

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 33/CR/Jun03

In the matter between:

The Competition Commission

Applicant

and

The Association of Pretoria Attorneys

First Respondent

**All the members of the Association of
Pretoria Attorneys**

2nd – 447th Respondents

Order

Further to the application of the Competition Commission in terms of Section 49D, in the above matter -

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondents.

D.H. Lewis

30 July 2003
Date

Concurring: N. Manoim, U. Bhoola

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA HELD AT
PRETORIA**

Case no: 2002 AUG 157

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

**THE ASSOCIATION OF PRETORIA
ATTORNEYS**

First Respondent

**ALL THE MEMBERS OF THE ASSOCIATION OF 2ND – 447TH Respondents
PRETORIA ATTORNEYS (As per annexure “A”)**

**CONSENT ORDER, IN REGARD TO A VIOLATION OF SECTION 4(1)(b)(i)
OF THE COMPETITION ACT, AS AMENDED (ACT NO 89 OF 1998)**

**WHEREAS THE COMPETITION COMMISSION OF SOUTH AFRICA
INITIATED A COMPLAINT AGAINST THE RESPONDENTS AND,**

HAVING REGARD to the Competition Act, 1998 (Act No 89 of 1998), as last amended by the Competition Second Amendment Act, 2000 (Act No 39 of 2000), and in particular Chapter 2 and Chapter 5 thereof,

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HAVING REGARD to the form CT 6 Notice of Motion filed by the Commission and issued pursuant to Rule 42 of the Rules for the Conduct of Proceedings in the Competition Tribunal,

HAVING REGARD to the Rules for the Conduct of proceedings in the Competition Commission pursuant to Government Notice 20384 in Government Gazette No. 22025 (Vol. 410 of 1999),

HAVING REGARD to the parties hereto having agreed to be bound by the provisions of this Consent Order to fully and finally resolve all possible claims between the parties to this Consent Order arising out of the aforementioned Notice of Motion lodged by the Applicant,



NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon consent of the Competition Commission and the Respondents it is hereby ORDERED as follows:

DEFINITIONS

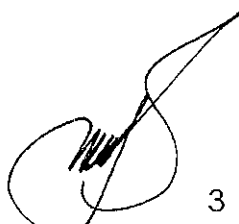

I.

For the purposes of this Order the following definitions shall apply:

1. The *Act* means the Competition Act, Act No. 89 of 1998, as amended.

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2. *Agree* means to enter any contract, arrangement, or understanding, whether oral or written or by conduct.
3. The *Commission* means The Competition Commission of South Africa, a statutory body, established in terms of Section 19 Act No. 89 of 1998 with its principal place of business at Building B, Glenfield Office Park, Cnr of Glenwood Road and Oberon Street, Faerie Glen, Pretoria.
4. The *Complaint* means the complaint initiated by the Commission in terms of Section 49B(1) of the Act.
5. *Firm* is defined in Section 1(xi) of the Act to include a person, partnership and a trust.
6. *Person* means any natural person, corporation, association, firm partnership, or other business or legal entity.
7. The *Respondents* means the Association of Pretoria Attorneys, a voluntary association established in terms of section 69(j) of the Attorneys Act No. 53 of 1979, to look after the members' interest on the basis of its Constitution as amended from time to time, and all its members who carry on business as attorneys and whose names are set out in the annexure attached hereto as Annexure "A".

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8. *Guidelines* means the guidelines issued by the First Respondent and titled "*ASSOCIATION PRETORIA ATTORNEYS- GUIDELINES FOR ATTORNEY AND OWN CLIENT FEES JUNE 2001*" attached hereto as Annexure "B" and any previous guideline of this nature.

APPLICABILITY

II.

The Consent Order applies to the Respondents, and, to each of its officers, directors, agents, employees, members and successors and who are engaged in economic activity within or having an effect within the Republic

JURISDICTION

III.

The Competition Tribunal has jurisdiction over the subject matter of this Consent order and over each of the consenting parties hereto, for the purpose of enabling either party to this Consent Order, but no other person, to apply to this honourable Tribunal at any time for further orders or directions as may be necessary or appropriate to implement or construe this Consent Order to enforce compliance, or punish violations of its provisions.


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COMMISSION INVESTIGATION

IV.

The Commission initiated an investigation into alleged fixing of selling prices of the services that attorneys render in the Pretoria area. The Commission has reached the conclusion that the Respondents have contravened the Act in that the Respondents did indirectly fix the price for services rendered by a member attorney of the First Respondent by issuing the "Guideline for Attorneys and Own Client Fees". The Commission considers the First Respondent to have contravened Section 4(1)(b)(i) of the Act.

Section 4(1) of the Act provides that:

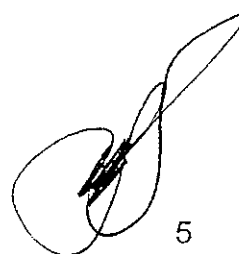
"Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in horizontal relationship and if –

(a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) It involves any of the following restrictive horizontal practices:

- (i) Directly or indirectly fixing a purchase or selling price or any other trading condition;*
- (ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
- (iii) Collusive tendering."*


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1. **Association of Pretoria Attorneys**

The First Respondent refers to itself as an “*association of attorneys*”. Membership of the First Respondent is limited to attorneys practising in Pretoria.

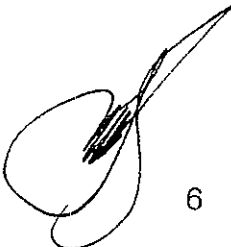
2. **Nature of the Complaint**

The complaint was initiated on the basis of a “*Guideline for Attorneys and Own Client Fees*” issued by the Association and circulated to its members under cover of an undated letter under signature of Dr. C. R. Botha. The Commission is satisfied that this guideline contravenes Section 4(1)(b)(i) of the Act since it is the Commission’s view that by issuing the Guidelines the Association of Pretoria Attorneys indirectly fixed selling prices of the services that its members render in Pretoria.

3. **Decisions by an Association**

The UK guideline “Trade associations, Professions and Self-Regulating Bodies” states as follows:

“A decision has a wide meaning. It may include for example, the constitution or rules of an association of undertakings or its recommendations or other activities. A recommendation of an association of undertakings may be a decision. This will be the case even if the recommendation is not binding on the members or has been fully complied with.”


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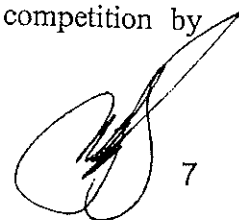
4. **Horizontal relationship**

Attorneys who have been admitted by the High Court and practise as attorneys are in a horizontal relationship with one another. Although they might specialise in particular fields (Competition law, Criminal law, Labour law, etc.) they are technically and by law permitted to practise in whichever field they choose, although they may have to write additional examinations as are required by law. They are obliged to register with one of the country's Law Societies, in the instant case the Law Society of the Northern Provinces (incorporated as the Law Society of Transvaal). It is submitted that they are competitors and Section 4 applies.

5. **Directly or indirectly fixing a selling price**

The Commission submits that:

- 5.1 it is accepted in international anti-trust law that recommendations of this nature have the effect of becoming the ruling price for the service.
- 5.2 This is especially true in concentrated industries or in instances where restraints are placed on any meaningful advertising of fees. The latter is the case in South Africa where statutory restraints restrict such advertising. EU rulings on recommended tariffs have also consistently found that such recommendations are unlawful. The circulation by a trade association of recommended tariffs is liable to prompt firms to align their charges, irrespective of their costs. Such an approach dissuades firms whose costs are lowest from lowering their prices and thus creates an artificial advantage for firms that have the least control over their production costs.
- 5.3 Competition authorities have also considered that the aim and effect of such recommendations is to distort the proper working of free competition by


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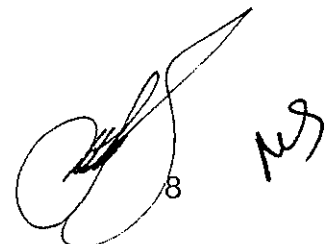
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encouraging businesses to set their prices artificially, by mutual agreement, with no regards for market favours or for agreements made.

STATEMENT OF CONDUCT

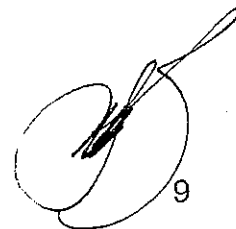
V.

- 1 The First Respondent admits that it is an association of attorneys practising in Pretoria and that it has issued the *Guidelines*;
- 2 The Respondents, excluding the first Respondent, admit that they were the intended recipients of the *Guidelines*;
- 3 The Respondents record that the *Guidelines* were not binding on the Second to Four Hundred and Forty Seventh Respondents.
- 4 The Guidelines could be construed as falling within the ambit of section 4(1)(b)(i) of the Act in that the Guidelines may indirectly be used by the Second to Four Hundred and Forty Seventh Respondents as providers of legal services as an indication of reasonable charges for their services, thereby leading indirectly to price fixing
- 5 The Respondents thus admit that, in the circumstance above, the *Guidelines* could constitute a contravention of section 4(1)(b)(i) of the Act.



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- 6 The Respondents state that:
- 6.1 It was never their intention that the *Guidelines* should be binding or should result in price fixing of any type whatsoever, but that it was intended to serve as a basis for negotiation with clients and that the *Guidelines* furthermore made it clear that clients must be in a free negotiation situation regarding fees.
- 6.2 It was the intention of the Respondents that the *Guidelines* should serve to protect the interest of the public in that they provided a means whereby fees charged by the Second to Four Hundred and Forty Seventh Respondents could be assessed by the Taxing Master or the Counsel of the Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal , as the case may be, in the event that any member of the public was aggrieved by such fees. In this context the *Guidelines* contained a specific reference to Rule 80 of the Rules of the Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal) which regulates assessment of fees.
- 6.3 Accordingly the *Guidelines* were not intended to cause prejudice to members of the public, but rather to protect members of the public.
- 7 It is noted that the Applicant accepts that the Respondents acted in the following manner:
- 7.1 The *Guidelines* were voluntarily withdrawn by First Respondent on 13 September 2002, with the knowledge and consent of the other Respondents;
- 7.2 A short period of time elapsed between the time of notification and the withdrawal of the *Guidelines*;
- 7.3 The Respondents at all times fully co-operated with the Commission in all respects.

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AGREEMENT CONCERNING CONDUCT

VI.

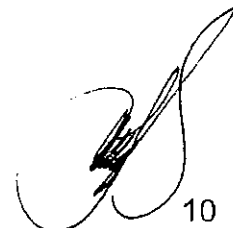
The following is agreed between the Respondents and the Commission:

1. The First Respondent has withdrawn the *Guidelines* with the knowledge and consent of the other Respondents and;
2. Undertakes not to re-issue them or any like *Guidelines*.
3. This agreement and the consent order based thereto are made in full and final settlement of the Complaint between the Applicant and the Respondents and any conduct of the members of the First Respondent in connection with or arising from the use of the Guidelines.

DAMAGES

VII.

No damages are provided for in this instance.



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ADMINISTRATIVE PENALTY

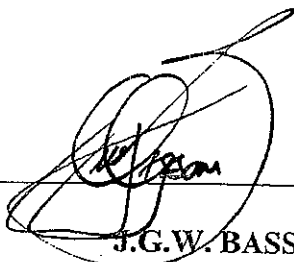
VIII.

1. In accordance with the provisions of section 58(1)(a)(iii) read with section 59(1)(a), 59(2) and (3) of the Act, the Respondents are liable for an administrative penalty.

2. With reference to the contravention of section 4(1)(b)(i):
 - An administrative penalty in the amount of R223, 000.00 (Two Hundred and Twenty Three Thousand Rand).

3. The Respondents are therefore liable to a penalty in the amount of R223, 000.00 (Two Hundred and Twenty Three Thousand Rand) to be paid not later than sixty (60) days after the confirmation of this Consent Order by the Competition Tribunal, provided that the Respondents may apply for an extension of time upon good cause shown.

Thus done and signed by the Parties here below.



J.G.W. BASSON
CHAIRPERSON OF THE FIRST RESPONDENT
FOR AND ON BEHALF OF ALL THE RESPONDENTS.¹

SIGNED ON THIS DAY 6th June OF ~~MAY~~ 2003 AT PRETORIA

¹ Authority to conclude this Consent Order on behalf of the members attached as Annexure C

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Adv. M. SIMELANE

THE COMMISSIONER:

COMPETITION COMMISSION

SIGNED ON THIS DAY ~~11th~~ ^{JUNE} OF ~~MAY~~ 2003 AT PRETORIA