REPORTABLE

CASE NO.: SA 9/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WITVLEI MEAT (PTY) LTD	**First Appellant**
ATLANTIC MEAT MARKET (PTY) LTD	**Second Appellant**
MARKETLINK NAMIBIA (PTY) LTD	**Third Appellant**
MARKETLINK INVESTMENTS (PTY) LTD	**Fourth Appellant**
M-INVESTMENTS (PTY) LTD	**Fifth Appellant**
FRANS HENDRIK BADENHORST	**Sixth Appellant**

and

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS	**First Respondent**
KOEP & PARTNERS	**Second Respondent**
LAW SOCIETY OF NAMIBIA	**Third Respondent**
MINISTER OF JUSTICE	**Fourth Respondent**
FATLAND JAEREN AS	**Fifth Respondent**
BRODR. MICHELSEN AS	**Sixth Respondent**

Coram: MAINGA JA, CHOMBA AJA and O'REGAN AJA

Heard: **03 July 2013**

Delivered: **15 November 2013**

APPEAL JUDGMENT

O'REGAN AJA (MAINGA JA and CHOMBA AJA concurring):

[1] This is an appeal against an order of the High Court in which the High Court dismissed an appeal in terms of s 35 of the Legal Practitioners Act, 15 of 1995 (the Act). The case concerns the important issue of the duties of loyalty and confidentiality owed by legal practitioners to their clients.

Background

[2] On 29 April 2010, the six appellants complained to the Law Society that Koep and Partners, a firm of legal practitioners based in Windhoek and the second respondent in this appeal (the legal firm) had acted in conflict with their duty to the six appellants when they took instructions from the fifth and sixth respondents, Fatland Jaeren AS and Brodr. Michelsen AS, to institute shareholder litigation against first appellant, Witvlei Meat (Pty) Ltd. The fifth and sixth respondents are minority shareholders in the first appellant.

[3] The Law Society referred the complaint to its Disciplinary Committee for Legal Practitioners, established in terms of s 34 of the Act. On 6 July 2011, the Disciplinary Committee informed the appellants that their complaint did not disclose a *prima facie* case of misconduct.

High Court proceedings

[4] Thereafter, on 17 August 2011, the six appellants launched proceedings in the High Court seeking a declaration that the complaint lodged with the Law Society does disclose a *prima facie* case of unprofessional, dishonourable or unworthy conduct within the meaning of the Act, an order instructing the Disciplinary Committee to hear the application and an interdict restraining the legal firm from accepting any instructions which would require them to provide advice or institute litigation against the six appellants' interests.

[5] During the exchange of affidavits, the appellants sought to adumbrate the facts that had been set out in the complaint that they had originally lodged. The respondents objected to this, and made application for the new factual allegations in the affidavits to be struck out. The High Court granted the respondents' application, and struck out the relevant aspects of the affidavit relying upon the decision in *Health Professions Council of SA v De Bruin*.[1]

[6] In its judgment delivered on 20 February 2012, the High Court found that the Disciplinary Committee had been correct in concluding that on the record before it the complaint did not disclose a *prima facie case* of misconduct. The High Court accordingly dismissed the application with costs.

[7] On 1 March 2012, the appellants noted an appeal against the whole of the judgment and order of the High Court. The appeal record was filed on time, but due to an oversight, appellants did not lodge security for costs of the appeal

[1] 2004 (4) All SA 392 (SCA) at para 23.

timeously. Once this oversight was discovered, a dispute arose between the parties as to the quantum of security that had to be filed. The dispute was resolved after application to the Registrar of the High Court and security of N$30 000 was paid on 2 July 2012.

[8] Given that in terms of the rules, the late filing of security had resulted in the lapsing of the appeal, the appellants launched applications seeking condonation for the late filing of security for the costs of the appeal, as well as for reinstatement of the appeal on the same day that the security was finally paid. On 12 April 2013, appellants made application to lodge a further affidavit in support of the applications for condonation for the late filing of security and the reinstatement of the appeal. The new affidavit set out the appellants' averments in relation to the prospects of success on appeal. The respondents opposed the reinstatement application as well as the lodging of the new affidavit.

[9] Although in their notice of appeal, appellants noted an appeal against the whole of the judgment and order of the High Court, in their written heads of argument and in oral argument, the grounds of appeal were narrowed to the question whether the Disciplinary Committee was justified in coming to the conclusion that the complaint lodged against the second respondent did not disclose a *prima facie* case of misconduct.

Issues for decision

[10] Accordingly, the following issues arise for decision:

(i) Should the application to lodge a new affidavit in support of the application for condonation of late filing of security for costs of the appeal, and the accompanying application for reinstatement of the appeal, be granted?

(ii) Should the application for condonation of the late filing of security and the accompanying application for reinstatement of the appeal, be granted?

(iii) What is the nature of the Court's power under s 35(3) of the Act?

(iv) What was the relationship between the legal firm and the first and sixth appellants as established on the record before the Disciplinary Committee?

(v) What are the relevant legal principles?

(vi) Applying the legal principles to the facts on the record before the Disciplinary Committee, was a *prima facie* case of misconduct made out?

(vii) Should any relief be granted?

(viii) Should costs be ordered?

[11] A key issue in the applications for condonation of the late filing of security and reinstatement of the appeal is the question whether appellants have prospects

of success upon appeal. It will, therefore, be convenient to deal with issues (iii), (iv), (v) and (vi) before turning to questions (i) and (ii) which relate to condonation.

What is the nature of the Court's powers under s 35(3) of the Act?

[12] In order to answer the key question in this appeal, whether the Disciplinary Committee was correct in concluding on the record before it that appellants had not disclosed a *prima facie* case of misconduct against the legal firm, it is necessary briefly to analyse the relevant provisions of the Act.

[13] Part IV of the Act provides for the discipline and removal of legal practitioners from the Roll.[2] Section 32 provides that a legal practitioner may be struck off the Roll by the High Court 'if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner'.[3] Section 35(2)(*b*) of the Act provides that an application to strike a legal practitioner off the Roll shall be made by the Disciplinary Committee. The composition and establishment of the Disciplinary Committee is provided for in s 34 of the Act, which states that the Disciplinary Committee shall consist of four legal practitioners appointed by the Council of the Law Society and one person appointed by the Minister of Justice.[4] Section 35 provides that the Disciplinary Committee shall hear allegations of alleged

[2] 'Roll' is defined in s 1 of the Act as 'the register of legal practitioners referred to in section 2' of the Act. Section 2 provides that the Registrar of the High Court shall keep the Roll, which shall include the names of all people admitted and authorised to practise as legal practitioners in terms of the Act, as well as particulars of any court order striking the name of a legal practitioners from the Roll (see s 2(2) of the Act).

[3] Section 32(1)(b) of the Act.

[4] Section 34(1).

unprofessional or dishonourable or unworthy conduct on application of the Council of the Law Society or a person affected by the alleged conduct.

[14] Section 35(2) then provides that if the Disciplinary Committee thinks that an application made to it does not disclose a *prima facie* case of unprofessional or dishonourable or unworthy conduct, the Committee may summarily dismiss the application. Section 35(3) then provides that:

> '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. . . .'

[15] The appellants' application to the High Court was founded on s 35(3) and the question arises how a court should approach the task of determining the 'appeal' contemplated by the subsection. In *Tikly and Others v Johannes NO and Others*,[5] in a judgment that has been cited with approval by many courts on many occasions, Trollip J held that the word 'appeal' has at least three different connotations. The first is an 'appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information'.[6] The second is an appeal 'in the ordinary strict sense, that is a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong'.[7] And the third, is a

[5] 1963 (2) SA 588 (T).
[6] Id. at 590G.
[7] Id. at 590 H.

review, 'that is a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly'[8].

[16] The High Court in this case, relying on a decision of the South African Supreme Court of Appeal, *Health Professions Council of South Africa v De Bruin*,[9] held that an appeal to the Court in terms of s 20 of the Health Professions Act, 56 of 1974, was an 'appeal in the ordinary sense',[10] that is a re-hearing on the merits limited to the evidence on which the decision under appeal was given. Section 20 of the Health Professions Act has a broader application than s 35(3) of the Act, as it provides that a person 'who is aggrieved by any decision of the [Health Professions] council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision'. Although the appeals provided for in s 35(3) are narrower in ambit than those contemplated in s 20, they are nevertheless similar in that they are appeals from the decisions of professional bodies in relation to the regulation of a profession.[11] Given the similarity of function and context between s 20 of the Health Professions Act and s 35(3) of the Act under consideration here it is appropriate that an appeal in terms of s 35(3) should also be considered to be an appeal 'in the ordinary sense'.

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[8] Id at 590H – 591 A.

[9] Cited above n 1 at para 23.

[10] Id. at para 23. The Supreme Court of Appeal cited the earlier decision of *Thuketana v Health Professions Council of South Africa* 2003 (2) SA 628 (T) with approval.

[11] In this regard, see the comment by Van Heerden JA in *De Bruin* that the Health Professions Council is the statutory *custos morum* of the medical profession. Id. at para 23.

[17] The approach of the High Court in this regard can therefore not be faulted. Nor can its decision that the question whether a complaint before the Disciplinary Committee had disclosed a *prima facie* case of 'unprofessional or dishonourable or unworthy conduct' had to be determined on the record of the proceedings that had been placed before that Committee. The question for this Court to determine, therefore, is whether the terms of the complaint put before the Disciplinary Committee did disclose a *prima facie* case of misconduct. In considering this question, the Court must first consider what the facts were on the record before the Disciplinary Committee and it is to this question to which this judgment now turns.

What was the relationship between the legal firm and the first and sixth appellants as established on the record before the Disciplinary Committee?

[18] The complaint was lodged by Mr FH Badenhorst, the sixth appellant, in his personal capacity, as well as in his representative capacity as Managing Director of Witvlei Meat (Pty) Ltd, the first appellant, and as Director of Atlantic Meat Market (Pty) Ltd, the second appellant, Marketlink Namibia (Pty) Ltd, the third appellant, and Marketlink Investments (Pty) Ltd, the fourth appellant. Mr Badenhorst also lodged the complaint on behalf of the first, second, third and fourth appellants, and on behalf of Mr Sidney Martin, in his representative capacity as a director of the second appellant. Mr Martin is not a party to the proceedings before this Court.

[19] The complaint states that the legal firm 'created a conflict of interest' with the complainants by accepting a new instruction from the fifth and sixth respondents in relation to a dispute between those respondents and the first appellant of whom the sixth appellant is Managing Director. The result, it is argued,

is that the legal firm is likely to be 'obliged to act against existing clients in order to diligently protect the new clients' best interests'. The complaint states that the legal firm had, since 2004/5, had an 'uninterrupted' professional relationship of legal practitioner and client with Mr Badenhorst, as well as with second, third and fourth appellants.

[20] Annexed to the complaint was a letter addressed to the first appellant by the legal firm on 17 July 2009. The letter states that the legal firm was acting for the fifth and sixth respondents who were 'concerned in the way the company [the first appellant] has been managed', stating that the management of the company is 'running the affairs of the Company in a manner which is unfairly prejudicial, unjust or inequitable to the Company as well as to our clients'. Accordingly, the letter continued, the legal firm had been instructed to launch an investigation into the affairs of the company, if necessary, with the assistance of a forensic auditor. The letter continues by requesting certain disclosures of documents and information.

[21] The complaint also annexed a further letter by the legal firm, dated 24 July 2009. Although it is addressed to the first appellant, it is marked for the attention of Mr Badenhorst, the sixth appellant, and from its contents, the letter seems to be directed at Mr Badenhorst himself. The letter states that

> '. . . you are acting in breach of agreement. Your actions may lead to serious damages being claimed against you personally, as you have no authority from Witvlei Meat (Pty) Ltd to act in the manner you are.

> You are aware of the content of the shareholders agreement, which agreement is in existence and binding on all shareholders. Any attempt by you to breach that agreement will be dealt with appropriately.'

[22] It is clear from the complaint that the legal firm had taken a brief from the fifth and sixth respondents to act on behalf of the two respondents in relation to alleged failures of management in the first appellant of which the sixth appellant is the managing director. Although the primary focus of the letter is the first appellant, the sixth appellant is clearly directly involved in the pending dispute, as the letter of 24 July 2009 makes plain.

[23] The complaint and the initial affidavits in this application suggested that the conflict of interest arose between all six appellants and the legal firm, but in argument before this Court, appellants made clear that they were pursuing only the question of a conflict of interest between the legal firm and the first and sixth appellants. This narrowing of the ambit of the complaint was appropriate, as the record of the proceedings before the Disciplinary Committee does not suggest that the legal firm was undertaking any mandate to act against the second, third, fourth and fifth appellants.

[24] The legal firm lodged a response to the complaint comprising two affidavits made by two partners in the firm, Mr R Mueller and Mr P Koep. No rebuttal to these affidavits appears to have been lodged by the appellants. In his affidavit, Mr Mueller acknowledged that he had acted as a correspondent in two pieces of litigation, on instructions from a firm of South African attorneys, for the second, third, fourth and sixth appellants in relation to litigation that had arisen between

these three companies and Standard Bank in relation to events that had taken place between 2003 and 2004. The sixth appellant's involvement in the litigation arose from his signature of a deed of surety. Mr Mueller noted that his role as a correspondent was 'to take instructions from the instructing attorney in South Africa, to draft letters, file documents, attend to the necessary notices in terms of the Rules of the High Court of Namibia and so forth'. He admitted that he had some draft financial statements of the second and third appellants in his possession, but that they date to the year 2004 and disclose no particulars relating to directors of the second, third and fourth appellants nor any dealings between the second, third and fourth appellants and the first appellant.

[25] Mr Mueller also states that he has no confidential information which might prejudice any of the appellants and that the complaint does not identify any such confidential information. He states that in his view there is no conflict of interest between his role as correspondent in the litigation involving second, third, fourth and sixth appellants with Standard Bank, and the instruction his partner, Mr Koep, had received from fifth and sixth respondents relating to the first appellant. He states that he has never been privy to any financial statements of Witvlei (the first appellant) and has 'absolutely no knowledge of the internal procedures of Witvlei or how this company is run'.

[26] For his part, Mr Koep stated that he had first obtained instructions from fifth and sixth respondents in 2007 and has acted for them since. He denies that any conflict of interest exists, and also denies that the legal firm has in its possession any confidential information relating to the first appellant or the sixth appellant.

[27] The facts set out on the record before the Disciplinary Committee do not establish that the legal firm has ever acted for the first appellant. However, the legal firm has acted for the sixth appellant in a limited fashion: as a correspondent for a South African firm of attorneys who are acting on behalf of the sixth appellant in respect of litigation against Standard Bank. Can it be said on the basis of the relationship between sixth appellant and the legal firm that a conflict arose when the legal firm took instructions from the fifth and sixth respondents? In order to answer this question, it will be necessary to consider briefly the relevant legal principles.

The relevant legal principles

[28] Section 32 of the Act provides that a legal practitioner may be struck off the Roll by the High Court 'if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner'. The Rules of the Law Society of Namibia provide some guidance as to what will constitute 'unprofessional or dishonourable or unworthy conduct' within the meaning of s 32. Rule 21(1)(*a*) of those Rules states that it will be a breach of the required professional legal standards if a practitioner is guilty of 'a breach of faith or trust in relation to his or her client'.[12]

[12] The Rules of the Law Society of Namibia may be found on their website: see http://www.lawsocietynamibia.org/

[29] The trust that a client reposes in his or her legal representative is of foundational importance to the administration of justice and confidence in the legal profession. As Binnie J reasoned in a decision of the Supreme Court of Canada:

> '. . . the duty of loyalty – is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained. . . . Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.'[13]

[30] In determining the ambit of the duty of loyalty, its functional importance to the integrity of the administration of justice remains key. As Binnie J remarked in the same case:

> 'In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. . . .Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.[14]

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[13] *R v Neil* 2002 SCC 70, [2002] 3 SCR 631 at para 12.

[14] Id. at para 15.

[31] Thus understood, the duty of loyalty is an aspect of the fiduciary obligation owed by a legal practitioner to his or her client. The duty of loyalty requires legal practitioners to act disinterestedly and diligently in their clients' interests. Implicit in the duty is the principle that a legal representative cannot act on both sides of a dispute, at the very least without the explicit consent of both clients. The duty of loyalty is ordinarily understood to lapse for most purposes once the relationship of lawyer and client has ended.[15] A second aspect of the fiduciary duty a legal practitioner owes a client is the duty to preserve confidentiality, and this aspect of the fiduciary duty is generally understood to survive the termination of the lawyer-client relationship.[16] Lord Millett formulated it in the following words in a leading decision of the House of Lords in the United Kingdom:

> . . . the duty to preserve confidentiality is unqualified. It is a duty to keep information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.'[17]

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[15] See, for example, *Prince Jefri Bokiah v KPMG* [1999] 1 All ER 517 (HL(E)) at 526, where the House of Lords held that the duties of the auditors in that case were to be treated in the same way as the duties of solicitor (at 526) but that general fiduciary duties do not survive the termination of the relationship (at 527).

[16] Id. at 527.

[17] Id. at 527.

[32] The duties of loyalty and confidence are clear in principle, but difficulties arise in their application. Where difficulties of application arise, Judge Binnie's guidance is useful: a court should 'determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests'.[18] Two of the difficult issues of application of the duties of loyalty and confidentiality that have arisen are: Do the duties require that a legal practitioner never act against a former client? And do they require a legal practitioner never to act against a current client, no matter if the matters are unrelated and no matter how attenuated the current relationship with the client is?

[33] In respect of the question of acting against former clients, the answer often turns on the assessment of the risk of the disclosure of confidential information that may arise. In the early case of *Rakusen v Ellis Munday & Clarke,*[19] the House of Lords set a test that, although somewhat differently formulated by each of the three members of the Court, has been characterised as whether the circumstances give rise to 'a reasonable probability of mischief'.[20] The South African courts adopted the test set in this English case in an early decision.[21]

[34] More recently, courts across the Commonwealth have developed more stringent tests to determine when a legal practitioner may accept instructions to act against a former (or existing) client.[22] In the United Kingdom in *Prince Jefri*

[18] Cited above n 12 at para 15.

[19] [1911 – 1913] All ER Rep 813.

[20] As formulated by Lord Millett in *Prince Jefri Bokiah*, cited above n 14, at 527.

[21] *Robinson v Van Hulsteyn, Feltham & Ford* 1925 AD 12 at 22: "real mischief and real prejudice will in all human probability result if the solicitor is allowed to act".

[22] See also *Retha Meiring Attorney v Walley* 2008 (2) SA 513 (D) at paras 42 – 43 where the Court found that an attorney had acted unprofessionally in circumstances where she had acted for one party to a marriage in contested divorce proceedings some years after advising the other party to

Bolkiah, the House of Lords established the principle that a court must be satisfied 'that there is no risk of disclosure',[23] although the risk must 'be a real one, and not merely fanciful or theoretical'.[24] In Canada, the Supreme Court has held that the existence of a lawyer-client relationship gives rise to two rebuttable presumptions, that the former client in the course of the retainer will have communicated confidential information, and that lawyers who work together share confidences.[25] If these presumptions are not rebutted, the lawyer will be prevented from acting for the new client.[26] And in New Zealand, by majority, the Court of Appeal established a balancing test which requires a Court to establish whether confidential information is held, which if disclosed, would adversely affect the former client's interests; whether, viewed objectively, there is a real or appreciable risk of disclosure; and whether the Court's discretionary power to disqualify should be exercised given the importance of the fiduciary relationship between lawyer and client and in the light of a client's interest to choose a lawyer, as well as practical considerations of mobility within the profession.[27]

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the marriage in relation to a matrimonial dispute.

[23] Cited above n14, at 528.

[24] Id.

[25] See *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249

[26] An even stronger test was stated in *R v Neil*, cited above n 12, at para 29, where Binnie J stated 'the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – *even if the two mandates are unrelated* – unless both client consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other'. (Italics in the original) Scepticism has been expressed as to how consistently this apparently bright line has been applied in practice. See, for example, Gavin McKenzie 'How Murky can a Bright Line Be? Coping with Conflicts of Interest in the wake of *R. v. Neil*" (Paper presented at the Tenth Colloquium of the Canadian Bar Association, March 28, 2008), www.isuc.on.ca/media/tenth_colloquium_mackenzie.pdf/ ; Richard F. Devlin and Victoria Rees 'Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v. Gray* to *R. v. Neil'* 84 (2005) *Canadian Bar Review* 433 – 456. Devlin and Rees question, for example, whether the performance of 'merely technical tasks' will generate the duty of loyalty (at 454). The apparent ambit of the rule in *R. v Neil* also needs to be considered in the light of the facts of the case, which involved an egregious conflict in criminal proceedings, where one lawyer who was representing two co-accused persons, had sought to present a defence on behalf of one of his clients which implicated the other.

[27] See *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA).

[35] It is important for the promotion of confidence in the fair administration of justice that both the duty of loyalty and the duty of confidence are protected and affirmed. But in applying the principles reflected in these duties, a court needs to recognise that the context of any particular legal relationship needs to be taken into account. It is of particular importance that a client be protected from the inadvertent (or deliberate) use of confidential information that he or she may have shared with a legal representative to advance the interests of either the legal representative or another client. A stringent test to protect confidentiality is therefore appropriate. It is this principle that has underpinned the introduction of more rigorous principles to protect confidentiality across the Commonwealth, and Namibia should find an appropriately rigorous approach to protect confidential information. It is also important that clients can be assured of the undivided attention of their legal practitioner, and so the duty of loyalty requires legal practitioners not to act for more than one party in the same dispute, where the interests of those parties diverge.[28]

[36] In determining the proper approach to the duties of loyalty and confidence, it should be borne in mind that Art 12 of the Constitution requires that litigants be afforded a fair hearing before an independent court in the determination of their civil rights and obligations. In the light of Art 12 of the Constitution, and drawing on the guidance provided by the Commonwealth jurisprudence discussed above, the

[28] See, for Namibian authority in the criminal law context, *S v Smith and Another* 1999 NR 142 at 144; and for authority relating to civil proceedings, see the following South African authority, for example, *Zulu and Others v Majola* 2002 (5) SA 466 (SCA) at para 18; and *Kirkwood Garage (Pty) Ltd v Lategan and Another* 1961 (2) SA 75 (E) at 77E–G, where O'Hagan J called upon an attorney to provide an explanation on affidavit as to why he had acted for two creditors petitioning for insolvency of two respondents in circumstances where he had represented the respondents. The record before the Disciplinary Committee in a closely related matter.

following principles should guide legal practitioners in observing the duty of loyalty and the duty of confidentiality that they owe their clients. These principles are not intended to be exhaustive and may well be supplemented by other principles as the law develops.

[37] First, the duty of loyalty imposes an obligation upon a legal practitioner to act diligently and devotedly in the interests of the client. The duty of loyalty subsists as long as the relationship of legal practitioner and client exists, but is terminated when that relationship is terminated. The duty implies that a legal practitioner may not ordinarily act against an existing client in respect of a matter which is related to any matter upon which the legal practitioner has advised, or acted on behalf of, the existing client, without first obtaining the written consent of that client. If a matter involves a contentious dispute between an existing client and the new client, even written consent may not be sufficient to render the practice legitimate.[29] This is not an issue in this case and need not be decided now.

[38] Whether it is a breach of loyalty for a legal practitioner to act against an existing client in relation to a matter unrelated to any matter upon which the legal practitioner has advised, or acted on behalf of the existing client, without first obtaining the client's consent, will depend on the circumstances of each case. Those circumstances include the nature and extent of the relationship between the legal practitioner and the existing client, as well as the nature of the new instruction, and the question whether, viewed objectively, the existing client has a

[29] See the full discussion in Lewis *Legal Ethics* (1982: Juta) paras 59 – 64.

reasonable expectation of loyalty from the legal practitioner such that the legal practitioner should seek his or her consent before accepting the new instruction. The more casual or attenuated the relationship between the legal practitioner and the existing client, the less likely the existing client will have a reasonable expectation of loyalty. Of course, where a client has specifically requested and obtained a retainer from the legal practitioner, in terms of which the legal practitioner undertakes not to act against the client in respect of any matter at all or without first obtaining written consent, then that undertaking will, in addition to contractual obligations, give rise to a reasonable expectation of loyalty.

[39] Secondly, the duty of confidentiality imposes an obligation upon a legal practitioner not to divulge any information received from a client in confidence. Nor may a legal practitioner use confidential information obtained from a client to promote his or her own interests over those of the client from whom he or she obtained the confidential information, or to promote the interests of any other client over those of the client from whom the information was obtained. The duty persists beyond the termination of the legal practitioner's mandate. To ensure the duty of confidentiality is properly observed, a legal practitioner may not take an instruction from a new client that will give rise to the risk that confidential information obtained from an existing or former client may be disclosed.

[40] In determining whether a legal practitioner is liable for misconduct in circumstances where one client complains that the legal practitioner has failed to observe the duty of confidentiality by taking instructions from another client that may result in the disclosure of information confidentially communicated to the legal practitioner, the following approach should be adopted. The approach should be

adopted regardless of whether the litigant is a current or former client of the practitioner.

[41] The complaining client must establish (a) that it provided confidential information to the legal practitioner that is relevant or related to the issue upon which the legal practitioner has given advice to, or is acting in litigation on behalf of, another client; and (b) that disclosure of the confidential information would be likely to be adverse to the complaining client's interests. Once the complaining client has established (a); and, (b), it will be presumed that there is a risk of breach of confidentiality and the legal practitioner will bear the burden of establishing the absence of such risk. The effect of this approach will be to require legal practitioners to take care when they obtain confidential information on behalf of a client to ensure that they create a proper record of possible conflicts to guide them in accepting future instructions to avoid a breach of their duty of confidence to their clients.

Application of the rules to the facts of this case

[42] The cause of the complaint to the Law Society arose from the fact that the legal firm had accepted instructions from the fifth and sixth respondents in relation to a dispute between those respondents and the first appellant. The record before the Disciplinary Committee does not establish that the first appellant has ever been a client of the legal firm, and accordingly the complaint, insofar as it relates to the first appellant does not disclose a *prima facie* case of 'unprofessional or dishonourable or unworthy conduct'.

[43] The situation regarding the sixth appellant is different. In his case, the record before the Disciplinary Committee makes plain that the legal firm was on brief to act for the sixth appellant who is the Managing Director of the first appellant. The question arises whether the legal firm's acceptance of instructions from fifth and sixth respondents in relation to their dispute with the first appellant, and to some extent with the sixth appellant in his capacity as Managing Director of the first appellant, constituted unprofessional or dishonourable or unworthy conduct, To answer this question, it is necessary to consider the relationship between the sixth appellant and the legal firm. According to the record before the Disciplinary Committee, the legal firm was not instructed by the sixth appellant personally but acted on the instructions of a South African firm of attorneys as its correspondent. It was the South African firm of attorneys who were the legal practitioners appointed to act on behalf of the sixth appellant in relation to the litigation against Standard Bank.

[44] The work done by a correspondent firm of legal practitioners varies but in most cases it is formal and technical, aimed at compliance with court rules and the proper service of court process. Legal practitioners who act as correspondents thus do not ordinarily provide legal advice to clients or build a close relationship with them. In his affidavit lodged with the Disciplinary Committee, Mr Mueller confirmed that his role in the litigation on behalf of the sixth appellant was a limited one. He described his role as being 'to take instructions from the instructing attorney in South Africa, to draft letters, file documents, attend to the necessary notices in terms of the Rules of the High Court of Namibia and so forth'. The sixth appellant thus did not establish that the relationship he had with the legal firm in

this regard was any different to the ordinary relationship that would exist between a litigant and the firm that litigant's legal practitioners choose to act as correspondent for purposes of compliance with the rules of court.

[45] There is no suggestion on the record before the Disciplinary Committee that the litigation involving Standard Bank is in anyway related to the dispute between fifth and sixth respondents and the first and sixth appellants. Nor has sixth appellant pointed to any confidential information that the legal firm would have obtained acting in their capacity as a correspondent firm that would have been relevant to the dispute between fifth and sixth respondents and the first and sixth appellants. Nor has sixth appellant pointed to any confidential information that may have been given to the South African firm of attorneys that would have had any bearing on the dispute between fifth and sixth respondents and the first and sixth appellants and might have been transmitted to the legal firm. In all these circumstances, it must be concluded that it has not been established that the sixth appellant has provided any confidential information either to the legal firm, or to the South African attorneys, that would have any bearing on the dispute between fifth and sixth respondents and the first and sixth appellants. It must be concluded, therefore, that appellants have not established a *prima facie* risk of the disclosure of confidential information.

[46] In respect of the duty of loyalty, the relationship between the sixth appellant and the legal firm disclosed in the complaint relates to a matter entirely unrelated to the dispute between fifth and sixth respondents and the first and sixth appellants. Moreover, the relationship as set out in the complaint is not the ordinary relationship between a legal practitioner and client, which involves the

provision of advice on the basis of information provided in confidence. It is an attenuated relationship that has been instigated by another firm of legal practitioners with a correspondent legal practitioner to ensure compliance with the rules of Court. There is no evidence on the record before the Disciplinary Committee that the sixth appellant ever sought advice directly from the legal firm, or that he ever provided any confidential information to them. In the circumstances, this Court concludes that the complaint had not established a close enough relationship with the legal firm to give rise to a reasonable expectation of loyalty which would prevent the legal firm from taking instructions from a client whose interests were adverse to the sixth appellant in an unrelated matter. Accordingly, it must be concluded that the record before the Disciplinary Committee does not disclose a *prima facie* case of misconduct.

[47] Given the conclusion reached above, it is clear that the appeal has no prospects of success. As there are no prospects of success, the application for condonation for the late filing of security, and the application for reinstatement of the appeal should be refused.

Conclusion and costs

[48] The appellants have failed in their applications for condonation and reinstatement of the appeal, and there is no reason why they should not be ordered to pay the costs of the appeal.

Order

[49] The following order is made:

1. The application for condonation for the late filing of security is dismissed.

2. The application for reinstatement of the appeal is dismissed.

3. The appeal is struck from the roll.

4. The costs of the appeal, including the costs of the applications for condonation for the late filing of security and for reinstatement of the appeal are to be paid by the appellants, jointly and severally, on the basis of two instructed and one instructing counsel.

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O'REGAN AJA

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MAINGA JA

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CHOMBA AJA

APPEARANCES

APPELLANT:	T J Frank SC (with A W Corbett) Instructed by Conradie & Damaseb
2ND 5TH & 6TH RESPONDENTS:	R Heathcote (with R L Maasdorp) Instructed by Koep & Partners