IN THE COMPETITION APPEAL COURT OF THE

REPUBLIC OF SOUTH AFRICA.

CASE NO. 64CAC/AUG/06

In the matter between:

AMERICAN NATURAL SODA ASH CORP	**1st Appellant**
CHC GLOBAL (PTY) LTD	**2nd Appellant**

And

BOTSWANA ASH (PTY) LTD	**1st Respondent**
CHEMSERVE TECHNICAL PRODUCTS (PTY) LTD	**2nd Respondent**
WEBBER WENTZEL BOWENS	**3rd Respondent**
THE COMPETITION COMMISSION OF SOUTH AFRICA	**4th Respondent**

JUDGMENT: 5 JANUARY 2007

DAVIS JP

This is an appeal against a decision of the Competition Tribunal ('the Tribunal') which dismissed an application for the disqualification of first respondent ('Botash') from continuing to participate as interveners in complaint proceedings brought by fourth respondent before the Tribunal together with its legal team, being third respondent ('Webbers'), from continuing to represent Botash in these proceedings. The application was brought after appellants found out that one Darryl Dingley, one time employee of the

fourth respondent and who had subsequently been employed by Webbers had been deployed by the latter to be part of its legal team which represented Botash in these complaint proceedings. It was common cause that Dingley had participated in negotiations between appellants and fourth respondent which were directed to a settlement of the complaint proceedings against appellants.

The present dispute flows from a complex and drawn out process of litigation based upon an allegation that first appellant ('Ansac') was a cartel falling within the scope of section 4 of the Competition Act 89 of 1998 ('Competition Act') and further that it had been guilty of predatory pricing in terms of section 8(d)(iv) of the Competition Act.

On 14 April 2000 a complaint was referred to the Tribunal and pursuant to an agreement between the parties Botash was joined as an intervener. Sometime thereafter, the respondent and appellant embarked on settlement negotiations in an effort to resolve their differences. According to Mr. Reshaan Laljith, a director of second appellant who deposed to a founding affidavit, Ansac went to great lengths to emphasize that both the fact and the contents of the negotiations were to be treated as a confidential and under no circumstances should they be divulged to Botash. This demand was unequivocally accepted by fourth respondent. One of the issues with which the negotiations were concerned was whether a penalty should be imposed on Ansac for its conduct and, if so, on what basis and in what amount. According to Mr. Menzi Simelane, then the Competition Commissioner, Dingley was requested as head of case analysis in the policy and research division of fourth respondent to participate in the settlement negotiations and to apply a financial model that he developed for the assessment of penalties.

The discussions culminated in an agreement of settlement that was signed by both Ansac and the Commissioner. For reasons that are not relevant to this dispute, the agreement was repudiated on the grounds that, in material respects, it supposedly failed to address fourth respondent's concerns.

In the period leading up to the conclusion of this agreement Dingley left the employ of fourth respondent. He played no further part in the negotiations. In October 2005 he joined Webbers. The partner who was designated to lead Botash's legal team, Mr. Martin Versfeld asked him in February 2006 to join Botash's legal team. According to Dingley, he immediately disclosed to Versfeld that he had been involved in the case while in the employ of the fourth respondent. In his affidavit Dingley states: 'After honest and thorough consideration, I reported to Mr. Versfeld that there was no reason to believe that I had knowledge of information confidential to the Respondents relevant to Botash's cause and to involve me in the matter was unlikely to result in any impropriety.'

Botash's attorney wrote to Mr. Anthony Norton of Webbers on 21 June 2006 in which he said the following:

> 'As you know Daryl Dingley was an employee of the Competition Commission before he joined your firm. In that capacity he worked intensively on this matter, playing a significant role in the Commission's deliberations and having access to a considerable amount of material submitted under cover of confidentiality undertakings, including material submitted confidentially to the Commission alone in connection with the negotiation and discussion of the consent agreement.
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> In the light of this, it was with great surprise and consternation that we found him present yesterday as a professional Webber Wentzel employee on the Botash legal team handling this matter and fully participating in the case and meetings on your clients' behalf with representatives of the Commission. Given his prior employment by the Commission, this is plainly improper, presenting serious ethical and professional issues. Indeed, on the face of it, it appears that the situation created through his participation is such as to compromise Webber Wentzel's continued participation in the case.'

Dingley was then withdrawn from all involvement in third respondent's legal team representing Botash on 29 June 2006.

Summary of Ansac's case

Mr. Brassey, who appeared together with Mr. MacNally, on behalf of Ansac contended that there were three independent bases for the disqualification of both Botash and its legal team:

1 Webbers had assigned a person to the case and thus placed themselves in a position in which advantage might be derived from his contribution to the legal team when he had, to their knowledge, previously participated to a material extent in the proceedings on behalf of fourth respondent, a statutory body that as a regulator has objects, interests, information and constraints that manifestly differ

or might differ from those of Botash. In short, Mr. Brassey invoked the principle that no lawyer can in the same case represent in succession parties whose objects, interests, knowledge and strategies cannot in law be identical or manifestly are not identical.

2 By including a person with Dingley's knowledge of the content of the confidential, without prejudice, settlement discussions, the principle was infringed that no one should place himself or allow himself to be placed in a position in which he risks breaching obligations of confidentiality.

3 By including on the legal team, a person who might be a material witness in the principle case, particularly on the issue of the validity and/or appropriateness of the settlement agreement that, to his knowledge had been concluded with the fourth respondent, the potential was created of the corruption of a witness's testimony.

The Tribunal's Findings

In a careful analysis of the arguments presented by Ansac as outlined above, the Tribunal found that, although Dingley had participated briefly in the Botash legal team and may have been exposed to 'without prejudice information' in relation to the case as a result of his employment with fourth respondent, Ansac had failed to provide evidence of more than a possibility of harm. In the Tribunal's view 'the possibility of harm is insufficient to found a case for unfairness in our law'.

At this stage it is opportune to refer to the evidence made available to the Tribunal of the content of the negotiations which had taken place between fourth respondent and Ansac. This evidence proved to be of considerable importance in that the Tribunal found that it was incumbent on appellants to prove more than a breach of confidentiality 'in the air'. The content of the negotiations had not been disclosed to the Tribunal because Ansac had adopted the approach that it would be 'incompatible with the preservation of their confidential, without prejudice status'. According to the Tribunal, during the course of his argument, counsel for Botash invited Ansac and fourth respondent to permit the Tribunal to have sight of the Commission's file to ascertain that the documentation indeed contained material prejudicial to Ansac. Ansac replied that they would 'leave the matter in our hands'. However the Tribunal recorded that counsel for Ansac had cautioned the Tribunal against adopting the approach of allowing 'a judicial peak' to take place.

He had argued that, if the Tribunal looked at the documents without hearing oral evidence, this would constitute an irregular procedure. The documentation could not be analyzed out of the context of the negotiations and in particular the oral exchanges that had taken place. For these reasons, the Tribunal found 'given Ansac's stance we were reluctant to take this 'judicial peak' at the documents and we have not done so'. The Tribunal found that although Mr Laljith had made claims in general terms concerning confidentiality, there was in the Tribunal's view 'no revelation of what the substance of these is or even the broadest hint'. The Tribunal noted that by contrast, Dingley characterized the negotiations as 'guarded' and suggested that he had no awareness of the fact that he 'is now a repository of Ansac's secrets which he has unwittingly conveyed to the rival camp'. On the basis that Ansac had not provided sufficient evidential justification for its application, the Tribunal dismissed it.

I now turn to deal with the three key arguments which Mr Brassey raised in his effort to persuade this court that the Tribunal had erred in dismissing the application.

Side switching

Mr Brassey submitted that Botash had assigned a person to the case and placed themselves in a position in which advantage might be derived from his contributions to the legal team which had been deployed to pursue Botash's case. Webbers had known of Dingley's previous participation to a material extent in the proceedings on behalf of fourth respondent, whose interests as a statutory regulator were manifestly different to those of Botash.

Mr. Brassey attacked the Tribunal's finding that a ban on side switching only applied in circumstances where an attorney had acted for a client and then switched to acting against the client in the same matter. In contrast, he contended that the essential test in the present dispute was whether there existed so significant an identity, specifically of knowledge, interest and object, between the parties, Dingley left and the party he joined so as to satisfy a reasonable observer that no prejudice whether actual or potential might be engendered by the switch. In particular, the question arose as to whether Dingley, by switching sides, compromised a relationship of trust to the prejudice, whether actual or potential, of Ansac as a party to the litigation.

The essential component of this aspect of Mr Brassey's argument was a distinction that he sought to draw between the position of the fourth respondent and that of Botash with regard to their respective positions of litigants in the complaint proceedings. In this connection he referred to an affidavit filed on behalf of fourth respondent by Mark Worsley who said: 'It is patently clear that there is a considerable difference between the interests pursued by the Commission and those pursued by an intervening party'.

Mr. Brassey suggested that it was precisely because of the special status of fourth respondent that Ansac selected it as target for its efforts at settlement in the knowledge that it could expect a reception that in its fairness and independence would stand 'in marked contrast' to what might be expected from a commercial litigant such as Botash. Mr. Brassey emphasized the statement made in the founding affidavit of Mr. Laljith that Ansac had revealed its views and attitudes and candidly dealt with the strengths and weakness of its case, discussed the motives of Botash openly and elaborated to fourth respondent on a range of potential solutions to the problem raised by the complaint proceedings.

Accordingly, Mr. Brassey submitted that there was a distinct incongruence of interests between Botash and fourth respondent insofar as the complaint proceedings were concerned. He referred to the conduct of Botash in seeking to prevent a successful settlement of the complaint between fourth respondent and Ansac. In his view, if both

fourth respondent and Botash had been represented by a single attorney, it was impossible to believe that the attorney would not have felt compelled to withdraw from the matter on the basis of a conflict of interest.

In support of these arguments, Mr. Brassey cited a series of decisions from the United States of America as support for the general proposition that an official employed by a regulatory authority will be disqualified from acting on behalf of a party in a suit brought by or against the authority if: (1) when at the authority whether as a lawyer or otherwise he personally participated in the preparation or presentation of the suit on behalf of the regulatory authority to a degree that was not merely formal or perfunctory but constituted a substantial contribution and (2) in circumstances in which there may be prejudice to other parties in litigation or in which such prejudice appears to exist. See in particular Kessenich v Commodity Futures Trading Commission 221 US App DC 314(DC App, 1982) at [27] – [30].

In Kessenich supra, the applicant lodged a complaint before the Commodity Futures Trading Commission ('CFTC') a letter of complaint was addressed to one Clinton Burr, an attorney employed in the Division of Enforcement of the CFTC. The complaint alleged that there were certain unlawful activities which had been undertaken in connection with unauthorized transactions in commodity options on Kessenich's account with a company called Rosenthal and Company. When no settlement was reached, the complaint was forwarded for adjudication. During the

proceedings the law firm that had previously represented Rosenthal before CFTC was replaced by Rosenthal's general counsel, the same Clinton Burr who had previously worked at the CFTC. In finding that Burr should be disqualified from the case, the court held '[O]ur decision rests on consideration beyond the immediate case before us. The integrity, both actual and apparent, of the agency's dispute resolution mechanism is essential to the regulatory enforcement scheme created by Congress.'

Mr. Brassey also found support at the other end of the world for his argument; in a decision of the New Zealand Court of Appeal in Black v Taylor [1993]3 NZLR 403(CA). A solicitor had previously acted for members of family including the deceased plaintiff who brought proceedings against the estate of the deceased for breach of an alleged contract to leave him by will certain shares. Plaintiff sought an injunction against the solicitor's continued representation of the estate on the ground that the solicitor had been privy to confidential information relevant to the present dispute and hence there existed a conflict of interest. The court found that (at [408]) 'it would not be unreasonable for a family member to feel chagrin and concern to find a lawyer who had built up knowledge of that kind was able consciously or unconsciously to draw on it when acting against that member of the family'. The court found that justice would not have been seen to be done if when

dissension took place within the deceased's family, the family solicitor was seen to be acting for one side thereof.

Although these cases are distinguishable on the facts, Mr. Brassey insisted that the principle which was applied in both cases was applicable to this case, namely as Richardson J had put it in Black supra at 409, there are two key principles to be safeguarded, namely: 'that knowledge of a client may itself disqualify a practitioner from acting against that client and that an appearance of impropriety should be avoided'. In the view of Richardson J while these principles did not impose legal obligations having the force of law, they provided a clear indication of relevant public policy concerns.

Mr. Brassey sought to apply the principles derived from these cases to contend that, as Dingley had worked on the case for fourth respondent, he had been privy to Ansac's thoughts and ideas about the case and he should have been prohibited from putting this knowledge to the benefit of Ansac's determined opponent.

Evaluation

As Mr. Trengove, who appeared together with Mr. Chaskalson on behalf of third respondent, submitted, at no stage had Botash, third respondent or Dingley ever represented Ansac. On the contrary, they have at all times been the adversaries of Ansac. Thus, the cases cited by the appellants as authority for the argument on side switching are

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distinguishable from the present dispute. Dingley never represented Ansac and, if to the extent that there was switching, it was from one adversary of Ansac to another.

Significantly, Ansac accepted that any disclosures to which Dingley may have been privy were disclosures which took place within the context of settlement negotiations where Ansac understood the risks. It accepted that 'those members of the Commission who were exposed to its disclosures could not insulate themselves from what they had learnt and absorbed during the negotiations and would remain possessed of such knowledge during the further prosecution of the matter'. Whatever was disclosed to the members of fourth respondent therefore was available to its legal team in the ongoing litigation between the parties. Hence the argument was made by Mr. Trengove that any question which might be asked by a member of Botash's legal team could be properly asked by a member of the legal team representing fourth respondent.

Clearly the side switching cases relied upon by Ansac deal with a lawyer moving from one party/authority to a party which is in an adversarial or materially different position from that of the former. Thus, in order to utilize the authorities cited in support of the side switching argument, Ansac is constrained to contend that there is a material structural difference between the respective positions of the fourth respondent and of Botash. This would then allow for the argument that some form of side switching had taken place in the present dispute analogous to the facts of the cases cited above.

The motive of Botash in intervening in the complaint proceedings may well be different from that of the statutory regulator established in terms of the Competition Act to pursue the public interest. I readily accept that Botash is a private institution which has primarily a private interest at heart and most certainly is not necessarily motivated to act in the public interest

Significantly, Mr. Laljith said the following in his founding affidavit: 'Botash has no independent cognizable interest in the outcome of the proceedings. To the extent that it seeks to join with the Commission in the vindication of the public interest, the Commission is more than capable of discharging that function without Botash's assistance. To the extent that it seeks, by its intervention, to bolster the Commission's efforts in vindicating the public interest, that task can safely be left to the Commission. What is clear, however, is that there is no prospect of Botash obtaining its own separate relief in the proceedings.'

As Mr. Unterhalter, who appeared together with Mr. Gotz for Botash, contended the fourth respondent seeks relief in the form of a declaratory order that Ansac's cartel agreement constitutes a prohibited practice in terms of section 4(1) (b) of the Competition

Act and further seeks the imposition of an administrative penalty. It does not seek an interdict preventing Ansac from continuing to trade as a cartel in South Africa. Botash however seeks such relief. As Mr. Unterhalter correctly observed, this latter relief is but a logical extension of that which fourth respondent has pursued to date. The purpose of Botash's intervention was because an interdict was not sought although it is competent in terms of section 58(1) (a) (i) of the Competition Act.

Once the relief is viewed with this framework, it follows that the interest of Botash and the fourth respondent in the complaint referral proceedings are sufficiently complimentary to render the jurisprudence cited by Mr. Brassey in connection with side switching to be distinguishable from the facts of the present dispute. The facts of this case find no application in the authorities relied upon by appellants.

Breach of confidentiality

Mr. Brassey submitted that Dingley owed a duty of confidentiality to Ansac flowing from his participation in the settlement negotiations which were conducted on a 'without prejudice' basis.

Ansac's case on this ground is that Webbers, as lawyers for Botash assigned Dingley to the case and accordingly placed themselves in a position in which advantage might be derived from his contribution to the legal team in circumstances where he was bound by statutory and non statutory obligations of 'utmost' confidentiality pursuant to which he had become privy to and materially contributed to the 'without prejudice' negotiations in which Ansac made disclosures of a confidential nature. In the founding affidavit Mr. Laljith describes the basis of the confidential nature of the settlement discussions thus:
'At the first settlement meeting, ANSAC stressed that the negotiations were being held in the strictest confidence and without prejudice to its interests in the complaint proceedings. ANSAC specifically pointed out that the discussions and any documentation created specifically for purposes of discussing settlement or information provided to the Commission must not be revealed to Botash. The Commission expressly accepted these stipulations.
These strictures were repeated from time to time in correspondence and at further meetings between ANSAC and the Commission. No one representing the Commission could have been left in the slightest doubt that the negotiations were not to be divulged without the consent of ANSAC. Nor could it be doubted that the contents of what was being disclosed could neither be used nor exploited in the complaint or other litigation.'
This description of events does not appear to be contested by Mr. Worsley who deposed to an affidavit on behalf of fourth respondent. The Tribunal also appeared to accept that

'Dingley participated briefly in the Botash legal team and may have been exposed to without prejudice information in relation to the case as a result of his prior employment with the Commssion.' Mr. Brassey submitted that, on this basis, the Tribunal should have found that Dingley was in a position in which he, whether wittingly or unwittingly, could disclose confidential information without the consent of Ansac. This conclusion remained true whether the information was indeed confidential when disclosed or whether it retained the status over time. The undertaking given by fourth respondent covered information which had been provided by Ansac under the umbrella of the undertaking and this remained true whatever the nature of the information.

Mr Brassey contended that in order to make out a case of disqualification on the basis of confidentiality, all Ansac had to show was: (1) Information was given either under cover of confidence or that it was in fact confidential; and (2.) Dingley was placed in a position in which the confidence could be (or might possibly be) imperiled.

Mr Brassey submitted that Dingley was under an obligation not to disclose information that had been given to him in confidence. He was under an obligation to maintain the ethical integrity of the legal system. By his participation in the legal team of Botash, he was placed in a position in which his memory might be triggered or in which facts learnt by him might be divulged explicitly, implicitly or by conduct. Accordingly, his participation in the Botash legal team, which was working on the very case in which he had been exposed to confidential discussions when employed by fourth respondent, had caused an irretrievable infringment of the integrity of the legal system. For this reason, a strict test should be adopted to protect the issue of confidentiality and thereby serve to disqualify Webbers from its further participation in any proceedings relating to the litigation between Ansac and Botash. Mr Brassey sought to rely upon judgements in Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 ALL ER 517 (HL); Martin v Gray [1991] LRC Comm 789

(SC) , cases which will presently be analyzed.

Evaluation

In order to evaluate this leg of Ansac's case, it is necessary to examine in some detail the evidence employed by appellants to justify their case and the comparative law cited in support thereof. In his founding affidavit Mr. Laljith describes the basis of Ansac's contention that there existed, at the very least, a potential breach of confidential information:

'Full disclosure of the contents of the negotiations in this affidavit is obviously

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incompatible with the preservation of their confidential, without prejudice status. The best I can do in this affidavit is to give a general summary of the nature of the negotiations and the path that they took. Directions will at the appropriate time be sought from this Tribunal on the manner in and extent to which disclosure should be made. In the negotiations there were two fundamental issues:
first, whether the complaint referral could be settled informally or whether its validity and enforceability depended on the approval by the Tribunal of a consent agreement that, at its most extreme, would have to embody a plea of guilty;
secondly, whether ANSAC Corp was a legitimate joint venture or not, and if not-whether future trading could be regulated by the settlement and, if so, upon what conditions (such as off shore trading);
what consequences (including trading prohibitions and penalties) might in addition be appropriate.
On the first issue, Dingley, in common with the rest of the Commission's team engaged in a lengthy debate with the ANSAC team on the basis on which the matter could be settled. In the course of these discussions, the ANSAC team candidly expressed its own views on the merits, from a legal point of view, of each of the contending positions. In these discussions Dingley appreciated that the status of an unconfirmed settlement agreement was a matter of debate and controversy and was openly made privy to ANSAC's understanding of the strengths and weaknesses of each legal standpoint.'

Laljith then attached to his founding affidavit a chronology of negotiations. Briefly the following was recorded:

> On 3 October 2001 the chief legal counsel at the Commission informed Ansac that a sub-committee was appointed to calculate a possible penalty. During October 2001 the name of Dingley was mentioned as the person who talked to the Ansac team regarding administrative penalties. On 28 November 2001 a meeting took place between members of the Commission and legal representatives of Ansac in which Dingley was present and in which according to the chronology 'Dingley advised what could be addressed in the consent agreement, discussed possible approaches to the calculation of the penalty'.
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> On 15 January 2002 a further meeting between the Commission and legal representatives of Ansac took place. The following was recorded 'discussions substantially led by Dingley of settlement options.' On 7 February 2002 it was recorded 'Dingley has "marathon session" presenting his ideas and figures to his superiors.' Thereafter Dingley left the employ of fourth respondent.

With these facts in mind, it is possible to examine the key comparative cases which were cited by counsel for the parties to this dispute. In the light of the importance placed upon the decision of the House of Lords in the Prince Jefri case supra, it is necessary to examine this case in some detail and seek to apply the legal principles outlined therein to the key facts of this dispute. In Prince Jefri, defendants were a firm of accountants employed as auditors of the Brunei Investment Agency established to hold and manage the general reserve fund of the Government of Brunei and its external assets, as well as to provide the Brunei government with

money managing services. Plaintiff had been chairman of the investment agency until his removal in 1998. Between 1996 and 1998 plaintiff, acting in his personal capacity, retained defendant to act for him or one of his companies in litigation in which he was then engaged.

In the course of acting for the plaintiff in that litigation, defendant provided extensive litigation support service of a kind usually undertaken by solicitors. Pursuant to its duties, defendant was entrusted with or required extensive confidential information about plaintiff's assets and financial affairs. When plaintiff was dismissed from his position as chairman of the agency, the Brunei government commenced an investigation into matters pertaining to plaintiff's conduct. The government sought to retain defendant to assist in the investigation. Defendant adopted the approach that it could accept the instruction because it had ceased to act for plaintiff more than two months previously. He was no longer a client. Adhering to a 'belts and braces' approach it created an information barrier around the department which carried out investigation on behalf of the Brunei government. Plaintiff had not been informed by the defendants of this decision nor had his consent been sought. He obtained an injunction to restrain defendants from continuing to work on the investigation. The matter finally reached the House of Lords.

The House of Lords confirmed two fundamental legal propositions in its resolution of the dispute being: (1) there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; (2) the solicitor may be restrained from so acting if the restriction is necessary to avoid a significant risk of disclosure or misuse of confidential information which belongs to the former client (at [526 (d)]).
Lord Millett then went on to say:

'It is in any case difficult to discern any justification in principle for a rule which

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exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of the fiduciary relationship may come into the possession of the third party and be used to his disadvantage. Where in addition information in question is not only confidential but also privileged the case for a strict approach is unanswerable. Anything less fails to give effect to a policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice

that a client should be able to have complete confidence that what he told his lawyer will remain a secret' (at 528 c – e). Lord Millett continued:
'Once a former client has established that the defendant firm is in possession of information which was imparted to it in confidence and that firm is proposing to act for another party with an interest adverse to his own in a matter to which information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party' (at 529 d).

On the facts, the court found that the defendant firm had not discharged the heavy burden of showing that there was no risk that information in their possession which was confidential to plaintiff and which they obtained in the course of a formal client relationship might unwittingly or inadvertently come to the notice members of defendant firm working for the government of Brunei.

Although this decision did not impose an absolute rule that a solicitor may not act in litigation against the former client, the court made it clear that, were there any avoidable risk however slight, that if information imparted in confidence in the course of a fiduciary relationship comes into the possession of a third party which could potentially be used to his disadvantage, the former client must be protected.

In the present case, Dingley did not act at any time for Ansac. No information was communicated to him pursuant to his having so acted. Mr Brassey insisted that Dingley had access to information which was confidential and which had only been conveyed to fourth respondent on the basis of an undertaking of such confidentiality.

Assuming therefore that the relationship between Dingley and Ansac can be rendered equivalent to that of the defendant firm and the plaintiff in <u>Prince Jefri,</u> the question still arises as to whether the appellant has made any showing with

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regard to confidentiality of information held by Dingley which would bring Webber's within the scope of the approach adopted by the House of Lords in Prince Jefri.

In what amounts to an essential factual determination of the present application, the approach set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) must be considered. Hence, the question arises as to whether the relief should be granted on the basis of the facts presented by respondent together with the admitted facts in applicant's affidavit and where it was clear although not formally admitted, facts that cannot be denied and must therefore be regarded as admitted. Within this context, it is useful to commence with respondents evidence. Dingley states that he 'presented the generic model to the first applicant's representatives and debated with him the model on a high level, academic basis. It was not necessary for me to have regards to the merits of the first applicant's case to do this.'

He further contends that 'the level of my influence over the development of consensus is pure speculation. It is noteworthy that to the best of my knowledge and belief the Commission has never adopted my economic model.' He also says: 'I have no reconnection whatsoever of the First Applicant ''revealing its hand'' during any

discussion I had with its representatives…' He also did not recall being made a party to Ansac's 'confidential strategies and tactics in relation to their case or to their thoughts and views and any of the relevant documents'.

The question therefore needs to be asked whether Ansac has shown that Dingley was given confidential information, that the information is still confidential and that the information is relevant to the case.

In its papers, appellants did not set out in anything more than generalization, information which it alleged was confidential. It argued that it could not do more because this disclosure would further subvert the possibility of it having a fair trial. Without crafting some approach whereby the Tribunal could have undertaken 'a judicial peak' of that which was alleged to be confidential, it is difficult to see how so drastic a remedy sought by appellant can be granted on the basis of generalized statement. This difficulty is compounded when Mr. Dingley says in his affidavit:

'I wish to stress that it was my perception that the Respondents' representatives

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remained guarded at all times during the meetings and discussions. I have no recollection whatsoever of the First Applicant "revealing its hand" in the sense suggested, during any discussion that I had with its representatives. If it is being suggested that I was made party to the Applicants' confidential strategies and tactics in relation to their case or to their thoughts and views on any of the relevant documents, I simply do not remember their representatives ever doing so. The discussions in which I was involved were about the principles and terms on which the matter could be settled.'

There is no justification for an outright rejection of the evidence of Dingley. There was no application to have the factual disputes resolved by the hearing of oral evidence. It must follow, on the basis of the existing record, that appellant has not discharged even the limited onus of showing the nature of the confidential information possessed by Dingley. What compounds the difficulty is a point made by Mr. Trengove, namely that when Ansac sought to speak to fourth respondent about the possibility of settlement, it effectively consented to certain information being employed in litigation in the event that the settlement talks would not be successful. There is no dispute that fourth respondent

can employ any of this information in the continuing litigation.

To an extent Mr. Brassey might have been taken to rely on the clarification made by Corbett JA (as he then was) to the approach adopted in Stellenbosch Farmers' Winery Limited v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C) (at 235) namely that in certain cases a denial by respondent of a fact alleged by the applicant may not be such as to give rise to a real genuine bona fide dispute of fact. To the argument that there could not be a genuine factual dispute on the basis that Dingley possessed information sub-consciously which he may well disclose in circumstances which were neither deliberate nor conscious, the approach adopted by the Supreme Court of Victoria represents a more than adequate response:

'However, there is not the slightest basis for thinking that the first defendant

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would intentionally use such confidential information. As I have said, the plaintiff's submission emphasized that danger of the unconscious use of such information. It is at this point, I think, that the plaintiff's argument fails. It is not possible, in the absence of any specificity concerning the nature and content of the supposed confidential information, to make any fair or meaningful assessment of the likelihood that it might be used unconsciously to the unfair disadvantage of the plaintiff.'

Grimwade v Meagher and others (1994) VIC LEXIS 816 (at 26). In Martin v Gray [1991] LRC (Comm) 789 (SC) the Canadian Supreme Court examined the problem of the reticence of an applicant to reveal confidential information allegedly communicated to an erstwhile legal advisor. Sopinka J said in this regard:

'[o]nce it is shown by the client that there existed a previous relationship which

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is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that the confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.' (at 805).

In that case the court was dealing with a lawyer who had worked for a firm of solicitors who had acted in a case for one party and then had moved to work for solicitors acting for the very adversarial party in the same case. In the present dispute, the relationship between Dingley and Ansac, is for reasons set out above entirely different. The kind of inference to be drawn about the communication of confidential information from client to attorney acting in litigation does not without any further factual support apply to the present dispute.

For all these reasons as set out, I am of the view that appellants have not provided a sufficient factual basis for the approach adopted in <u>Prince Jefri</u> to be applied to the present dispute. This conclusion must hold even if it is assumed that there was no structural equivalence between Botash and fourth respondent.

The Corrupted testimony argument

Ansac contends that the continued participation by Botash and Webbers can not be justified because they appointed a person to the case and placed themselves in a position in which advantage might be derived from his contribution to the legal team when third

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respondent knew or might reasonably have anticipated that he might be called as a material witness on the issue of the validity and/or appropriateness of the settlement agreement that, to his knowledge, had been concluded with fourth respondent. Mr. Brassey submitted further that Dingley's participation on Botash's legal team generated the perception that his evidence when tendered cannot but favour Botash.

On the evidence, it is unclear why Dingley might or will be called as a material witness in proceedings regarding the validity of a settlement agreement. He left the employment of fourth respondent four months before the settlement agreement was signed. He cannot testify to the Commissioner's thinking or state of mind when he signed it. He had nothing to add to the repudiation of the agreement.

Much of Ansac's argument turns on the allegation that Versfeld should have appreciated that Dingley could have been called as a witness in proceedings to enforce a settlement agreement. Dingley suggests that Versfeld knew that an agreement had been concluded in 2002 and knew that an application in terms of which the settlement agreement would be made a consent order had been withdrawn by fourth respondent in December 2005, four months before he approached Dingley to become a member of the Botash legal team. This means that Ansac and the fourth respondent had re-entered negotiations with a view to concluding a new settlement agreement by which time Dingley had long left fourth respondent. If Dingley was called as a witness he would be bound under oath to testify truthfully about events to which he was not the only party to the settlement negotiations. But, at best for appellants, Dingley had knowledge of the 2002 settlement but not of the negotiations that begun in February 2005 which commenced with a view to leading to a possible settlement.

As Mr. Trengove submitted, it would be a radical decision to expel Botash and Webbers because one of the latter's junior employees might one day be a witness in a case on an issue which has not even been raised and may never be raised and which appears to be surpassed by subsequent events.

Section 34 of the Constitution

Section 34 of the Republic of South Africa Constitution Act 108/1996('the Constitution') provides 'Everyone has the right to have any dispute that can be

resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. In De Beer N.O. v North Central Local Council and South Central Local Council and Others 2001 (11) BCLR 1109(CC) at para 11 the Constitutional Court said this of this right:

'This s 34 fair hearing right affirms the rule of law, which is a founding value of

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our Constitution .The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a pre-requisite to an order being made against any one is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair'.

See also President of RSA v Modderklip Boerdery (Pty) Ltd. 2005(5) SA 3 (CC) at paras 39 –41. In this connection Mr. Brassey contended that the conduct of Webbers in assigning Dingley to the Botash legal team had compromised Ansac's right to a fair trial; at the very least by breaching the perceptual principle that justice must not only be done but be seen to be done. By effectively including 'a spy' on to its legal team, the perception, no matter what the evidence may objectively have indicated, had been created that Ansac could not obtain a fair trial in these proceedings.

In this connection the following dictum from the judgment of The Government of India v Cook Industries INC 569 F. 2d 737 was invoked where Mansfield J of the Second Circuit of the United States Court of Appeal said: 'The essential issue, is

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whether an impression is created that the attorney may have gained confidential information from his prior relationship that is usable against his former client'.

Notwithstanding these arguments about adverse perception, the answer to whether section 34 of the Constitution has been breached can be tested in an enquiry as to whether Ansac's right to a fair hearing before the Tribunal would be violated if Botash and Webbers were allowed to continue to participate in the hearing and, if so, whether their exclusion would not only avoid the violation and would be an appropriate remedy.

Even if the test is put on the basis of whether there would exist a reasonable perception that appellant's right to a fair proceeding will be compromised by the actions of Webber's in designating Dingley to the case, the answer has already been located in the analysis of the facts as set out above. To summarize: In my view, the absence of any specified factual basis for a breach of confidentiality is equally applicable to the invocation of a right to a fair trial in terms of section 34. Similarly, it is not clear why any question which could be asked by Botash's legal representatives in cross examination of an Ansac witness on the basis of the information which allegedly is in the possession of Dingley could not be equally be asked by the fourth respondent's legal representatives of the knowledge gained by the representatives between the settlement negotiations. The latter action can hardly be construed as giving rise to unfairness in the proceedings.

To the extent that appellants have argued that there is a danger of a derivative use of unlawfully obtained information, under existing South African law there is no absolute bar against such evidence under South African law. See Ferreira v Levin N.O. 1996 (1) SA 984 (CC) at para [150]; Shaik v Minister of Justice and Constitutional Development and Others 2004(3) SA 599 (CC) at paras [35] – [37].

In both these cases, the Constitutional Court rejected an absolute bar against the derivative use of evidence and opted for direct use immunity that protected the

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examinees from their answers being used against them and no more. In Shaik supra at para [36] Ackermann J said: 'It (the Court in Ferreira) came to the conclusion that in the South African context, mere direct use immunity was sufficient, bearing in mind that the trial Judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.'

The question of relief

On whatever basis Ansac has sought to justify the relief for which it has applied, such relief will have a most significant impact on Botash's own rights in terms of section 34 of the Constitution. Preventing Botash from continuing to participate as an intervener in complaint proceedings brought before the Tribunal would be destructive of its rights under section 34 insofar as fundamental dispute between the parties is concerned.

Even Mr. Brassey was unable to summon much enthusiasm for this aspect of the relief. His major focus turned on the question as to whether third respondent's counsel and legal representatives in the proceedings, being Webbers, should be barred. Mr. Trengove submitted that for Botash some seven years into the litigation to proceed without its chosen attorneys and counsel who represented it in all proceedings arising out of a dispute thus far would constitute a substantial violation of its fundamental right to choose its legal representatives. It would force Botash to

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replace its attorneys and counsel after seven years without any meaningful communication of the issues in the case taking place between Webbers and the new attorneys. It would also result in a further lengthy delay of proceedings which had been already been characterized by delays and ferocious point taking and scoring. As the Second Circuit said in Government of India, supra:

'We are mindful that there is a particularly trenchant reason for requiring a high

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standard of proof on the part of one who seeks to disqualify his former counsel, for in disqualification matters we must be solicitous of a client's right freely to choose his counsel a right which of course must be balanced against the need to maintain the highest standards of the profession. A client whose attorney is disqualified incurs a loss of time and money in being compelled to retain new counsel who, in turn, have to become familiar with the prior comprehensive investigation which is the core of modern complex litigation. The client moreover may lose the benefit of its longtime counsel's specialized knowledge of its operations'

The appointment of Dingley on to the legal team may well be the kind of ethical matter which requires the attention of the Law Society. But Ansac seeks far more then a debate about legal ethics. It contends for wide ranging legal relief which depends on an evidential foundation. In my view, an aggrieved party, in a case where the 'switcher' has moved from a regulator which had similar interests in the case to that of the party which he now represents, must be prepared to take the court into its confidence and provided it with a clear evidential basis as to why, at the very least, the conduct of the parties like Webbers may be perceived to undermine an applicant's right to a fair hearing.

That evidence was not produced in this case. Relief that will destroy or, at the very least, undermine Botash's rights under s 34 of the Constitution must be justified by more than a generalized claim to confidentiality, which claim does not even give rise to a reasonable inference that confidentiality has been is or is likely to be breached to the detriment of applicant's rights.

Ansac has therefore not passed legal or evidential muster in this case. The appeal is

dismissed with costs, including the cost of two counsel.

DAVIS JP

Mailula and Patel AJA concurred.
