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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 564

2015

NOTICE OF DECISION OF COMMISSION REGARDING EXEMPTION IN RESPECT OF PROFESSIONAL RULES CASE NO.: 2010DEC0054EXEMP

Competition Act, 2003 (Act No. 2 of 2003)
(Section 31(4), Rule 25(5))

1. The above named applicant association has applied to the Commission on 16 December 2010 for an exemption in respect of professional rules as contemplated in section 31(1) of the Act.
2. The Commission gives notice of its decision in terms of section 31(4)(c) of the Act of its decision to grant in part and refuse in part the exemption concerned.

S. AKWEENDA
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION

ANNEXURE A

1. Introduction

- 1.1 The Namibian Competition Commission (“the Commission”) received an application from the Law Society of Namibia (“LSN”) for exemption in terms of section 31 of the Competition Act, Act 2 of 2003 (the “Competition Act”).
- 1.2 The application for exemption seeks to exempt certain of the LSN Rules from the application of Part I of Chapter 3 of the Competition Act. The exemption sought is for a period of 15 years.
- 1.3 Section 31(4) of the Competition Act requires that:
- “after considering the application and any submission or other information received in relation to the application, and consulting with the responsible Minister, the Commission-*
- (a) either grant an exemption or reject the application by issuing a notice in writing to the applicant;*
 - (b) give written reasons for its decision if it rejects the application; and*
 - (c) publish a notice of that decision in the Gazette.”*
- 1.4 Form 34 and this Annexure serve as notification of the Commission’s decision as envisaged in terms of section 31 of the Competition Act read with Rule 25 of the Rules promulgated under the Competition Act.
- 1.5 The Commission’s decision is effective 1 July 2016.

2. The Commission’s Jurisdiction

- 2.1 The LSN contends that the Competition Act does not apply to some of the LSN Rules by virtue of section 3(3) of the Competition Act and that those rules do not require an exemption under section 31 of the Competition Act.
- 2.2 Accordingly, it was also the LSN’s assertion that Rules 23, 21(2)(h) read with 16, 21(2)(k), 21(2)(l)(i), 21(2)(l)(ii), 21(2)(m) read with 23(2), 21(2)(n), and 21(2)(o) and Rules 21(2)(w), 21(2)(x), and 21(2)(y)(iii) rules were “specifically authorized” by the Legal Practitioners Act, Act 15 of 1995 (“the LPA”) and that the Competition Act does not apply to those rules by virtue of section 3(3) of the Competition Act.
- 2.3 After having considered the LSN’s assertions pertaining to the Commission’s jurisdiction over some of the LSN Rules, the Commission respectfully has a different view based on the following:
- 2.3.1 The Commission’s jurisdiction over the LSN Rules derives in the first place from section 3(1) of the Act, which provides that the Act applies to “*all economic activity within Namibia or having an effect in Namibia ...*”.
- 2.3.2 The jurisdiction of the Commission over the LSN Rules is confirmed by section 31 where a specific process is laid out for the consideration and exemption of the Rules of professional associations. The LSN is a professional association in terms of section 31 of the Competition Act, especially section 31(7)(e) thereof.

2.4 Hence, the Rules of professional associations are clearly contemplated within the jurisdiction of the Competition Act as they may be subject to an application and decision regarding their exemption.

2.5 Therefore, the Competition Act establishes jurisdiction over the LSN Rules, except in so far as those activities are authorized by any law.

3. THE COMMISSION'S DECISION

3.1 After having considered the exemption application by the LSN, the Commission grants an exemption in respect of the following LSN Rules:

3.1.1 In respect of professional fees:

Rule 21(2)(h), Rule 21 (2) (k), Rule 21 (2)(l) (i), Rule 21 (2)(l) (ii), Rule 21 (2) (m), Rule 21 (2) (o), Rule 23 (1) and Rule 23(2), with the exception of Rule 23(2)(k).

3.1.2 In respect of reserved work:

Rule 21(2)(w) and Rule 21(2)(y)(iii)

3.1.3 In respect of multidisciplinary practices:

Rule 21(2)(g), Rule 21(2)(p) and Rule 21(2)(aa).

3.1.4 In respect of advertising and marketing:

Paragraph 5.1.2 of Annexure A to the LSN Rules, Paragraph 8 of Annexure A to the LSN Rules and Paragraph 12 of Annexure A to the LSN Rules.

3.2 **The Commission refuses to grant exemption in respect of the following LSN Rules:**

3.2.1 In respect of professional fees:

Rule 21(2)(n) and Rule 23(2)(k)

3.2.2 In respect of reserved work:

Rule 21(2)(x)

3.2.3 In respect of multidisciplinary practices:

Rule 21(2)(i), Rule 21 (2)(y)(ii) and Rule 21(2)(ff)

3.2.4 In respect of advertising and marketing:

Paragraph 2.1 of Annexure A to the LSN Rules, Paragraphs 2.4, 4.2 and 11 of Annexure A to the LSN Rules, Paragraph 4.3.1 of Annexure A to the LSN Rules, Paragraph 4.3.2 and the cautionary notes of Annexure A to the LSN Rules, Paragraph 5.1.1 of Annexure A to the LSN Rules, Paragraph 7.1 of Annexure A to the LSN Rules, Paragraph 11.1.1 of Annexure A to the LSN Rules, Paragraph 11.2 of Annexure A to the LSN Rules, Rule 21(2) (f), Rule 21 (2) (bb), Rule 21(2) (ee), Rule 21(3) and the guidelines on advertising and publicity.

3.2.5 In respect of touting:

Rule 21(2)(t)(i) and (ii), Rule 21(2)(t)(iii) and (iv) and Rule 21(2)(y)(i), Paragraph 6 of Annexure A to the LSN Rules.

4. BASIS OF THE COMMISSION'S DECISION

4.1 Professional fees

4.1.1 The Commission grants exemption based on the following grounds:

Rule 21(2)(h) read with Rule 16 is not specifically authorized in terms of the LPA. Section 48(h) of the LPA requires regulation of allowances among legal practitioners but does not require a specific form of regulation, nor does it require that fee sharing with persons other than legal practitioners be prohibited or even regulated, nor does it require that failure to respect the allowances among legal practitioners be conduct determined to fall outside required professional standards. Further, section 33(1)(b) of the LPA provides that the practice of sharing of fees with persons other than legal practitioners is "subject to the provisions of any other law" unprofessional. If it were not for the "subject to" clause of section 33(1)(b) of the LPA, LSN Rule 21(2)(h) would be specifically authorized. However, given that clause, the Competition Act's jurisdiction over the practice addressed by section 33(1)(b) of the LPA is acknowledged within the scheme of the LPA. Nonetheless, even though Rule 21(2)(h) read with Rule 16 is not specifically authorized, 21(2)(h) read with Rule 16 should be exempted since it may be useful for the maintenance of professional standards.

Rule 21(2)(k) is not specifically authorized in terms of the LPA. However, the Commission regards this rule as one oriented to protecting members of the public and should be exempted.

Rule 21(2)(l)(i) is not specifically authorized in terms of the LPA. Nonetheless, this rule is akin to a prohibition on overreaching, has an element of consumer protection and assists in the maintenance of professional standards and should therefore be exempted.

Rule 21(2)(l)(ii) is not specifically authorized in terms of the LPA. However, the prohibition and sanction of overreaching is necessary for the maintenance of professional standards and the ordinary function of the profession and should therefore be exempted.

Rule 21(2)(m) is specifically authorized by the LPA and should therefore be exempted. Section 33(1)(f) of the LPA specifically authorizes Rule 21(2)(m).

Rule 21(2)(o) is specifically authorized by the LPA and is reasonably required for the maintenance of professional standards or the ordinary function of the profession and should be exempted.

Rule 23(1) is specifically authorized by the LPA and should be exempted. However, the form of that mechanism including the criteria used for assessment is not specifically authorized by the LPA. Thus, the remainder of Rule 23 is not specifically authorized by the LPA. In particular, section 48(d) of the LPA does not specifically authorize that one of the criteria of the assessment be “any tariff of fees approved by the Society for the sole purpose of serving as a guide to members” (Rule 23(2)(k)).

Rule 23(2), with the exception of Rule 23(2)(k), is considered by the Commission as necessary for the maintenance of professional standards and the ordinary function of the profession and should therefore be exempted.

4.1.2 The Commission refuses to grant an exemption based on the following grounds:

Rule 21(2)(n) is not specifically authorized by the LPA and should therefore not be exempted. Rule 21(2)(n) makes charging a contingency fee conduct determined to fall outside of the required professional standards. Section 48(h) of the LPA requires regulation of allowances among legal practitioners but does not require a specific form of regulation, nor does it require that failure to respect the allowances among legal practitioners be conduct determined to fall outside required professional standards. While contingency fees have advantage and disadvantages, the equation of agreeing to contingency fees and unprofessional conduct is not reasonably required for the maintenance of professional standards or the ordinary function of the profession.

Rule 23(2)(k) should not be exempted. Guidelines for fees in this format may facilitate the coordination of otherwise competitive behaviour of professionals to the disadvantage of consumers of legal services. The tariff guidelines developed by the LSN are not supported by internationally applied norms and are not reasonably required to maintain professional standards and the ordinary function of the profession. The Commission is of the view that the tariff guidelines developed by the LSN have little relation to the criteria provided for in Rule 23(2). Nothing in Rule 23(2) should be construed as authorizing the LSN to develop and distribute tariff guidelines among its members. The development of guidelines is an instance of price fixing which is not specifically authorized. The Commission notes that failure to follow the guidelines is an action with real consequences as such failure is deemed unprofessional, dishonourable, or unworthy conduct in terms of rules 21(2)(1)(ii) and 21(2)(m).

4.2 Reserved work

4.2.1 The Commission grants exemption based on the following grounds:

Rule 21(2)(w) is specifically authorized and should therefore be exempted. Section 21(1) of the LPA specifically authorizes Rule 21(2)

(w) as it makes it an offence for a person who is not a legal practitioner to hold himself or herself as such including making “*use of ... any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner*”. Given that this practice is criminalized, Rule 21(2)(w) and the determination of such conduct as falling outside of professional standards is arguably required by section 21(1)(b) of the LPA.

Rule 21(2)(y)(iii) is specifically authorized and should therefore be exempted. Section 22 of the LPA criminalizes the practice of unqualified persons preparing or executing any document or performing professional work (subject to certain exceptions). General principles of criminal law would extend liability in some instances to those aiding and abetting this practice. Further, professional standards for legal practitioners would wish to counter rather than assist the commission of a criminal offence. Moreover, section 33(1)(c) of the LPA specifically determines that such assistance constitutes unprofessional conduct. Rule 21(2)(y)(iii) is arguably required by section 22 of the LPA.

4.2.2 The Commission refuses to grant an exemption based on the following grounds:

Rule 21(2)(x) is in the Commission’s view not necessary for the maintenance of professional standards and should therefore not be exempted. As drafted and enacted, Rule 21(2)(x) is not specifically authorized by the LPA. This practice is not criminalized by section 21(1)(b) of the LPA as the one in Rule 21(2)(w) is.

4.3 Multidisciplinary practices

4.3.1 The Commission grants exemption based on the following grounds:

Rule 21(2)(g) should be exempted. The Commission understands Rule 21(2)(g) is aimed at ensuring that law firms that have more than one office in Namibia are required to have a duly and qualified legal practitioner running that office. Rule 21(2)(g) is therefore necessary for the maintenance of professional standards and ordinary function of the profession and should therefore be exempted.

Rule 21(2)(p) should be exempted. This rule tries to curb abuses and exploitative practices that may arise in claims arising from death or personal injury. Rule 21(2)(p) is therefore reasonably required to maintain professional standards.

Rule 21(2)(aa) should be exempt. This rule contains a prohibition against entering into a contract or arrangement in terms of which the practitioner is placed under the control of an unqualified person. The element of control by an unqualified person may raise particular issues for a legal practitioner that are distinct from those of sharing fees or working with others on an equal footing. Thus, this rule is arguably required for

the maintenance of professional standards and the ordinary function of the profession.

4.3.2 The Commission refuses to grant an exemption based on the following grounds:

Rule 21(2)(i) should not be exempted. This rule is not reasonably required for the maintenance of professional standards or the ordinary function of the profession.

Rule 21(2)(y)(ii) should not be exempt. This rule is not reasonably required for the maintenance of professional standards or the ordinary function of the profession.

Rule 21(2)(ff) is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This rule may be inspired by section 33(1)(e) of the LPA which prohibits partnership, fee sharing by a legal practitioner with a person who is not legal practitioner. However, Rule 21(2)(ff) would still be subject to competition law scrutiny since that section of the LPA specifically states that it is subject to any other law.

4.4 Advertising and Marketing

4.4.1 The Commission grants exemption based on the following grounds:

Paragraph 5.1.2 of Annexure A of the LSN Rules is based on the Commission's analysis necessary for the maintenance of professional standards and should therefore be exempted. These provisions are relatively specific and may be justified as reasonably required for maintaining professional standards as well as in line with international norms.

Paragraph 8 of Annexure A of the LSN Rules is a permissive rule and does therefore not require exemption.

Paragraph 12 of Annexure A of the LSN Rules is considered to be an appropriate measure for the maintenance of professional standards and should therefore be exempted.

4.4.2 The Commission refuses to grant an exemption based on the following grounds:

Paragraph 2.1 of Annexure A of the LSN Rules is not necessary for the maintenance of professional standards and should therefore not be exempted. Paragraph 2.1 of Annexure A to the LSN Rules is crafted in a very broad manner. The paragraph would satisfy the objectives of maintaining professional standards if it was limited to a proscription of misleading material, e.g. that the advertising conforms to the general advertising standards in that it is truthful and not misleading to the public.

Paragraphs 2.4,
Paragraph 4.2, and
Paragraph 11

Annexure A of the LSN Rules are based on the Commission's analysis not necessary for the maintenance of professional

standards and should therefore not be exempted. They regulate in very broad terms. They would achieve their purpose of maintaining the standard of the profession without having unnecessary anti-competitive effects were they to embody a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement is truthful and not misleading to the public.

Paragraph 4.3.1

of Annexure A of the LSN Rules is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This rule should be viewed within the context that legal practitioners practicing in Namibia are generally trained to be able to apply their skills to diverse areas of law and in a small market such as that of Namibia specialization is not a key focus. Further, this rule is generally very broad. It would achieve its purpose without unnecessary anti-competitive effects with a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement is truthful and not misleading to the public.

Paragraph 4.3.2

of the LSN Rules and the cautionary notes of Annexure A of the LSN Rules are based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This rule is very broad. It may be more narrowly tailored with a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement is truthful and not misleading to the public.

Paragraph 5.1.1

of Annexure A of the LSN Rules is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This is very broad. The restriction in its current form may hinder purposeful advertising through which existing and prospective clients are provided with valuable information which helps them to choose among competing legal practitioners. Through increasing available information, advertising can contribute positively to competition, client choice and access to legal services. This paragraph can be more narrowly tailored with a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement is truthful and not misleading to the public while ensuring continued professionalism and integrity of the profession.

Paragraph 7.1

of Annexure A of the LSN Rules is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This rule is overbroad and not in line with international best practice, such as demonstrated in the South African case of *Law Society of the Northern Provinces v Routledge Modise*

t/a Eversheds, High Court of South Africa, Case No.: 24605/10, delivered on 2011/02/22

Paragraph 11.1.1 of Annexure A of the LSN Rules is in the Commission's view too broad, not necessary for the maintenance of professional standards and should therefore not be exempted. It may be more narrowly tailored with a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement is truthful and not misleading to the public.

Paragraph 11.2 of Annexure A of the LSN Rules is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. This Rule is very broad. Its purposes of maintaining professional standards can be achieved with a simple rule that allows for any restrictions on advertising that conform with the general advertising standards, in that the advertisement through broadcasting is truthful and not misleading to the public.

Rule 21(2)(f),
Rule 21(2)(bb),
Rule 21(2)(ee),
Rule 21(3)

and the guidelines on advertising and publicity are in the Commission's view too broad, not necessary for the maintenance of professional standards and should therefore not be exempted. These rules can be narrowly tailored with a simple rule that allows for any restrictions on advertising that conforms with general advertising standards.

4.5 Touting

4.5.1 The Commission refuses to grant an exemption based on the following grounds:

Rule 21(2)(t)(i) and (ii) is based on the Commission's analysis not necessary for the maintenance of professional standards and should therefore not be exempted. The definition of touting or what amounts to touting in these rules is wide. As a result legal practitioners may be reluctant to advertise or look for business legitimately due to the fear that they will be accused of touting. International trends show that the definition or conduct that amounts to touting has in most jurisdictions been narrowed.

Rule 21(2)(t)(iii) and (iv)
and Rule 21(2)(y)(i) is not specifically authorized and should therefore not be exempted.

Paragraph 6 of Annexure A of the LSN Rules is in the Commission's view too broad, not necessary for the maintenance of professional standards and should therefore not be exempted
