He then proceeded to explain his own involvement with the 5th and 6th respondents as shareholders of Witvlei Meat. He confirmed that he had been instructed by them to investigate the financial affairs of Witvlei Meat. He also stated that there was no information in the hands of his firm which would have assisted him in ascertaining this information on the instructions of his clients by virtue of the involvement of Mr Mueller in the litigation between Atlantic Meat Market and the Marketlink entities with Standard Bank. He also pointed out that the complainants had not complied with his demands for information on behalf of the 5th and 6th respondents by raising a conflict of interest. He pointed out that this issue had been raised in early September 2008 and that the complaint was only lodged with

the Law Society several months later in late April 2009. He pointed out that his clients were prejudiced by the failure to address the demands for information made on their behalf as shareholders of Witvlei Meat. He further stated that he had no knowledge of any financial statements which could be used against the complainants in defending the interests raised by the 5th and 6th respondents against Witvlei Meat. He also referred to the statements in the possession of Mr Mueller for the period prior 2004 which, according to Mr Mueller, nowhere disclosed information which relates either directly or indirectly to dealings with Witvlei Meat.

[82] The aforegoing constituted the complaint and the answer given by Koep & Partners. After it had been received by the Law Society, the complainants were informed that the complaint together with the reply would be referred to the Law Society's Standing Committee on Ethics for investigation. It would then make a recommendation to the Council of the Law Society.

[83] The further passage of the complaint as set out in the founding affidavit was that on 22 September 2010 the complainants received a letter from the Manager of Professional Affairs of the Law Society in which the applicants were informed that the complaint had been duly considered by the Law Society's Ethics Committee and that a recommendation had been made and that the matter was then referred to the Disciplinary Committee for investigation (under s 35).

[84] A letter was then sent several months later on behalf of the Committee (on 6 July 2011) stating that:

> *"The Disciplinary Committee, after perusing the file and reviewing all the information supplied by you, is of the opinion that there is no prima facie case against the legal practitioner(s) concerned".*

[85] The applicants then instructed the legal practitioners representing them in this application who addressed a letter to the Committee on 11 July 2011 requesting the following information and documentation from the Committee as a matter of urgency:

> *"1. Who were the members of the Committee at the time of the decision;*
>
> 2. *When was this decision taken;*
>
> 3. *A copy of the full record of the proceedings where this decision was taken."*

[86] The Committee was provided with an entirely unreasonable deadline to provide the information by the following day. There was reference in the founding affidavit to a further letter addressed to the

Committee seeking grounds in support of its opinion, apparently addressed on 14 July 2011. Although referred to in the founding affidavit, this letter was not attached. The applicants did not compel reasons from the Committee or the record previously requested within the unreasonable deadline. Instead, this application was launched the following month in August 2011.

[87] This Court in determining whether the Committee was right or wrong in deciding that there was no *prima facie* case against Koep & Partners is, as I have said, confined to the record of that decision placed before this Court. It comprises the terms of the complaint set out in the affidavit together with the attached correspondence and the answering affidavits given by Messrs Mueller and Koep in response to it. It would have been preferable if the applicants had pressed and if necessary compelled the Committee to provide its full record and its reasons. In the absence of doing so, the applicants are in my view confined in their appeal to the documentation which they have provided to this Court as constituting the record.

[88]

[89] The wider ambit to their complaint sought to be introduced by the applicants in the founding affidavit in this application and more so in reply cannot avail or assist them in the determination of this appeal. The further material is in my view irrelevant in determining the appeal under s 35(3).

[90] When I pointed this out to Mr Corbett, he submitted that this Court should have regard to the further matter contained in the founding affidavit and in reply even though it did not serve before the Committee because of this Court's overriding supervisory role with regard to legal practitioners. Despite the advent of the Act, this Court does retain an overriding supervisory role in respect of legal practitioners and will on appropriate occasion exercise its powers of discipline including striking practitioners from the roll. But this does not mean that the supplying of further material by the applicants in the founding affidavit and especially in reply shortly before the hearing, upon which the practitioners in question have not had the opportunity to respond and which is extraneous to the appeal, would warrant the exercise of this Court's inherent powers with regard to the disciplining of the practitioners in question.

[91]

[92] The legislature has after all devised a mechanism for the investigation of complaints against legal practitioners. It is for the duly designated Committee to investigate complaints and in serious instances to bring them to this Court where the striking or suspension of practitioners is justified. It is for the Committee thus to investigate complaints and not for the Court, especially by in the present context where new matter is raised which did not serve before the committee. This does not mean that the Court would be precluded from taking appropriate steps upon clearly established misconduct brought before

the Committee in an investigation. But this matter would not in my view be an instance for this Court to conduct its own investigation. It is after all an appeal under s 35(3). The untenability of this contention is also demonstrated by the dispute of fact on the papers on the further material and where yet even further new matter is raised in reply and upon which the practitioners have not had the opportunity to respond. The applicants are at liberty to bring a fresh complaint to the committee, raising such further matter, if so advised.

[93]

[94] The case of unethical conduct – in the form of an impermissible conflict of interests – which the 2nd respondent had to meet, is that contained in the complaint which served before the Committee. Although Witvlei Meat is referred to as an existing client in the description of the parties at the outset of the complaint, the existing attorney-client relationships with Koep & Partners, forming the basis of the complaint, are set out in paragraph 2 of that complaint. The relationships in question are those with the 6th applicant, Atlantic Meat Market and the two Marketlink concerns since 2004 and relationships with the directors of Atlantic Meat Market and the Marketlink concerns being the 6th applicant and Mr Sidney Martin. Concluding the segment of the complaint referring to the existing attorney-client relationships, paragraph 2.4 of the complaint refers to a letter dated 5 August 2009 from Koep & Partners confirming *"the existence of the abovementioned relationships ever since 2004."* That letter, not annexed as part of the attached complaint but found elsewhere as an

annexure to the affidavit attaches a statement from Mr Mueller which refers to the litigation between Atlantic Meat Market and the Marketlink concerns and Standard Bank, as well as the litigation between Standard Bank and Marketlink Investments and Mr AH Badenhorst as sureties of Atlantic Meat Market.

[95]

[96] Apart from the mere reference in the description of the six complainants as “existing clients”, there is no further reference in the complaint to Koep & Partners having an attorney-client relationship with Witvlei Meat. The relationships referred to are in the context of the representation of Atlantic Meat Market and Marketlink concerns and the 6th applicant in the litigation against Standard Bank. That is also how Messrs Mueller and Koep would have understood that complaint and how they dealt with it in their affidavits provided to the Committee.

[97] In the founding affidavit to this application, the applicants however refer to Koep & Partners acting on behalf of the 1st applicant. When I raised with Mr Corbett that this was not the nature of the complaint which served before the Committee, he referred to paragraph 4.11 of the complaint which, he submitted together with the reference of Witvlei Meat in the description as an existing client, sufficiently referred to an attorney-client relationship between Witvlei Meat and Koep & Partners. In paragraph 4.11 of the complaint it was

stated:

> *"The fact that a professional legal representative relationship between Koep & Partners, Frans Hendrik Badenhorst in his personal capacity as well as in his representative capacity in the companies mentioned herein, likewise with Sidney Martin, exists since 2004,* ***cannot be disputed****"*.

[98]

[99] This would not in my view in the context of the description of the existing attorney-client relationships with Koep & Partners under that very heading in paragraph 2 of the complaint sufficiently alert Koep & Partners to the complaint extending to acting on behalf of Witvlei Meat as well. There is no reference in the complaint, including the annexed correspondence, to this. This is compounded by the fact that the complaint referred to unspecified confidential information in the hands of Koep & Partners which would be to the prejudice of the applicants by reason of the alleged conflict but failing to identify the nature and ambit of such information and how it would prejudice the applicants.

[100] The reference in the founding affidavit of this application to Koep & Partners acting for Witvlei Meat was squarely denied in the answering affidavits. In his answering affidavit, Mr Koep stated that he had acted for the 5th and 6th respondents since approximately 2007 in negotiations with the other shareholders of Witvlei Meat in relation

to issues surrounding the reaching of the shareholders agreement. That fact alone would not in my view necessarily preclude Mr Koep or his firm from acting for the 5th and 6th respondents against the first applicant in the event of a breakdown in the shareholder relationship or in a claim by those shareholders in respect of a breach of that agreement.

[101] The applicants attached to the founding affidavit several pages of accounts from Koep & Partners directed to Atlantic Meat and the Marketlink entities, in demonstrating the attorney-client relationship. These statements run into some 13 pages. They refer to the litigation with Standard Bank and Mr Mueller's representation of those entities in that litigation. None was attached in respect of Witvlei Meat. Nor is one attached to the replying affidavit despite the extensive further matter contained therein seeking to refer to Koep & Partners acting on behalf of Witvlei Meat.

[102] In the founding affidavit, the existing attorney-client relationships of Koep & Partners are amplified to refer to companies in which the 6th applicant and Mr Martin have shareholding or are directors, and for whom Koep & Partners acts as lawyers. An instance of this, not mentioned in the complaint but in the founding affidavit, is that Mr J Agenbach, also a partner in Koep & Partners, was a trustee of the Sidney Martin Family Trust. It was stated that the Trust holds *"a significant number of shares in the various corporate entities referred*

to above". These entities are essentially one or more of the applicants in these proceedings. There is also reference to Koep & Partners being Mr Martin's legal representatives in matters which are currently pending in this Court and in respect of a matter where Mr Martin intends proceeding against another entity unrelated to these proceedings. These issues were not contained in the complaint where Mr Martin is referred to as a complainant in the following way:

> *"Sidney Martin in his representative capacity as Director in Witvlei Meat (Pty) Ltd and Atlantic Meat Market (Pty) Ltd."*

[103] In the founding affidavit, there is however reference to the litigation where Koep & Partners acts on behalf of both Mr Martin and with reference to the Standard Bank litigation and it is stated that the numerous confidential documents relating to that litigation has been provided to Koep & Partners. Despite the denial in the preceding answering affidavit to the complaint in this regard, there is no specific reference to confidential documentation in the founding affidavit which had been provided to Koep & Partners and which would be prejudicial to those applicants or the 1st applicant in the representation of Koep & Partners of the 5th and 6th respondents in their dispute with Witvlei Meat. Nor is the prejudice relating to the unspecified documents stated or explained, despite having been questioned in the earlier answering affidavits to the complaint. Even

though such material could not be considered in the context of an appeal, the absence of any reference to it is telling.

[104]

[105] The founding affidavit refers for the first time to the Sidney Martin Family Trust (*the Trust)* having a 22.667% share in Witvlei Meat and to the Trust's shareholding in Atlantic Meat Market.

[106] In the founding affidavit, the applicants referred to Mr Koep's denial of any information relating to the litigation being of any relevance to his acting for the 5th and 6th respondents. Despite this reference, no confidential information is referred to. The reference to Koep & Partners declining to act for Witvlei Meat in a claim against 5th and 6th respondents when requested to do so in June 2010 on the grounds of already representing the 5th and 6th respondents, cannot avail the applicants. Mr Koep had stated that his firm had acted on behalf of the 5th and 6th respondents for some considerable time prior to that request which was then correctly declined. The fact that the request was directed to Koep & Partners does not in my view advance the applicants' case except if it were raised in the complaint to demonstrate a relationship between Witvlei Meat and Koep & Partners which had not been established in the complaint.

[107]

[108] The founding affidavit does however refer to Koep & Partners acting for Witvlei Meat. This is, as I have stressed, denied in the answering affidavits to this application. In its lengthy and discursive

replying affidavit, the applicants in some detail alleged that there was an attorney-client relationship between Witvlei Meat and Koep & Partners and referred to certain instances but, as was pointed out by Mr Heathcote, they failed to attach any statement of account in respect of such attendances. The reference to these specified instances forms the subject matter of a striking out application by Koep & Partners on the grounds that these references and passages contain new matter which should have been contained in the founding affidavit. In my view, the notice to strike in respect of this new matter is well founded. These references should, if they were to have been raised, been contained in the founding affidavit. Not only does this material constitute impermissible new matter, but it is also in any event irrelevant by reason of the fact that this alleged relationship does not form part of the complaint and because an appeal against that complaint is confined to what served before the Committee. Insofar as it may be relevant for the interdictory relief sought by the applicants, it would in my view in any event constitute new matter and fall to be struck on that basis as well. Certain material is also sought to be struck on the grounds of being inadmissible hearsay. The second respondent's notice to strike thus succeeds with costs as I set out in the order at the conclusion of this judgment.

[109] Whilst the Act and Rules of the Law Society of Namibia do not specifically address conflict of interest as a form of unethical,

dishonourable or unworthy conduct, it is of course well established that a legal practitioner who continues to represent a party in the face of a conflict of interest would be guilty of such conduct. Counsel for both the applicants and the 2nd respondent referred to *Lewis Legal Ethics: A guide to Professional Conduct for South African Attorneys*[3] where a useful definition of the concept is provided:

> *"A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interest of the client or prospective client."*

[110] In considering the appeal under s 35(3) in the context of the basis upon which the complaint was raised, it would not seem to me that the Committee was wrong in finding that no *prima facie* case of unethical conduct against Koep & Partners was raised. The relationships referred to in the complaint are essentially with reference to the litigation involving the 2nd, 3rd, 4th and 6th applicants with Standard Bank concerning the honouring of the 2nd applicant's cheques by that bank in 2003/2004. The applicants did not in their complaint establish how <u>that</u> representation would constitute a conflict of interest in respect of the firm's representation of the 5th and 6th respondents in their dispute with Witvlei Meat. The relationship set

[3] 1982 at paragraph 49

out in the complainant do not in my view preclude the 2nd respondent from representing the 5th and 6th respondents in their dispute against Witvlei Meat. This is not even a case of a parent/subsidiary relationship between Witvlei Meat and the 2nd, 3rd, 4th and 6th applicants. These applicants are not even alleged to be shareholders of Witvlei Meat. The 5th applicant, which is, does not have any relationship with Koep and Partners and it was not a complainant. Nor was Mr Martin in his capacity as trustee. The helpful test which was applied in a parent/subsidiary context in the judgment from the California Court of Appeals cited by the 2nd respondent which would in any event be against the applicants does not find application to this matter[4]. Nor does the *alter ego* doctrine referred to in that case – where there is such unity of interest that the separate legal personalites of corporations (and a shareholder and director) should be treated as the same entity for conflict persons. The relationships raised in the complaint are in my view too remote to establish an impermissible conflict.

[111] Much of Mr Corbett's argument concerning a conflict of interest was premised upon it being established that Koep and Partners had acted for Witvlei Meat. But this was not properly raised in the complaint which served before the Committee, as I have pointed out. Nor was this even established in this application upon the well

[4]Brooklyn Navy Yard cogeneration Partners, LP v The Superior Court of Orange Country (Respondent) and Persons Corp. (Real Party in Interest) 60 Cal. App. 4th 248.

established approach to disputed facts in motion proceedings. Many of the authorities cited in argument would thus not find application. Mr Corbett suggested that this aspect should then be referred to oral evidence. I decline to do so as it would serve no purpose to do so, given the failure to have properly raised it in the complaint which is after all for the committee to investigate and is irrelevant to this appeal.

[112] What has been established by the applicants in their complaint is that Koep and Partners have represented a director of Witvlei Meat and other applicants which are not even shareholders in respect of entirely unrelated litigation against their banker in respect of a cause of action which arose in 2003/2004 which was not shown to have any relation to the 5th and 6th respondents' dispute with Witvlei Meat. The applicants in my view failed to establish in their complaint quite why this constituted an impermissible conflict of interests. The representation of another director, Mr Martin, unrelated proceedings like wise would not constitute an impermissible conflict of interest. The Committee was in my view correct in finding that a *prima facie* case of misconduct was not established on the matter which served before it.

[113] It would follow that the appeal under s 35(3) against the decision of the Committee is to be dismissed and the committee's decistion is confirmed. The declaratory relief sought in paragraph (a)

(in the nature of such an appeal) is thus to be dismissed. It would also follow that the relief sought in paragraphs 2 and 3 of the notice of motion must also fail as it is dependent upon a successful appeal against the Committee's decision. It is thus not necessary to further consider that relief.

[114] I turn now to the application to intervene.

Application to intervene

[115] In the answering affidavit to this application, Mr Koep attached draft financial statements of the Trust as well as certain resolutions of the Trust in dealing with an allegation made in the applicants' founding affidavit as to the shareholding of the applicants. In the founding affidavit it was stated under oath by the 6th applicant that the Trust owns 30% of the shares in Atlantic Meat Market and 51% of the shares in Marketlink Namibia and 100% of the shares in the 5th applicant, M-Investments (Pty) Ltd. These statements, contained in the founding affidavit, are confirmed under oath by Mr Martin in a confirmatory affidavit.

[116]

[117] The draft financial statements and resolutions of the Trust came into the possession of Mr Agenbach in his capacity as a duly appointed trustee of the Trust. They were attached to refute and deal with allegations made concerning the shareholding of the Trust.

Those financial statements refer to the Trust having 100% shareholding in M-Investments Holdings (Pty) Ltd. There is no reference to any shareholding in the 5th applicant. In the complaint, where Mr Martin is referred to as a complainant, it is in his representative capacity as a director of Witvlei Meat and Atlantic Meat Market. But Mr Martin, in that capacity, made common cause with the complaint against Koep & Partners to the Law Society. In his confirmatory affidavit in this application, he confirmed the allegations referring to him and the Trust in the founding affidavit and sought to amplify the complaint to extend to Koep and Partners' relationship with the Trust. The Trust was incidentally not referred to in the complaint. Nor was Mr Martins' capacity as trustee referred to there, but only his capacity as director of Atlantic Meat Market and Witvlei Meat (and thus not himself a party to the litigation against Standard Bank).

[118] Following the attachment of the draft financial statements and resolutions, Mr Martin and Mr TJA Saunderson as trustees launched an application to intervene in the main application for the purpose of striking those documents from the record and seeking costs against Koep & Partners jointly and severally with any applicant or respondent opposing their application for intervention and further relief. In that application, the intervening applicants submit that they have a direct and substantial interest in the litigation in the main application because, so they contend, Mr Koep wrongfully disclosed and made

public draft financial statements and resolutions of the Trust (annexed to the answering affidavit). They contend that these documents are confidential and privileged and protected by attorney and client privilege. That was the primary basis for seeking intervention and, if granted, to strike those documents from the record. The intervening applicants also invoked the Trust's right to privacy protected by Article 13 of the Constitution as a second and further basis for intervention and to strike the documents from the record.

[119]

[120] In the application for intervention, Mr Martin contends that attorney-client privilege arose in the following way. It is common cause that on 27 October 2010 he approached Mr Mueller of Koep & Partners to serve as a trustee of the Trust. In the course of that meeting,

Mr Mueller advised Mr Martin that he did not consider his legal knowledge and experience sufficient to do so and suggested his partner Mr J Agenbach be approached for appointment as a trustee. On 4 November 2010 Mr Martin duly approached Mr Agenbach who accepted the appointment as a trustee. On 30 November 2010, the latter signed a document styled "*Acceptance by a trustee*". On 12 January 2011 a copy of the deed of trust was delivered to Mr Agenbach. The trustees held a meeting on 26 January 2011 at which Mr Agenbach indicated that he had not seen any financial statements or draft financial statements of the Trust. At that meeting, Messrs Saunderson and Martin handed a copy of draft financial statements of

the Trust dated 10 November 2010 to Mr Agenbach. Subsequent to the meeting of 26 January 2011, a resolution was adopted and dated 26 January 2011. It is attached to the opposing affidavit without receiving an annexure number. Two further resolutions were attached, dated 28 February 2011, as annexures "PFK11" and "PFK12" to the answering affidavit.

[121]

[122] In the answering affidavit deposed to by Mr Agenbach, the 2nd respondent denies that there was an attorney and client privilege attaching to the documents and also denies that the constitutional right to privacy applies to the circumstances of this case, even though it is acknowledged that the documents were confidential.

[123] In order to determine the issue as to whether there was an attorney and client privilege as well as a breach of the right to privacy, the disputed facts will be approached in accordance with the principle generally applicable to motion proceedings as set out in Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd [5] consistently applied by this Court over the years.

[124] In his affidavit, Mr Martin contended that Koep & Partners were appointed as legal practitioners for the Trust with Mr Agenbach as trustee to attend to the work on its behalf. He referred to an invoice in the sum of N$515.20 provided by Koep & Partners to the Trust on

[5] 1984(3) SA 623 (A) at 635 C

1 April 2011 and referred to the agreed remuneration which would be payable to Mr Agenbach as trustee. He further asserted that when the draft financial statements of the Trust were handed to Mr Agenbach, they were entrusted to him only for the purpose of the affairs of the Trust and as its legal practitioner. Mr Martin contended in the intervention application that Mr Agenbach had a general duty to keep the information and documents confidential.

[125]

[126] Mr Martin further pointed out that the disclosed draft financial statements contained information which was irrelevant to refute the allegations in the main application and that the proper manner to establish who the members of a company were would be to have invoked the provisions of s 120 of the Companies Act, 28 of 2004 by inspecting the register of members. The registers of companies are public documents and would, so he contended, not be protected by any claim to privacy or confidentiality and would have been a less damaging option open to Koep & Partners. It was, he submitted, their duty to pursue that avenue instead of disclosing the confidential information included in the Trust documentation. Mr Martin reiterated that the Trust was a client of Koep & Partners and that the firm should have approached the Trust permission to disclose the confidential documents. It was also stated that Mr Agenbach would have known that the description of the 5th applicant as M-Investments (Pty) Ltd was a *bona fide* error and that it should have been corrected to read M-Investment Holdings (Pty) Ltd.

[127] In his answering affidavit to the application for intervention, Mr Agenbach stated that his firm did not oppose the application for intervention in the main application but opposed the costs order sought against it. In oral argument, Mr Heathcote also opposed the application to strike the documentation in question on behalf of Koep & Partners.

[128]

[129] In his affidavit, Mr Agenbach denied that the documentation was wrongfully disclosed. He stated that the 2nd respondent did so in order to counter allegations of unethical conduct on their part to the effect that as a trustee of the Trust, he was required to protect the assets that vest in the Trust and had not done so by virtue of his firm acting against Witvlei Meat. This was after all an allegation made in the founding affidavit of the main application – but not made in the complaint which served before the Committee. Mr Martin in his affidavit confirmed it and the allegations raised in support of it and those which referred to him and the Trust.

[130] Mr Agenbach conceded that the documentation was confidential as between trustees of the Trust. But he denied that the documentation was subject to attorney-client privilege. The documents were, so he stated, not provided to or obtained by him in the course of providing legal advice or any legal service to the Trust. He further stated that his firm was entitled to refer to the documents

on the grounds of waiver as well as invoking Article 12 of the Constitution in view of the fact that Mr Martin by deposing to his supporting affidavit had joined forces with the applicants to accuse the 2nd respondent and Mr Agenbach in particular of unethical conduct by representing clients with conflicting interests, by relying upon Mr Agenbach's position as trustee of the Trust to support those allegations. Mr Agenbach however points out that his appointment as trustee occurred at a time when Mr Martin had full knowledge of the fact that the 2nd respondent represented the 5th and 6th respondents.

[131]

[132] Of more relevance for present purposes, Mr Agenbach further stated that the information in the documentation sought to be struck was relevant to the issues raised in the main application for the purpose of correcting information placed before this Court with reference to information he had at his disposal as trustee of the Trust. He conceded that some of the information contained in the financial statements was not relevant to the main application and that he had in correspondence offered that certain portions could be blocked out. But the intervening applicants' legal practitioners however insisted in response to that offer that the financial statements should be removed in their entirety from the record.

[133] Mr Agenbach however points out that the relevance of the financial statements appear from page 11 thereof. Under note 3 it is

stated that the unlisted investments of the Trust include 100% of the shares in M-Investment Holdings (Pty) Ltd. The unlisted investments do not include holding shares in the other applicants in the main application as was alleged in paragraphs 21 to 24 of the founding affidavit which Mr Martin had confirmed under oath. Mr Agenbach points out that those allegations were made for the purpose of persuading this Court in the main application that the 2nd respondent had a conflict of interest.

[134] The 2nd respondent was in my view entitled to refute those allegations which were false or incorrect and which had been confirmed by Mr Martin under oath. The draft financial statements would and did in fact refute those allegations. The fact that the same information could have been obtained by inspecting the various companies' registers would not in my view mean that the draft financial statements could not be referred to.

[135] The only question which arises is whether the 2nd respondent was precluded by attaching the documents by virtue of an attorney-client privilege or by Article 13 of the Constitution.

[136] In supporting his denial of an attorney-client privilege, Mr Agenbach emphatically stated that Mr Martin had approached him to act as a trustee and that the approach was on the basis of Mr Agenbach's experience and expertise in handling trust matters. Mr

Agenbach stated that the office of a trust is by no means the exclusive preserve of the legal profession. He pointed out that neither of the two other trustees are legal practitioners and that Mr Saunderson is a chartered accountant. He further pointed out that the duties of a trustee and in particular those duties he performed for the Trust did not constitute legal advice or legal representation of the Trust and were not performed in his capacity as a legal representative of the Trust.

[137]

[138] He accordingly denied that there was any attorney and client privilege attaching to his position as trustee. He denied that Mr Martin had requested his firm, Koep & Partners, to act as a trustee for the Trust and stated that he had been personally approached and appointed. He also denied that Koep & Partners was engaged to act as legal advisors to the Trust.

[139]

[140] Mr Agenbach further pointed out that even if Mr Martin had requested his firm to do so, he would not have agreed to that as it is not his standard practice for his firm to act for entities in which he has a personal interest. He correctly states that this would not be in accordance with good governance and could compromise the objectivity of both himself and members of his firm. He explained that the account of N$515.20 sent by his firm to the Trust had been in respect of disbursements such as copies and that these charges are generated by his firm whenever a file is opened, regardless as to

whether a practitioner acted as such or in another capacity such as serving as a director or other office bearer of an entity or organisation. He said that this invoice did not include professional fees and that he had agreed to charge a standard rate as trustee determined with reference to a percentage of its income.

[141] Applying the well accepted approach to disputed facts, already referred to I accordingly find that the intervening applicants have not established an attorney-client privilege in the circumstances and that the disclosure of the documentation could not be precluded on that basis. Given my conclusion that attorney client privilege has not been established, it is not necessary for me to deal with the authorities raised by counsel for the intervening applicants, Mr Vos, as to its consequences.

Right to privacy

[142] Article 13 of the Constitution protects the right to privacy in the following way:

> *"(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health*

or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied."

[143]

[144] I assume for present purposes, without deciding the issue, that a trust, through its trustees can invoke Art 13, on the strength of the approach of the Supreme Court in *African Personnel Services v Government of Namibia & Others*[6] with which I respectfully agree.

[145]

[146] The intervening applicants contend that Koep and Partners breached the right of privacy which the Trust enjoys under the Constitution by disclosing the information in question whilst there

[6]2009(2) NR 596 at paragraphs 33 to 44

were less damaging means available to secure information regarding the members of the corporate entities in question. The intervening applicants contend as a consequence that Koep and Partners were not permitted thus to breach the right to privacy which the Trust enjoys.

[147] In support of this contention, the applicants referred to NM and others v Smith and others (Freedom of Expression Institute as *amicus curiae)* [7]. But this case is in my view distinguishable. The matter addressed the issue of the right to privacy in the context of the disclosure of an individual's HIV status which caused mental distress and injury and deserving of protection and that an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure by reason of the negative social context of that condition, as well as potential intolerance and discrimination which resulted from that disclosure. The issue of that disclosure was raised in the context of an *actio injuriarum*.

[148]

[149] The present circumstances are entirely different. Mr Martin had after all made common cause with the applicants in their complaint which served before the Committee and thereafter in this application and confirmed statements about the Trust which were not correct and which Mr Agenbach on behalf of Koep & Partners was entitled to correct. Having placed Mr Agenbach's position as trustee in issue with regard to the interests of the Trust, it was in my view open to the

[7] 2007(5) SA 570 (CC).

2nd respondent to address false or incorrect information deposed to under oath in his answering affidavit, and to do so with reference to material of the Trust in his possession. This the 2nd respondent did. This is entirely different to the disclosure of a patient's HIV status in the circumstances of the matter which served before the Constitutional Court of South Africa.

[150] Mr Vos also referred to an individual's right to privacy in relation to medical information which arose and was protected by the South African High Court in Tshabalala-Msimang and another v Makhanya and others [8]. That Court ordered a newspaper to return to the applicant, a Minister, certain private medical information concerning her which had been disclosed without her consent. It would also seem to me that the present circumstances are distinguishable from that matter. The newspaper was not authorised to have had that confidential matter and was ordered to return it. That is entirely unlike Mr Agenbach's possession of the Trust's documents which refuted an allegation made in the context of an unethical conduct complaint raised against that practitioner with reference to being a trustee of that Trust (by Mr Martin, a fellow trustee).

[151]

[152] It would follow in my view that the intervening applicants have not established a breach of the Trust's right to privacy, insofar as a Trust, which is not a separate legal entity, would be entitled to raise

[8] 2008(6) SA 102 (W)

such a constitutional right through its trustees. The latter question is left open as it is not necessary to be determined in these proceedings.

[153] The application to intervene is unopposed. Its purpose is essentially to intervene in the main application to strike out the documents of the Trust attached to the answering affidavit and listed in the application and for their return. I am satisfied that the rights raised in support of the application to strike out, namely the protection of documentation on the basis of an attorney client privilege and upon the constitutional right to privacy, would amount to a direct and substantial interest in the litigation thus entitling those applicants to intervene in the main application for that purpose to exercise those rights. I accordingly grant them the right to intervene but make no award as to costs in granting such leave.

[154]

[155] But having failed to establish the legal privilege in question and a breach of the right to privacy, the application to strike the documents of the Trust from the record is dismissed. That application to strike was opposed by Koep & Partners. They are entitled to their costs of opposition to it. The applicants to invene are however to bear their costs in respect of the application for intervention. The applicants also did not establish the need for the relief sought for the return of the documents, as Mr Agenbach returned those in his possession and the remaining documents form part of the court record.

Order

[156] [111] In the result, I make the following order:

[157]

(a) Leave is granted to Sidney Wilfred Martin NO and Theodore James Anthony Saunderson NO to intervene in the main application. No order as to costs is made in respect of granting such leave.

[158]

(b) The further relief sought in the application to intervene is dismissed with costs. The intervening applicants are to pay the costs of the second respondent opposing the application to strike the documents referred to in the notice of motion from the record in the main application. For the purpose of the Taxing Master, approximately 2 hours were spent on this aspect and such costs are to include the costs of two instructed and one instructing counsel.

[159]

(c) The application is dismissed with costs which include the costs of two instructed and one instructing counsel.

[160]

(d) The portions of the replying affidavit referred to in paragraphs 1, 2 and 3 of the 2nd respondents' notice to strike are hereby struck with costs, also including two instructed and one instructing counsel.

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Smuts, J

ON BEHALF OF APPLICANTS **ADV. A. CORBETT**

Instructed by: **CONRADIE & DAMASEB**

ON BEHALF 2ND, 5TH & 6TH RESPONDENTS **ADV. R. HEATHCOTE SC,**

Assisted by: **MR. R. MAASDORP**

Instructed by: **KOEP & PARTNERS**

ON BEHALF OF THE INTERVENING APPLICANTS. **MR. W. VOS**

Instructed by: **CONRADIE & DAMASEB**