

NOTICE 113 OF 2011**NOTICE IN TERMS ITEM (4)(c) OF PART A OF SCHEDULE 1 OF THE COMPETITION ACT
89 OF 1998****LAW SOCIETY OF SOUTH AFRICA****EXEMPTION REJECTED**

Notice was given in the Government Gazette 26992, Notice No. 2697 on 12 November 2004 that the Law Society of South Africa (LSSA) had in accordance with the provisions of Items 1 and 2 of Part A of Schedule 1 of the Competition Act 89 of 1998, (as amended) ("the Act"), applied to the Competition Commission ("the Commission") for an exemption from the provisions of Chapter 2 of the Act.

The LSSA filed the application on behalf of the four statutory provincial law societies and sought an exemption, from the application of the Act, for the provincial law societies' rules on the basis that the rules:

- could have the effect of substantially preventing or lessening competition in the market; and
- are reasonably required to maintain professional standards or the ordinary function of the legal profession.

The rules of professional conduct and ethics for which the LSSA sought an exemption were published in terms of the Attorneys Act, 53 of 1979, as amended, with the objective of maintaining the standards and the proper function of the attorneys' profession.

The four constituent Statutory Associations of the LSSA on behalf of which this application was brought are:

- a) The Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal
- b) The Law Society of the Cape of Good Hope, incorporated as the Law Society of the Cape of Good Hope
- c) The Law Society of the Free State, incorporated as the Law Society of the Orange Free State and
- d) The Law Society of Kwa-Zulu Natal, incorporated as the Natal Law Society.

These associations are hereinafter also referred to as ("the Statutory Associations").

Items 1 and 2 of Part A of Schedule 1 of the Act provides:-

"(1) A professional association whose rules contain a restriction that has the effect of substantially preventing or lessening competition in a market may apply in the prescribed manner to the Competition Commission for an exemption in terms of Item 2.

(2) The Competition Commission may exempt all or part of the rules of a professional association from the provisions of Part A of Chapter 2 of this Act for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain-

- (a) professional standards; or,
(b) the ordinary function of the profession."

The categories of rules for which the LSSA applied for exemption are as follows:

- Professional fees
- Reserved work
- Organisational forms and multi-disciplinary practices
- Advertising and marketing
- Touting

Notice is therefore given in terms of item 4(c) of Part A of Schedule 1 of the Act that the exemption application by the LSSA was rejected.

Subsequent to the Commission's decision, the Commission and the LSSA entered into a process of engagement and consultation to resolve the Commission's concerns and to facilitate the continued regulation of the attorneys' profession, and this process continues. The rules that were the subject of the exemption application will soon be replaced or amended by the uniform rules of practice which are anticipated to come into effect by operation of the Legal Practice Bill that was approved by Parliament in May 2010.

Set out below are the Commission's findings and decision in respect of the category of rules sought to be exempted:

Professional fees:

The rules under this category encompass various prohibitions on attorneys to accept remuneration for professional services other than at the tariff prescribed by law. The Commission determined that, as presently formulated, the rules of the LSSA regarding professional fees should not be exempted because:

- The prescription of fees by an association of firms, being in a horizontal relationship, is prohibited under section 4(1) of the Act.
- The restriction, contained in the rules, on the manner of pricing is not reasonably required to maintain professional standards or the ordinary function of the profession as:-
 - o there are ways to prevent excessive pricing or overreaching other than through a guideline of fees; and
 - o the Department of Justice and Constitutional Development indicated that the Statutory Associations' rules concerning professional fees should be reviewed, and consideration given to the option of lowering the fees structure for professional legal services.

Reserved work:

The two sets of rules pointed out by the LSSA prohibit practitioners from:-

- allowing or assisting any unqualified person to get money for professional work that only attorneys may do; and

- referring work to persons prohibited from performing such work.

The Commission found that the LSSA rules falling under the above categories should not be exempted as presently formulated because:-

- the restriction contained in those rules is the result of competitors determining who should compete with them under a statutory dispensation. This has the effect of harming competition, in that, it prevents other competent service providers from providing legal services to the public. This restricts the number of service providers and is likely to result in harm to consumer welfare, in that it reduces service (product) choice and could result in increased legal fees for the services of qualified practitioners;
- the restriction is not reasonably required to maintain professional standards or the ordinary function of the profession, as it is too broad. The profession may still maintain its standards with less restrictive measures. Consumers may also benefit from a relaxation of the existing rules;
- there is a growing body of international norms which supports the opening up of some areas of reserved work to suitably qualified persons;
- the Department of Justice and Constitutional Development was also in the process of considering measures to open up the profession.

Organisational forms and multi-disciplinary practices

The rules assessed under this category are:-

- the prohibition on practitioners from sharing fees with non-practicing attorneys; and
- the prohibition on practitioners from sharing offices with persons who are not practising members.

The Commission found that the existing restriction on multi-disciplinary practices is too wide and that it in its current form is not necessary for the ordinary function of the profession, especially in the case of professions closely related to or ancillary to the legal profession. Furthermore, the Commission's role is to promote a pro-competitive market and the Commission determined that the abovementioned restriction prevents innovation and the development of a fair competitive environment.

Advertising, marketing and touting

The rules under this category encompass various prohibitions including the prohibition on a firm from holding itself out as specialising in any branch of law, the prohibition of certain acts of advertising, marketing and/or touting which constitute unprofessional, dishonourable or unworthy conduct by a legal practitioner.

The Commission is of the view that advertising and marketing should be subject only to general restrictions such as, for example:-

- advertising should fall in line with the general advertising laws South Africa (e.g. against comparative advertising);
- advertising should not be misleading or false; and
- advertising should not bring the administration of justice into disrepute.

The Commission found therefore that the LSSA rules relating to advertising and marketing go beyond what is reasonably required to maintain professional standards or the ordinary function of the profession and accordingly, as they stand, should not be exempted. Furthermore, touting is not defined but the various Statutory Associations have a wide discretionary power to decide that specific conduct amounts to touting. Further, relaxation of the restrictions against advertising and marketing in the legal profession will be in the consumers' interest.

Notice is further hereby given in terms of item 8 of Part A of Schedule 1 of the Act that a professional association, or any other person with a substantial interest affected by the abovementioned decision may appeal the decision to the Competition Tribunal in the prescribed manner.

Any queries in this regard should be directed to: Mr Mziwodumo Rubushe, Advocacy and Stakeholder Relations, Competition Commission, Private Bag X23, Lynwood Ridge, 0040 or at (tel.) 012 394 3194, (fax) 012 394 4194 citing case number 2004Jul1127.