REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: (P) I 2044/2010

In the matter between:

1.1.1.1. **WITVLEI MEAT (PTY) LIMITED**

APPLICANT

and

FATLAND JAEREN AS **FIRST RESPONDENT**

BRODR MICHELSEN AS **SECOND RESPONDENT**

KOEP & PARTNERS **THIRD RESPONDENT**

Neutral Citation: *Witvlei Meat (Pty) Ltd v Fatland Jaeren AS (I 2044/2010) [2013] NAHCMD 76 (20 March 2013)*

Coram: SMUTS, J

Heard: 20 February 2013

Delivered: 20 March 2013

Flynote: Interlocutory application for stay of action pending the removal of third respondent as legal practitioners for first and second respondents or pending an appeal in another application involving the parties. Defences of res judicata and issue estoppel raised. Requirements set out conflict of interest referred to and discussed.

ORDER

[2] That this interlocutory application is to be dismissed with costs. The parties are in agreement that an order as to costs should include those occasioned by the employment one instructing and two instructed counsel. I make an order to that effect. I also grant an order striking the portion of the replying affidavit referred in paragraph 1.2 of the notice to strike, with costs. For the purpose of the Taxing Master, one tenth of the time used for argument was directed at this issue.

JUDGMENT

SMUTS, J

[3] The applicant is the plaintiff in an action against the first and second respondents (first and second defendants respectively). In that action, the plaintiff claims damages for the breach of an import/export agreement with the first and second defendants in a sum in excess of N$12,2 million. The defendants are joined in this interlocutory application by their legal representatives in that action, Koep & Partners. That firm is cited as the third respondent.

[4] In this interlocutory application, the applicant seeks a stay of its action against the first and second respondents pending the withdrawal of the third respondent as the legal practitioners of record for the first and second respondents and directing that they appoint a new firm of legal practitioners to represent them in the action proceedings within 30 days of an order to that

effect. In the alternative, the applicant seeks a stay of the action pending the outcome of an appeal noted by the applicant in the matter of *Witvlei Meat (Pty) Ltd and 5 others v The Disciplinary Committee for Legal Practitioners and 5 others* under Case No SA 9/2001 against the order of this court handed down on 20 February 2012. The applicant also seeks the costs of this interlocutory application in the event of opposition. The applicant contends that it is a client of long standing of the third respondent and that it would constitute an impermissible conflict of interest for the third respondent to represent the first and second respondents in the action.

[5] This interlocutory application has arisen in the following way.

[6] The applicant's action against the first and second respondents was issued out of this court on 11 June 2010. In the particulars of claim, it is alleged that the applicant and first and second respondents concluded a written agreement in terms of which they, being concerns incorporated in Norway, would import and engage in the sales and marketing of the applicant's meat and meat products in that country. The applicant operates an abattoir in Namibia and is a producer of fresh, frozen and chilled meats and fresh, frozen and chilled offal. The agreement was concluded in September 2007. The first and second respondents were at the time shareholders in the applicant.

[7]

[8] The applicant alleges that the first and second respondents breached the agreement and as a consequence the applicant suffered damages in an amount in excess of N$12,2 million. The first and second respondents, as *peregrini* of this court, consented to the jurisdiction of this court. They did so through a letter addressed by the third respondent to the applicant's legal practitioners of record. The first and second respondents requested further particulars to the applicant's particulars of claim in 2010. These were not forthcoming and resulted in an application to compel the delivery of particulars. That application was brought and the applicant was ordered on 8 July 2011 to deliver certain particulars in response to the request.

[9]

[10] The first and second respondent's thereafter brought a further application

to strike out the applicant's action by reason of the alleged failure on the part of the applicant to comply with the court order.

[11]

[12] The matter was subsequently referred for a judicial case management. In advance of judicial case management hearing on 22 February 2012, the parties provided a case management report in which it was stated that the first and second defendants were prepared to withdraw the application to strike the applicant's action provided that certain further and better particulars were filed. This subsequently occurred and the first and second defendants served and filed their plea on 24 July 2012.

[13]

[14] When the matter reverted back to case management on 3 October 2012, the applicant gave notice in the case management report that it intended to bring an interlocutory application to stay the proceedings pending the outcome in the appeal referred to. It undertook to do so by 31 October 2012. This application was served on the following day. When the matter reverted to case management on 28 November 2012, the application was postponed by agreement to 20 February 2013 for argument. The respondents were ordered to file their answering affidavits by 18 January 2013 and the applicant to file a replying affidavit by 31 January 2013. Those affidavits were duly filed. The papers in this interlocutory application are voluminous. Including annexures, they exceed 300 pages.

[15] As is pointed out in the founding affidavit, the applicant and four other corporate entities and the deponent to the founding affidavit Mr Badenhorst, Managing Director of the applicant, brought a substantive application in this court against the Disciplinary Committee for Legal Practitioners and the respondents in this application as well as citing the Law Society of Namibia and the Minister of Justice as respondents. That application has some relevance to these proceedings, as the respondents claim that the matters raised in this application are res judicata or that issue estoppel arises. It is accordingly necessary to refer to it in some detail. I refer to it as the earlier application. An appeal was noted against the order given in that matter by the applicants in that matter, including the applicant, and is the appeal referred to in the alternative

relief.

[16] The applicants in the earlier application sought a declarator in the form of an appeal in terms of s 35(3) of the Legal Practitioners Act, 1995 (the Act). The declaratory relief sought by them was that their complaint against the third respondent disclosed a *prima facie* case of unprofessional or dishonourable or unworthy conduct on their part. The gravamen of the applicant's complaint was that it constituted an impermissible conflict of interests for the third respondent firm to represent the first and second respondents against the applicant as the other applicants, who or which were shareholders in or were connected to the applicant were existing clients of the third respondent's firm. The Disciplinary Committee, established under the Act, had ruled that the conduct referred to in the complaint did not constitute a *prima facie* case of unprofessional or dishonourable or unworthy conduct in terms of the Act. In addition, the applicants in that earlier application sought an order compelling the Disciplinary Committee (the Committee) to hear the complaint brought by them against the third respondent under s 35. The applicants also sought an interdict against the third respondent pending the finalisation of disciplinary proceedings under s 35 with the 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 3rd 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 3rd respondent's existing clients.

[17] The applicants in that earlier application made it clear that the purpose of that application was to seek the declaratory relief by way of an appeal against the decision of the Committee in terms of s 35(3) of the Act. This sub-section affords a person aggrieved by a decision of the Disciplinary Committee an appeal to this court against the Committee's decision. The provisions of that

sub-section were referred to in more detail by the court in its judgment in that matter. In determining an appeal under s 35(3), this court found that it was limited to the evidence or information upon which the decision under appeal was given. Further material which had not served before the Committee was however set out in the founding affidavit. This court did not consider that further material was relevant for the purpose of the appeal.

[18]

[19] The respondents who opposed the earlier application denied many of the allegations raised in the founding papers and placed material before court in support of those denials. In the replying affidavit filed shortly before the hearing in the earlier application, the applicants in that application saw fit to considerably amplify their case against the third respondent. This then resulted in an application to strike out new matter in reply which met with some success.

[20]

[21] The applicants in the earlier application however contended that this court should have exercised its overriding supervisory role in respect of legal practitioners and exercise its inherent powers with regard to disciplining practitioners and therefore grant the declaratory relief sought even if matter referred to in that application had not served before the Committee. This court however referred to the provisions of the Act and the role of the Committee in investigating complaints against legal practitioners. This court referred to the mechanism specifically created in the Act for the Committee to do so and in serious instance to bring them to this court where the striking or suspension of practitioners is justified. This court made it clear that it is thus for the Committee to investigate complaints and not for the court, especially in the circumstances of the earlier application where new matter was raised which did not even serve before the Committee and where even further new matter was raised in reply shortly before the hearing where the practitioners did not have the opportunity to deal with such further matter. But this court did make it clear that in the exercise of its inherent powers relating to the supervision and disciplining of legal practitioners, that a court could take action against practitioners on matter properly placed before it. The earlier application had however been brought as an appeal under s 35(3) and was to be treated thus.

[22]

[23] This court concluded that, on the basis of the material which served before the Committee, the latter had not been wrong in finding that no *prima facie* evidence of unethical conduct against the third respondent was raised. The appeal under s 35 against the decision of the committee was thus dismissed and the committee's decision was confirmed. The declaratory relief thus sought in the earlier application was dismissed and the further interdictory and other relief, dependent upon a successful appeal, was also dismissed. This court indicated that it was open to the applicants to file a fresh complaint against the third respondent incorporating matter which had not served before the committee previously. I was informed during argument in this matter that the applicants had not done so.

[24] In the earlier application, it had been alleged in the founding affidavit that the third respondent had acted for the applicant in this application. That was squarely denied in the answering affidavits in that application. The complaint raised with the Committee had also not been premised on the basis of the third respondent having previously acted for the applicant in this application. This court found that it was not established upon the well-established approach to disputed facts in motion proceedings that the applicant had been the third respondent's client.

[25]

[26] The earlier application had much to do with Mr Koep of the third respondent representing the first and second respondents in their dispute with the applicant culminating in the action and representing them in that action. That dispute manifested itself when Mr Koep sent an email on 4 September 2008 on behalf of the first and second respondents to the applicant in respect of that dispute. This elicited a response from Mr H Badenhorst, the Managing Director of the applicant and deponent to the founding and replying affidavits in this application. He responded on 8 September 2008 complaining of a conflict of interest on the part of the third respondent and sought to resist that the third respondent from acting for the first and second respondents. In that email of 8 September 2008, Mr Badenhorst did not contend that the third respondent had acted for the applicant but rather that it acted for other companies linked to shareholders of the applicant in proceedings referred to in the earlier application.

That was also how the complainant was raised with the Committee against the third respondent.

[27] As was pointed out in this court's judgment in the earlier matter, much of the argument advanced on behalf of the applicants was premised upon it being established that the third respondent had acted for the applicant. But, as was pointed out in that judgment, this had not been properly raised in the complaint which served before the committee. Nor had it been established in that application upon the well-established approach to disputed facts in motion proceedings. But the earlier application had been brought on that basis.

[28] The applicant together with the other applicants in that application, then noted an appeal against the judgment of this court given in respect of the earlier application on 20 February 2012. But that appeal had not been prosecuted in accordance with the Supreme Court Rules and has lapsed. This had resulted in the applicant and the other appellants bringing an application on 28 June 2012 to reinstate the appeal. That application is opposed. Notwithstanding that, this application was then brought this application some months later on 1 November 2012, as I have already pointed out. The lapsing of the appeal is not disclosed in the founding affidavit and this issue, including the status of the application for reinstatement, is not even referred to in the replying affidavit.

[29]

[30] In the answering affidavit the respondents made it clear that the basis for the application being that the applicant had been a client of long standing and was an existing client of the third respondent was unfounded. But the respondents also pointed out that this court had found that this attorney-client relationship raised in the earlier application was not established in the earlier application and that this issue, thus raised in the earlier application and thus decided, was res *judicata* alternatively that issue estoppel should find application. It was accordingly argued on behalf of the respondent that the main relief sought in this interlocutory application should be dismissed with costs for these reasons. As to the alternative relief, namely that a stay should be ordered pending the finalisation of the appeal, the respondent pointed out that the appeal had already lapsed. As I have pointed out this relief would not be

competent in the circumstances. The lapsing of the appeal was not disputed or even dealt with at all in reply. Mr Frank, SC, who together with Mr Corbett, appeared for the applicant however sought to amend the notice of motion in seeking the stay pending the application for reinstatement of the appeal. The respondents also opposed the application on the basis that the relief claimed is not competent.

[31] In this judgment I shall first deal with the defence of issue estoppel raised by the respondents. I then proceed to refer to the respondents' argument that the relief was not competent before referring to the question as to whether it was in any event established on the papers before me, properly approached whether there is an impermissible conflict of interests on the basis of the applicant being a long-standing and existing client of the third respondent and in possession of confidential information.

Issue Estoppel

[32] The respondents argue that what had been sought by the applicants in the earlier application – with the current applicant being one of that number – namely that the third respondent must withdraw as the first and second respondents' attorneys of record is the same issue as raised in this application and that issue estoppel would arise. I understood Mr Frank's argument on behalf of the applicant to be more nuanced than that contained in the applicant's heads of argument. The heads of argument disputed the application of issue estoppel on the grounds that the critical issue is one which would serve before the Supreme Court and that the appellants in the appeal enjoy good prospects of success in that appeal. Mr Frank however contended that the earlier application concerned an appeal against the ruling of the Committee by the third respondent in this action and that res judicata and issue estoppel would not arise.

[33]

[34] The parties would not appear to differ upon the applicable legal principles relating to issue estoppel. Both have referred to the detailed analysis of res judicata and of issue estoppel contained in *Bafokeng Tribe v Impala Platinum*

Ltd and others.[1] After a detailed survey of earlier and English authorities, the court in that matter concluded:

'From the aforegoing analysis I find that the essentials of the exceptio res judicata are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (ex eadem petendi causa), (3) with respect to the same subject-matter, or thing (de eadem re). Requirements (2) and (3) are not immutable requirements of res judicata. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.

A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions.

This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.

The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action.

Issue estoppel is a rule of res judicata but is distinguished from the Roman-Dutch Law exception in that in issue estoppel the requirement that the same subject-matter or thing must be claimed in the subsequent action is not required. Issue estoppel has a twofold requirement.

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[1] 1999(3) SA 517 (B).

Issue estoppel has been applied in our law in decisions of Provincial and Local Divisions. However, in the Kommissaris case supra the Court accepted that the expression “issue estoppels” had been in use in our law for a long time, and is a useful description of these cases which do not strictly conform to the threefold requirements of res judicata, because the same relief is not claimed on the same cause of action, but nothwithstanding that the defence may be successful.

Issue estoppel is also founded on public policy to avoid a multiplicity of actions in order 'inter alia to conserve the resources of the courts and litigants'. There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity.

In evaluating the exceptio res judicata and issue estoppel the courts are involved in a process and a search for a just juridic interpretation and decision. It is an open-ended process of elucidation and commentary, which explores, derives, reads into, and gives significance to the essentials referred to. It causes one to think in terms of grays. It is not an unchanging closed process.’

[35] I respectfully agree with this setting out of the defences of *res judicata* and *exceptio res judicata* and issue estoppel as explained in this judgment. This exposition in my view also reflects the state of Namibian law on the subjects.

[36]

[37] These defences are founded upon the need to avoid or limit needless litigation and to prevent the recapitulation of the same thing in diverse actions which could lead to conflicting decisions. At the same time there is the public policy imperative of conserving the resources of the courts and litigants by avoiding a multiplicity of actions. These powerful considerations are to be weighed up against the potential of denying a litigant’s access to the courts and to prevent an injustice. It is within that context that a court would then exercise its discretion in applying these defences and would thus in a case by case basis weigh these considerations with the overriding one being overall fairness and equity.

[38]

[39] It would seem to me that the fundamental basis for the applicant’s

application is premised upon the applicant having been and being a client of the third respondent and that this should preclude it from representing the first and second respondents in litigation against it. That very issue was raised in the earlier application and this court determined that issue. The relief actually claimed in this instance differs from an appeal under s35 of the Act. Thus res judicata would not find application. But the requisites of issue estoppel set out above have in my view been met. The earlier application led to a final judgment. The applicant noted an appeal against it and intends prosecuting that appeal. The same issue is again involved in this application, even though raised in a dissimilar cause of action.

[40] In the exercise of my discretion and weighing up the considerations I have referred to as well as those I refer to below in the context of an application for stay, I find that the main relief sought by the applicant should be refused on the grounds of issue estoppel.

Relief competent?

[41] The respondent also takes the point that the relief sought in the alternative is not competent by virtue of the fact that the appeal had lapsed. In taking this point, the respondents acknowledge that this court is possessed of an inherent jurisdiction to prevent the abuse of process by staying proceedings but that this power is to be exercised sparingly and only in exceptional circumstances.[2] As was correctly pointed out in the applicant's heads of argument, this power would only be exercised with great caution and only in clear cases.[3]

[42] As to the amendment sought to the notice of motion by Mr Frank at the hearing, namely that the stay should be granted pending the outcome of the application for reinstatement of the appeal and of the appeal, Mr Heathcote, SC, assisted by Mr R Maasdorp, for the respondents, submitted that the applicant

[2]Hudson v Hudson 1927 AD 259 at 267.

[3]Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd 1979(3) SA 1331 (W) at 1338.

had failed to show any reasonable prospects of success for the application for reinstatement of the appeal. He also submitted that the applicant had furthermore failed to present facts to demonstrate that it would suffer irreparable harm if the interlocutory application were not to be granted or that the balance of convenience favoured it. Mr Heathcote referred to the notice of appeal having been delivered on 1 March 2012 and that it was deemed to be withdrawn on 31 May 2012 already, when the applicant had failed to comply with Rule 8(3) read with Rule 5(5) of the Supreme Court Rules. He referred to the terms of the application for condonation and reinstatement which was served on 29 June 2012. That application is attached to the answering affidavit. He submitted that it lacked prospects of success. The lapsing of the appeal and the application for reinstatement are as I have said,also not dealt with in the replying affidavit.

[43] Nor is it stated in the replying affidavit what steps have been taken to prosecute the application for reinstatement.

[44] It is clear that the alternative relief as sought in the application would not be competent given the fact that the appeal has lapsed. Given the manner in which this issue has emerged and the failure on the part of the applicant to deal with it in reply and thus in the absence of any further facts concerning the application for reinstatement in the face of what is stated about that application in the answering affidavit, I would not in exercise of my discretion be inclined to grant the application for alternative relief in its amended form. In exercising my discretion in this regard, I also take into account the exceptional nature of an application for stay and that it should be granted with caution and only in clear cases. I also take into account what I have stated about, the lapsing of the appeal and the failure to refer to it in the founding affidavit and address it in reply and the manner in which this application was brought so long after the institution of the action, as raised in the answering affidavit, and also not dealt with in reply. This interlocutory application does not in my view meet the requirements for a stay.

[45]

Impermissible conflict of interests

[46] Even if I were to be incorrect in considering that issue estoppel finds application, it would seem to me upon the facts considered in accordance with the well-established approach to disputed facts in motion proceedings, that the applicant has failed to establish a disqualifying conflict of interest on the part of the third respondent. The basis for the applicant's complaint is primarily that it is a long-standing client of Koep & Partners.

[47]

[48] Both parties referred to *Robinson v Hulsteyn, Feltham and Ford* [4] as setting out the legal position although Mr Frank contended that a stricter test should be applied in determining the question.[5] In the Robinson case, the erstwhile Appellate Division in South Africa (at the time, the highest court of appeals in respect of Namibia) dealt with an appeal against the refusal of an application to suspend three attorneys from practice on the grounds that they had allegedly breached their professional duties by acting against the appellant in circumstances in which they should not have because he was a former client of their firm. The Appellate Division dismissed the appeal. In doing so, it set out the applicable legal principles with reference to earlier English decisions:

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

[4] 1925 AD 12.

[5] Relying upon the test adopted by the Canadian Supreme Court in *McDonald Estate v Martin* [1990] 3 S.C.R 1235.

restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the court in the words of Cozens Hardy, M.R., that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.'[6]

[33] Wessels JA in *Robinson* proceeded to set out the test to be applied in this context with reference to the leading English authorities at that time.

> 'I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client, but in my view we must treat each of this cases, not as a matter of from, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act." In the same case (p.841 Fletcher Moulton, L.J., stated the general rule in the following terms: "As a general rule the court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life it ought to interfere and say that a solicitor shall not act.'
>
> 'In all such cases the court considers the circumstances laid before it by the aggrieved client and exercises its jurisdiction in order to prevent a threatened mischief.'[7]

And further:

'It is not enough for the complainant to show that through a long course of years the solicitor gave him legal advice and did formal legal work for him. In such a case it is not enough to make a general charge against the solicitor that he must have become acquainted with the secrets of his client. Specific instances must be given of confidential

[6]Supra at p21-22.

[7]Supra at 22.

information having been given to the solicitor and of this information having been utilised for the benefit of the new client. It is not enough for Sir Joseph Robinson to say that during the long period that the respondents have acted for him they must have been acquainted with the confidential relationship between him and Sir Jan Langerman and with the secrets of the policy pursued by him from time to time in connection with the companies over which he had control.'

'He must show to the Court that the respondents did in fact become acquainted with his secrets and that they used the confidential information reposed in them to his detriment.'[8]

[49] It is accordingly incumbent upon the applicant to establish an anticipation of mischief in the sense set out above if the third respondent continues to act for the first and second respondents in the action.

[50]

[51] This application is premised upon the applicant being a 'long-standing client of Koep & Partners' and that it would be a conflict of interest for them to accept an instruction from its (other) clients, the first and second respondents, to act against its existing client, the applicant. In the founding affidavit, the applicant's deponent in some detail deals with the affidavit of Mr Koep opposing the earlier application in seeking to make its case that the applicant was a client of long standing. In doing so, the applicant refers to a large body of correspondence mainly in the form of e-mails.

[52] In support of the applicant's claim that the third respondent represented the applicant and that the applicant was its client, when stripped to essentials, the applicant would appear to raise four instances in support of the contention that it was the third respondent's client.

[53]

[54] In the first place, the applicant's Mr Badenhorst states that the third respondent represented Atlantic Meat Market (Pty) Ltd and himself in the negotiations to acquire the abattoir at Witvlei from an entity placed in liquidation. Following this reference, Mr Badenhorst continues:

[8]Supra at 23.

'Central to this was the drafting of the shareholders agreement for Witvlei by Koep & Partners. This was drafted by Koep. Koep also drafted the two distributorship agreements on behalf of Witvlei. At a board meeting of Witvlei held on 23 April 2007 I suggested that and it was resolved that Koep includes certain clauses in such agreements.'

[55] These three specific instances are supplemented by a further occasion when Mr Koep gave evidence concerning a cession by the applicant to its bankers in contending that the applicant was the third respondent's client. The other instances relied upon are thus acting for Mr Badenhorst and Atlantic Meat Market in seeking to acquire the abattoir from the liquidators, secondly drawing up the shareholders agreement on behalf of the applicant and thirdly preparing distributorship agreements on behalf of the applicant.

[56] The applicant's Mr Badenhorst then proceeds in considerable detail to refer to emails in support of the assertion that the applicant was a client of the third respondent in dealing in the three instances raised at the outset and the cession issue.

[57] In the respondents' answering affidavit, Mr Koep not only deals with the emails relied upon, but refers to several others which were not attached or refers to the full context of those which were. It emerges that the reliance upon several of the emails referred to in the founding papers is shown to be partial and selective or taken out of their context. Most of these instances are not placed in issue in the short replying affidavit.

[58] In respect of the first instance relied upon, it appears that the third respondent's Mr Mueller, no longer with the third respondent, represented Atlantic Meat Market which was sued by the liquidators. Mr Mueller represented Atlantic Meat Market on behalf of the third respondent in litigation against Standard Bank Namibia Ltd referred to in some detail in the earlier application. During this representation, Atlantic Meat Market's managing director was also Mr Badenhorst, the deponent on behalf of the applicant, had made an offer (on behalf of Atlantic) to take over the abattoir owned by the company in liquidation.

This offer was directed at the liquidators which had sued Atlantic Meat Market for monies apparently due to the company in liquidation. The third respondent, through Mr Mueller, had also opposed those proceedings on behalf of Atlantic Meat Market. This was during 2005.

[59] Atlantic Meat Market entered negotiations with Agribank, which held an interest in respect of the abattoir, concerning a proposal made by Atlantic Meat Market for the acquisition of the abattoir. The third respondent was not represented at those negotiations but its Mr Mueller was instructed by Atlantic Meat Market to threaten legal action when Agribank Bank failed to revert to Atlantic Meat Market concerning the latter's proposals. In summary, that was the extent of the involvement of the third respondent in relations to that issue. It was then on behalf of Atlantic Meat Market and possibly Mr Badenhorst and not on behalf of the applicant. In January 2006, Mr Badenhorst informed Mr Mueller of the third respondent of Agribank's decision to take the abattoir out of the liquidation and to further consider the offer by Atlantic Meat Market. During about this time and in the course of the negotiations which had preceded this communication, Agribank had put Atlantic Meat Market in touch with Norwegian concerns interested in acquiring an interest in the abattoir. Atlantic Meat Market was joined in these efforts by other Namibians, Messrs S Martin and F Fredericks either directly or through entities owned or controlled by them. At that time the Norwegian concerns were represented by Mr Gerdes of Engling, Stritter & Partners. He was tasked by the Norwegian concerns to represent them in establishing a joint venture to take over the abattoir. Those Norwegian concerns were the first and second respondents.

[60] The applicant relies upon an email forwarded by one of the representatives of the Norwegian concerns to Mr Martin on 24 January 2006 in which reference is made to Mr Gerdes representing the Norwegian concerns. Reference is then also made to an email on 27 January 2006 by the same Norwegian concerns to Mr Bossau, a Windhoek legal practitioner, concerning the Witvlei abattoir. The applicant does not state who Mr Bossau at that stage represented, but the email is relied upon in referring to Mr Gerdes as being the Namibian attorney for the Norwegian concerns. The applicant's Mr Badenhorst

then states that on 13 March 2006 he sent an email to that Norwegian representative and also sent a copy to the third respondent, stating that he notified the third respondent 'the legal aspects need to fall in place within this timeframe, please'. The implication made in the founding affidavit from this exchange is that the third respondent at that stage represented Mr Badenhorst or the applicant or both.

[61]

[62] The applicant in the founding affidavit also refers to other emails concerning the negotiations leading up to a letter of intent and a shareholders agreement also being copied to the third respondent, including an email of 17 March 2006 in which Mr Koep of the third respondent forwards a draft shareholders agreement to Mr Bossau. The applicant's Mr Badenhorst explains that Mr Bossau at that stage represented Mr Martin and Mr Fredericks as they required a balanced opinion about the formation of a new entity whilst the third respondent still represented himself, Atlantic Meat Market, his brother and certain related corporate concerns.

[63]

[64] It is apparent from the answering affidavit that the email to Koep & Partners by the applicant's Mr Badenhorst of 13 March 2006 where the reference "the need for legal aspects to fall in place" and implying that the third respondent acted for him and the applicant at that stage, is wrenched entirely out of context. This is demonstrated in the answering affidavit with reference to the full text of the emails in question as well as emails which were unfortunately not attached to the founding affidavit. One such email was addressed by Mr Endresen of one of the Norwegian concerns to Mr Bossau and copied to Mr Martin. It was dated 8 March 2006. It supports Mr Koep's statement that he had on that date succeeded Mr Gerdes in representing the interests of the Norwegian concerns in the negotiations. This is confirmed in an affidavit by Mr Gerdes. In this email, Mr Endresen refers to the factions involved in the negotiations and updates contact details for the lawyers involved with the transaction, following Mr Koep coming on board for the Norwegian concerns. He refers to Mr Bossau as representing Mr Martin / Mr Fredericks / Atlantic Meat Market. He then proceeds to refer to Mr P Koep representing the Norwegian concerns. The applicant's Mr Badenhorst in reply states that he was unaware of

this email. But it is to be noted that he responded to emails addressed by the Norwegian concerns to Mr Martin at that time and to which he was not copied. Mr Martin states in reply that this email was only drawn to his attention after service of the answering affidavit.

[65]

[66] What is however clear, is that Mr Koep's statement in both the answering affidavit in the earlier application as well as in this application that he represented the Norwegian concerns at the time in their dealings with regard to the setting up of the applicant and in its internal relations, is borne out by the correspondence placed in its full context and Mr Gerdes' affidavit to that effect.

[67] It thus becomes clear from the correspondence construed within its full context that Mr Bossau represented the Namibian protagonists involved in the negotiations whilst Mr Koep represented the Norwegian concerns. It was in that capacity that Mr Koep prepared a draft shareholders' agreement which was provided to Mr Bossau for comment to be made on behalf of his clients (then Mr Martin, Mr Fredericks and Atlantic Meat Market). Mr Badenhorst's assertion that it was prepared on his behalf and on behalf of the applicant is not borne out by the facts as properly construed in motion proceedings, and certainly not by the contemporaneous correspondence at the time.

[68] It would appear that the Norwegian concerns were responsible for the preparation of a draft of a shareholders agreement, prepared by their attorney Mr Koep, whilst the Namibian interests prepared a draft letter of intent through their attorney, Mr Bossau.

[69] What in any event emerges very clearly from the papers is that the shareholders agreement was not prepared in any sense on behalf of the applicant. The shareholders agreement is after all to regulate the relationships of the shareholders within the applicant. On the facts of this matter, the original draft was prepared by the Norwegian concerns for consideration by their Namibian partners in the project. It was thus not prepared upon the instruction of the applicant as a client but by certain of the constituent shareholders.

[70]

[71] The applicant also refers to the distributorship agreements in question being prepared by the third respondent on behalf of the applicant. Mr Koep explains – and this is not properly put in issue in reply – that he did so at the instance of Mr Endresen, representing one of the constituent shareholders of the applicant. The draft distributorship agreement prepared by him was thus done at the instance of one of the constituent shareholders in the applicant and presented to the applicant as its draft for that agreement. The draft was prepared because one of the Norwegian concerns would attend distribution in Norway. It was presented to the applicant's board for comment. This included comment by Mr Badenhorst which criticised the draft. The draft was referred back to Mr Koep for further work upon it following the comments which were made. Mr Koep accounted to his client, Mr Endresen's concern for his work on that draft, as he did in respect of the shareholders agreement. He explains that in both instances the work had been prepared on behalf of that specific client(s) and pursuant to its or their interests and not for the applicant. That is not contested in reply.

[72] A further instance raised by the applicant's Mr Badenhorst of the third respondent acting for it was in respect of advice which Mr Koep gave concerning a proposed cession of the applicant's book debts to a local commercial bank. But an examination of this letter shows that it was in fact sent to Mr Endresen and was addressed to him providing advice to him and his concern as to the implications of such a cession. Mr Koep explains that the advice on that issue was sought by Mr Endresen concerning his own position and that of the concern he represents, at it concerned potential personal liability of directors. The advice was thus given to him in those capacities and not to the applicant, as is stated by Mr Koep. Mr Koep denies ever having sent any account to the applicant at any stage. The applicant also does not provide any account rendered by the third respondent nor any payment of any account to the third respondent for professional services rendered by it to the applicant. Nor is any correspondence directed to the third respondent instructing the performance of any legal work.

[73] The letter of intent, attached to the answering affidavit refers to two

groups of parties represented in the proposal, to take over the abattoir. The two parties are defined as Messrs Martin, Fredericks and Atlantic Meat Market on the one hand referred to as Atlantic and the first and second respondents referred to as the Norwegians, on the other hand.

[74] It would follow from the aforegoing and applying the well established approach to disputed facts in motion proceedings,[9] the applicant has not established that the applicant was a client of and represented by the third respondent.

[75]

[76] After receipt of the answering affidavit, the applicant shifted the basis of its contention of a conflict of interest from being a client of long-standing to include a new ground in reply. Mr Badenhorst then states in reply that the third respondent through its continuous and close contact with him in the course of matters that he had dealt with him obtained inside in the way in which he as managing director of the applicant would approach matters, including the tactics utilised by the applicant and his personality traits which would give the first and second respondents an unfair advantage when dealing with discovery and cross-examination. He further contends that the same would apply to Mr Martin as a witness for the applicant. He further contended that the third respondent would thus have 'intimate knowledge of (his) personality, style and psychological make up as well as that of Mr Martin' as a result of the extensive contacts with him and provide an advantage which no other lawyer would have.

[77]

[78] This point is not raised in the founding papers. There is not even the assertion of frequent personal contact with Mr Koep – let alone the nature of such contact giving rise to the type of psychological insights contended for. Understandably it became the subject of an application to strike on the grounds of containing new matter. The application to strike went wider but those other aspects were withdrawn at the hearing. The relevant portion of paragraph 6 of the answering affidavit seeking to raise this further ground with reference to the psychological make up and personality and style of Messrs Badenhorst and Martin in my view constitutes impermissible new matter and thus should be struck.

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[9] Mostert v The Minister of Justice 2003 NR 11 (SC) at 21.

[79] Having failed to establish that the applicant was a client of the third respondent, it follows that the applicant has failed to make out a case of the probability of mischief arising if the third respondent were to continue to represent the first and second respondents in the action brought by the applicant against them. It is not necessary to decide whether a more stringent test should be applied in determining a conflict of interest as argued by Mr Frank. This is because, even on the application a stricter test, the applicant has not in my view established an impermissible conflict of interests or even the appearance of one. In coming to my conclusion, I would also want to make it clear that I respectfully subscribe to the view expressed by Harms ADP in *Malan and Another v Law Society Morthern Provinces*[10] where he stated:

> 'To the extent that the judgment in *Law Society of the Cape of Good Hope v King* 1995(2) SA 887 (C) at 892G-894C propagates an "enlightened approach", requiring courts to deal with misconduct which does not involve dishonesty with (in my words) kid gloves, I disagree. In order to stem an erosion of professional ethical values a "conservative approach" is more appropriate (*Incorporated Law Society, Transvaal v Goldberg* 1964(4) SA 301 (T) at 304A-F).[11]

Conclusion

[80] It follows that this interlocutory application is to be dismissed with costs. The parties are in agreement that an order as to costs should include those occasioned by the employment one instructing and two instructed counsel. I make an order to that effect. I also grant an order striking the portion of the replying affidavit referred in paragraph 1.2 of the notice to strike, with costs. For the purpose of the Taxing Master, one tenth of the time used for argument was directed at this issue.

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D SMUTS

[10] 2009(1) SA 216 (SCA).

[11] Supra at 221 (par 11).

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Judge

APPEARANCES

APPLICANT:	T. Frank (with him A. Corbett) Instructed by Behrens & Pfeiffer
RESPONDENTS:	R. Heathcote SC (with him R. Maasdorp) Koep & Partners