REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 7136/2011

In the matter between:

GRANT LOGAN WISHART	1st Applicant
MALCOLM GRANT WISHART	2nd Applicant
SHABIER BHAYAT	3rd Applicant
and	
THE HONOURABLE Mr JUSTICE P BLIEDEN NO	1st Respondent
Adv JOHN M SUTTNER SC	2nd Respondent
Adv ALLAN J EYLES	3rd Respondent
WESSEL JJ BADENHORST	4th Respondent
BHP BILLITON ENERGY COAL SOUTH AFRICA LTD	5th Respondent
NEIL McHARDY NO	6th Respondent
THE MASTER OF THE HIGH COURT, PIETERMARITZBURG	7th Respondent

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JUDGMENT

GORVEN J

[1] The three applicants were summonsed to appear before the first respondent on 20 July 2011 in an enquiry convened under s 417 of the Companies Act 61 of 1973 (the Act). The enquiry relates to Avstar Aviation (Pty) Ltd (Avstar). The second and third respondents are advocates practising at the Johannesburg Bar. The fourth respondent is an

attorney. The applicants do not want to be examined at the enquiry by the second, third and fourth respondents. They did not attend the enquiry. Their present attorney of record appeared instead. He submitted that the first respondent should not allow these respondents to represent the fifth respondent (Billiton) in the enquiry. The first respondent declined to make such a ruling. This application resulted. Part of the relief sought was to review and set aside this decision. That relief is not longer pursued. The application moves to interdict the second, third and fourth respondents from examining the applicants in the enquiry. Unless further particularity is necessary, the second, third and fourth respondents shall be referred to jointly in this judgment as the respondents. The second to fifth respondents are the only ones who have opposed the application.

[2] The applicants say that it would be improper for the respondents to participate in the examination of the applicants. They raise a fundamental objection *ad hominem*. This is the nub of the interdict application. The applicants say that the respondents are subject to a conflict of interests and are privy to confidential information. This is said to have been disclosed to them during consultations.

[3] It is necessary to set out the facts in some detail so as to assess these contentions. Most of the facts set out below are uncontested. I shall in due course indicate those which attract a challenge.

[4] There are three other companies which feature in this application. They are Eurocoal (Pty) Ltd (in liquidation) (Eurocoal), Rietspruit Crushers (Pty) Ltd (Rietspruit) and Colt Mining (Pty) Ltd (Colt). The first applicant is the sole director of Avstar and Eurocoal. All of the applicants are directors of Rietspruit. The second applicant is the sole director of Colt

and the father of the first applicant. In addition to being a director of Rietspruit, the third applicant is the financial manager of Rietspruit and Colt. Billiton has proved claims in insolvency against both Eurocoal and Avstar. The claim against Eurocoal resulted from arbitration proceedings which took place between 26 September and 5 October 2007. The fourth respondent has at all material times represented Billiton, including in the arbitration proceedings. The first applicant was present every day of the arbitration and was fully aware of the fourth respondent's position. The arbitrator made an award in favour of Billiton.

[5] In an attempt to settle Billiton's claim, a meeting was held on 7 March 2008 (the settlement meeting). The fourth respondent represented Billiton in those negotiations. The persons who represented Eurocoal included the first applicant and one Rory Loader (Loader). Loader was, at the time, a director of Avstar. He was also the 'legal manager' of Avstar and of many of its associated companies. In 1997, the fourth respondent came to know Loader. At the time he was a candidate attorney and Loader was practising at the Johannesburg Bar. The fourth respondent briefed Loader both then and later. At the settlement meeting a proposal was put to Billiton by Loader and the first applicant on behalf of Eurocoal. In response, at the settlement meeting, the fourth respondent indicated that Eurocoal must deliver coal to Billiton under their agreement. If it did not, Billiton would consider taking a number of steps. It would pursue a substantial damages claim against Eurocoal. If that claim was not satisfied, it would bring an application for the liquidation of Eurocoal. It would then move for an enquiry to be convened under s 417 of the Act and thereafter pursue a claim under s 424 of the Act against the first applicant. Loader responded that this route would not be likely to yield any substantial commercial benefit to Billiton. The first applicant says he does not recall

any such conversation. He does not deny that it took place or that he was present. He merely says that he was confident that the matter between Eurocoal and Billiton would settle and things would not progress that far. He also says that he does not consider that any action taken against him under s 424 of the Act would be well founded because he has done nothing wrong.

[6] Three days after the settlement meeting, the fourth respondent briefed the second respondent to represent Billiton in the dispute with Eurocoal. On 13 March 2008 the second and fourth respondents discussed with the in-house counsel of Billiton the strategy to be employed in this dispute. They agreed to attempt to wind up Eurocoal to force it to honour the award made against it in the arbitration. On 13 June 2008 the third respondent was briefed on behalf of Billiton. An application was prepared between 16 and 20 June 2008 for the arbitrator's award against Eurocoal to be made an order of court. An answering affidavit was delivered prior to 25 August 2008 which took a legal point and, as a result, all that was sought against Eurocoal was the costs of the arbitration. On 25 September 2008 an order was granted by consent requiring Eurocoal to pay those costs.

[7] During that period, one or more of the respondents represented Avstar, Rietspruit and Colt in specific disputes. This came about as follows. Shortly after the settlement meeting, Loader telephoned the fourth respondent and asked whether he would be prepared to act for Avstar. The fourth respondent agreed to do so. He had no knowledge at the time as to the identity of Avstar's directors. The dispute was between Avstar and 1-Time over aircraft leased by Avstar to 1-Time. Two engines had failed and had been replaced by engines leased at R500 000 per month per engine. 1-

Time looked to Avstar for these costs and for those to repair the failed engines. As a result, 1-Time had withheld the monthly lease payments to Avstar. After certain consultations were held over this matter, Loader indicated that the assistance of the fourth respondent would no longer be needed. Whilst instructed in the matter, the fourth respondent informally mentioned to the second respondent the nature of the dispute. He thought he might need to brief him. This need did not arise. Loader says that the decision to instruct the fourth respondent was taken by him and the first applicant because this access to the fourth respondent may facilitate a settlement of the Eurocoal dispute. The first applicant denies any such intention saying that, because he had been employed at Billiton, he knew the key people to talk to and was confident he could settle the matter without assistance.

[8] Shortly thereafter Loader contacted the fourth respondent and indicated that Colt and Rietspruit had received letters sent in terms of s 345(1)(a)(i) of the Act. These letters claimed that they each owed Safair (Pty) Ltd (Safair) more than R37 million. They clearly foreshadowed liquidation applications on the basis that they would be deemed to be unable to pay their debts. Loader told the fourth respondent that these matters were totally unrelated to the dispute between Billiton and Eurocoal and that there could be no conflict of interest. He requested him to assist. The fourth respondent agreed to do so and briefed the second respondent for a consultation to be held on 24 April 2008. He told him what Loader had said about the matters in no way impacting the Billiton dispute with Eurocoal. The facts and underlying disputes between Safair and each of the two companies were, to all intents and purposes, identical.

[9] The consultation on 24 April involved the second and fourth respondents. The fourth respondent instructed the second respondent that the companies disputed the debts claimed by Safair. They agreed to request documentation and evidence relevant to the dispute, including the most recent annual financial statements of Rietspruit and Colt. The disputed debts formed the main focus of a possible application to interdict the bringing of liquidation applications by Safair. As a precaution, the second respondent began to prepare interdict applications on 5 May 2008. On 6 May 2008 it became known that bonds of security had been taken out for liquidation applications against Rietspruit and Colt. The second and fourth respondents met that day. A letter was sent disputing the indebtedness, indicating that both Colt and Rietspruit were solvent, trading companies and requesting an undertaking that no liquidation applications would be brought. In case this was not forthcoming, the second respondent requested that the fourth respondent arrange a consultation with Loader on 7 May 2008. The second respondent met Loader for the first time on 7 May 2008 at the consultation. Loader's only involvement with, and knowledge of, Rietspruit and Colt related to this litigation.

[10] Between 5 and 8 May 2008, therefore, the second respondent settled a letter and drafted papers for applications to be launched by Rietspruit and Colt. He charged for three days of consultations. He consulted mainly with the fourth respondent but also with Loader and even less with the first applicant. Very few facts were elicited from Loader and the first applicant. Those elicited related to the terms of the agreements in question and the facts underlying the dispute with Safair. The second respondent was informed that Rietspruit was controlled by the second applicant. He was told that the second applicant had authorised the proceedings in question. He was requested to keep the second applicant out

of the matter at all costs. In addition, the second respondent requested and was given limited information extracted from the 2007 audited annual financial statements and the 2008 drafts. The statements were not shown to the second respondent prior to the applications being launched. The affidavits set out the profits made for the relevant financial years and the assets and liabilities, including cash, of each company. This was to support an averment that the companies were thriving, solvent, companies able to pay their debts as and when they fell due. The respondents and Loader say that there was no discussion with Loader or the first applicant about the nature of the business of either company or how it was conducted. 90% of the time spent by the second respondent dealt with the dispute concerning the indebtedness to Safair.

[11] The application was launched on 9 May 2008 on an urgent basis and interim relief was obtained. Once the opposing papers were received, the second respondent requested assistance and the third respondent was briefed as his junior. For the purpose of the replying affidavit, the respondents consulted with Loader but not with the first applicant. Prior to argument, a two-hour consultation took place involving the respondents, Loader and the first applicant. This was to update them and to advise on the prospects of success. They also discussed the possibility of referring the overall disputes to arbitration rather than to evidence if it was agreed between the parties that the factual disputes could not be resolved on the papers. The Rietspruit dispute was referred to arbitration. It was agreed that the Colt dispute would follow the result. The fourth respondent briefed the second and third respondents for a pre-arbitration meeting to be held on 28 August 2008. A statement of claim, prepared by the second and third respondents, was delivered on 29 September 2008. The only further consultation relating to Rietspruit and Colt took place amongst the

respondents. After the statement of claim was finalised, the second and third respondents returned their briefs and did not act any further for Rietspruit or Colt.

[12] Once the Rietspruit matter was referred to arbitration, it became clear that the first applicant would need to give evidence. If Billiton was successful in liquidating Eurocoal, the respondents would end up examining the first applicant in an enquiry under s 417 of the Act. The respondents decided, as a result, to withdraw from further representing Rietspruit. This was communicated to Loader by letter dated 24 November 2008. The respondents currently represent Billiton and the liquidators of Eurocoal. On behalf of the latter they have instituted actions against some of the applicants or their family members and companies or trusts associated with one or more of the applicants. They are briefed, effectively by Billiton, in enquiries convened under s 417 into the affairs of both Eurocoal and Avstar. The enquiry relating to Eurocoal is subject to a similar application in the South Gauteng High Court.

[13] It is necessary, in addition to having set out the factual common ground between the parties, to deal with some of the assertions made by the first applicant which are disputed by the respondents. The first applicant says that the evidence of the second and third applicants 'will inevitably overlap with privileged information [he] previously provided to the Second, Third and Fourth Respondents about the business, trade, dealings, property and affairs of Avstar'. He says that this is so because the business and affairs of Avstar were 'intermingled' with those of Rietspruit and Eurocoal. When challenged on having consulted at all about Avstar, he concedes that he did not do so at all. He then asserts, contrary to the evidence of Loader, and without claiming to have been present, that

Loader must have imparted confidential information. He initially claims that the second, third and fourth respondents were briefed in the Avstar matter. When this is denied, he accepts that only the fourth respondent was instructed.

[14] The first applicant also claims to have consulted with the second, third and fourth respondents to draft the application papers in the Rietspruit and Colt matters. Once again, when challenged, he accepts that the third respondent was only briefed after the replying affidavit had been delivered and was not involved in drafting the papers at all. He initially states positively that he told the respondents of inter-company loans at the consultations for the Rietspruit and Colt applications. In response to a denial by the respondents, he retracts this evidence and says that 'to the best of [his] recollection' he did so. He initially claims that the 2007 audited annual financial statements for Rietspruit and Colt were shown to the respondents at the consultations prior to the application being launched. Again, when challenged, he accepts that he phoned the third applicant for the relevant information to be included in the affidavits. The statements were not shown to the respondents at that stage but were provided to the fourth respondent later, when they were annexed to the papers.

[15] He initially claims that the respondents were engaged in work which 'entailed litigation, dealing with disputes, in respect of which Avstar and [he] personally sought legal advice from the Second, Third and Fourth Respondents. [He] did so in confidence'. In response to a challenge he states that, although he did not consult any of the respondents concerning 'any of [his] exclusively personal interests, they were fully aware of the fact that [his] interests in fact coincided with those of the entities whom [he] represented when [he] consulted with them'. He does not say in what

respect this is so or give any concrete example of the kind of personal matter which overlaps. When it is denied that he had attended many consultations, he says he cannot remember how many consultations he attended with the respondents. He says that he seems to recall that the third respondent was present at one of them.

[16] It is clear from this that the applicants make out no case on the papers that confidential disclosures concerning Avstar were made to any of the respondents. The initial assertion of the first applicant to this effect is withdrawn. Loader does not say so. The second and fourth respondents say that nothing of the sort happened.

[17] There is no challenge to Loader's evidence that he had no knowledge of Rietspruit and Colt beyond the confines of the disputes in question. He was therefore not in a position to divulge confidential information concerning any other aspects of their operations. The first applicant makes only general claims to having given the respondents confidential information. He is challenged to disclose the information but declines to divulge it, saying that this would defeat the object of the application since it would then no longer be confidential. He does not even state the nature of it, without disclosing the content. The only concrete claim is that Loader provided the fourth respondent with unspecified documentation which dealt with the contractual relationships between Avstar, Rietspruit and Colt. Again, he does not say that he was present on this occasion. In argument the only submission which is offered is that this refers to the financial statements put up in the Rietspruit and Colt applications. The first applicant refers repeatedly to discussions about the 'intermingling' of the affairs of companies run by the Wishart family. Again, when pressed in argument, this boils down to the respondents

having seen the 2007 audited financial statements for Rietspruit and Colt and the draft ones for 2008 which showed certain inter-company loans. The respondents say that they did not see the statements at the consultation and even when they had been annexed to the affidavits, did not look at inter-company loans since these were not relevant. In any event, because they were put up in those applications, the documents relied upon have entered the public domain. No confidentiality attaches to them. Any person tasked with examining any of the applicants at the s 417 enquiry would have access to them. The applicants have also, therefore, not made out a case that confidential information relating to Rietspruit and Colt was divulged to the respondents.

[18] The only confidential information personal to the first applicant that he says was disclosed is that his interests coincide with those of the companies in question. Quite what is meant by this is also not said. During argument it was conceded that the only information personal to the second applicant disclosed in the consultations was that he was the sole director of Rietspruit. This information was required in order to establish under whose authority the application was being launched. In addition, the first applicant requested that the second applicant be kept out of the Rietspruit application at all costs. No information personal to the third applicant is mentioned in the papers.

[19] Before dealing with the substance of the application, it is necessary to deal with an application which was brought for my recusal. The application was refused. These are the reasons. Before argument commenced I indicated that, during the course of my practise as an advocate, I had had dealings with the second respondent. The applicants brought an application for my recusal. In response to a suggestion, I placed

on record the precise nature of my dealings with the second respondent to the best of my recollection as follows. Between 2004 and mid-2006 I was briefed to appear in certain meetings of creditors following the liquidation of certain companies and the sequestration of the controlling individual. The second respondent was also briefed to appear in such meetings, representing a different creditor who broadly made common cause with the party I represented. My recollection is that there were no more than three such meetings at which both of us appeared. Prior to one such appearance, the second respondent came to the establishment where my instructing attorneys, counsel representing a different creditor and I were staying overnight and a discussion took place regarding the attitude of our clients and the strategy which we intended to adopt at the meeting the following day. We were at no stage co-counsel or briefed by the same set of attorneys in the matter.

[20] Thereafter the applicants persisted in the application. They submitted that there was a lingering concern arising from the professional interaction between the second respondent and me on these occasions. Since aspersions are cast in the application as to the propriety or otherwise of the manner in which the second respondent has conducted himself, it was submitted that, despite the applicants having full confidence in my integrity, I might still be influenced in deciding the application. It was further submitted that, because I had deemed it necessary to make the disclosure, I must have had well founded misgivings. The respondents opposed the application on the basis that this had not been a personal but a professional relationship and no reasonable person could have a reasonable apprehension that I would be influenced by my contact with the second respondent in the circumstances.

[21] Article 13 note 13(iv) of the relevant portion of the Code of Judicial Conduct is to the following effect:

'If a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts are to be made known timeously to the parties, either by informing counsel in chambers or in open court, and the parties are to be given adequate time to consider the matter.'[1]

This provision in the Code is what prompted me to make the disclosure, not any concern that there were *prima facie* grounds for my recusal.

[22] The test for the recusal of a judicial officer is as follows:

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and the ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'[2]

[23] As was submitted by the respondents, my dealings with the second respondent were at a purely professional level. No personal beliefs or predispositions developed which are in any way relevant to the present application. I am required to deal with issues argued on the papers. I am therefore not called upon to make any credibility findings or deal with the

[1] The Code was promulgated in Government Gazette No. 35802 of 18 October 2012. At the time the matter was argued, the Code was in draft form and this provision, in identical terms, formed note 12D.
[2] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (7) BCLR 725 (CC) para 48.

cross-examination of witnesses, including that of the second respondent. I am confident that I can fulfil my oath to administer justice to all persons in this application without fear, favour or prejudice in accordance with the Constitution and the law.[3] I was, and am, of the view that, on the facts, a reasonable, objective and informed person would not reasonably apprehend that I would not bring an impartial mind to bear on the adjudication of the application.

[24] As I have indicated, a final interdict is sought. The test remains clear and uncontroversial. The requisites are 'a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'[4]

[25] It will be useful to sketch the legal contours which bear on the relief sought at this stage. This will provide a backdrop against which to evaluate the specific issues which were argued before me. Different jurisdictions have divergent views as to the basis upon which a court will intervene to prevent legal practitioners from representing certain clients in certain contexts. All of them locate the origin in an existing or previous attorney-client relationship. For the purposes of this application, it is not necessary to deal with the former category since none of the respondents is in an existing attorney-client relationship with any of the applicants or the companies in which they are involved.

[26] The position in English law is fairly clear. In *Prince Jefri Bolkiah v KPMG (a firm)*,[5] Lord Millet accepted the law set out in the decision of the

[3] Section 174(8) read with paragraph 6(1) of Schedule 2 of the Constitution of the Republic of South Africa, 1996.
[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[5] [1999] 2 AC 222 (HL).

Court of Appeal in *Rakusen v Ellis, Munday & Clarke*.[6] He held that *Rakusen* was authority for two propositions, namely:

'(i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.'[7]

In his speech he first dealt with the position where solicitors represented two clients on opposing sides of a conflict at the same time. He then went on to say the following:

'Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.'[8]

Only once these have been proved does an evidential burden shift to the solicitor to show that there is no risk to the former client if the solicitor acts in the matter.[9]

[27] Posner J, in the majority judgment of the United States Court of Appeals, Seventh Circuit, in *Analytica Incorporated v NPD Research Inc*,[10] explained the position in their law as follows:

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[6] [1912] 1 Ch 831, [1911-13] All ER 813.
[7] *Bolkiah* at 234B-C.
[8] *Bolkiah* at 235C-E.
[9] *Bolkiah* at 237F-G.

'For rather obvious reasons a lawyer is prohibited from using confidential information that he has obtained from a client against that client on behalf of another one. But this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, so a further prohibition has evolved: a lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client….'[11]

The American courts, therefore, do not enquire into whether confidences were actually revealed in any one situation. They simply apply the 'substantial relationship' test referred to in that matter.

[28] In a leading Canadian case, the approach in the United States was rejected. The alternative approach of Canadian law was articulated by Sopinka J in delivering the majority judgment as follows:

In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.'[12]

The minority judgement in that matter, delivered by Cory J, preferred the approach in *Analytica*.[13]

[29] In addition to the confidential information basis, Australian law has added another basis for an injunction. This was applied by Young J in *Geelong School Supplies Pty Ltd v Dean*.[14] Here the court restrained a solicitor from acting in a matter on the basis of the court's 'inherent jurisdiction to control the conduct of its own officers so as to ensure the

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[10] 708 F.2d 1263.
[11] Para 9.
[12] *MacDonald Estate v Martin* [1990] 3 SCR 1235 at p28.
[13] *MacDonald* at p36.
[14] [2006] FCA 1404.

due administration of justice and the integrity of the judicial process'[15] (the inherent jurisdiction approach). He held that the leading English case of *Bolkiah,*[16] although it did not address it, did not exclude this approach.[17] He accepted as correct the following test of Brereton J in *Kallinicos & another v Hunt & others*:[18]

'The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice'.[19]

[30] Brereton J distilled the following principles governing the exercise of this jurisdiction from previous cases:

'· [T]he court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice…

· The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice…

· The jurisdiction is to be regarded as exceptional and is to be exercised with caution…

· Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause…

· The timing of the application may be relevant, in that the cost, inconvenience or

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[15] Per Young J para 1.
[16] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 (HL).
[17] Para 32.
[18] [2005] NSWSC 1181. See also *Cleveland Investment Global Ltd v Peter Evans* [2010] NSWSC 567, para 3.
[19] *Kallinicos* para 76. This test has been accepted throughout Australia. See, eg., *Cleveland* para 5 which, like *Kallinicos* and *Geelong*, used the inherent jurisdiction approach as the sole basis for granting an injunction. In *Yu Xin Li v Tao Wu* [2012] FCA 164, the court accepted this test but found that the facts did not support an injunction on this or the confidential information basis.

impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief….'[20]

The inherent jurisdiction of the court is discretionary.[21]

[31] In *Spincode Pty Ltd v Look Software Pty Ltd & Ors*,[22] Brooking JA held that the inherent jurisdiction approach arose from a line of cases dealing with the power of the court to keep control over all its officers. In this regard, he said the following:

'Since the earliest days of attempts to prevent solicitors from acting against their former clients it has been recognised that a basis - I use the indefinite article advisedly - of the jurisdiction is that which the court has over solicitors as it officers. Sir Samuel Romilly, for Lord Clinton, said that there were two heads of jurisdiction: irreparable injury which supports an injunction and in addition the general jurisdiction over an officer of the Court.'[23]

He concluded as follows:

'There is a good deal of authority for the view that a solicitor, as an officer of the court, may be prevented from acting against a former client even though a likelihood of danger of misuse of confidential information is not shown.'[24]

[32] Some Australian courts have introduced a third basis for intervention by invoking the test of 'a duty of loyalty' to former clients. This was explained by Batt JA, in *McVeigh & Anor v Linen House Pty Ltd & Rugs Galore Australia Pty Ltd & Ors*,[25] in the following way:

'The authorities established that a court will restrain a solicitor from acting for a litigant not only in order to prevent disclosure of confidences of a client or former client, but also to ensure that the solicitor's duty of loyalty to the former client is respected,

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[20] *Kallinicos* para 76. The references in this paragraph have been omitted.
[21] Para 51. In this regard, the fifth bullet point was considered in *Geelong* by Young J in the exercise of his discretion.
[22] [2001] VSCA 248.
[23] Para 32.
[24] Para 38.
[25] [1999] VSCA 138.

notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client.'[26]

Brooking JA, in *Spincode*, accepted the 'duty of loyalty' approach and held the case proved on all three bases as follows:

'[F]irst, the danger of misuse of confidential information; secondly, breach of the fiduciary's duty of loyalty; thirdly, the desirability of restraining the solicitors as officers of the Court.'[27]

Because he found that the injunction should be granted on the confidential information point, his treatment of the latter two bases must be regarded as *obiter*.[28] Neither of the other two judges sitting with Brooking JA supported the survival of any fiduciary duty beyond the contract which underlies the 'duty of loyalty' approach. The 'loyalty' basis has been upheld in Victoria, in some cases in Australian Capital Territory and Western Australia, but has not been followed in New South Wales or Tasmania, to mention only a few States.[29] It appears now to have been rejected in Western Australia.[30]

[33] The facts in *Cleveland*[31] bear mention. The solicitors had acted for a company, Ficaro Pty Ltd (Ficaro) to resist Cleveland's claim. Evans had served a cross-claim against Ficaro before Ficaro instructed the solicitors. The solicitors had taken instructions from Evans who was, at the time, the sole director of Ficaro. The nature of these instructions could obviously not be disclosed to Cleveland although there was some evidence to suggest that the solicitors had written a letter to Cleveland dealing with Evans's personal position arising from a notice served on Evans to produce. When

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[26] Para 23.
[27] Para 60.
[28] This was held to be the case by Bergin J in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550.
[29] A brief synopsis is given in *Ismail-Zai v The State of Western Australia* [2007] WASCA 150 paras 20-23.
[30] *Ismail-Zai* para 23.
[31] Footnote 18.

Evans was removed as a director of Ficaro, the solicitor's instructions to act for Ficaro were terminated. A notice of discontinuance was served on Ficaro by Cleveland, after which Ficaro remained in the litigation solely as the cross-defendant in the claim brought against it by Evans. Cleveland could accordingly not rely on the confidential information basis. A costs consultant employed by Ficaro asked what had taken place in a consultation for which the solicitors had charged Ficaro. The solicitors refused to indicate what took place on the basis that there were still proceedings between Ficaro and Evans. The solicitors also refused to disclose to Ficaro the contents of a consultation held with Evans on behalf of Ficaro when the solicitors acted only for Ficaro. It was held that the solicitors were in a position to use knowledge concerning Ficaro to the advantage of Evans in the cross-claim and in defending the claim of Cleveland against Evans. Cleveland applied to restrain the solicitors from acting. The court held that there was a parity of interest between Cleveland and Ficaro in the circumstances. The court issued an injunction preventing the solicitors from acting for Evans on the basis of the inherent jurisdiction approach.

[34] I have sketched the position in these jurisdictions fairly fully because, as will become clearer later, the applicants invite me to develop our law by applying the inherent jurisdiction approach along the lines done in Australia in *Geelong, Kallinicos, Cleveland* and other similar cases. They do not argue for the continuing duty of loyalty approach. They also do not contend for the approach employed in the United States of America or Canada. The applicants accept that, until now, the approach in our law has been similar, at least in its outworking, to that of *Bolkiah*. It is therefore necessary to examine the legal underpinnings of our law.

[35] The starting point for the legal position on fiduciary relationships in general has been carefully and cogently dealt with by Stegmann J in *Meter Systems Holdings Ltd v Venter & another*.[32] This case dealt with unlawful competition. It is to the following effect:

'[O]ur law recognises fiduciary relationships which, as a matter of law, give rise to an obligation to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract.'[33]

This obligation, or legal duty, arises within one of two contexts, contract or delict. Within the law of contract, such a legal duty is implied by law as a term of the contract. The legal duty so implied can, however, be limited by agreement.[34] When it is not founded in contract, 'it is necessary to look to the law of delict, and in particular to the principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence.'[35]

[36] Stegmann J held further that:

'These aspects of the law, including both the content of the contractual term relating to confidential information implied by law in a contract giving rise to a fiduciary relationship, and also the content of the legal duty relating to confidential information imposed on Aquilian principles, are currently in a process of development. They appear to be developing in parallel in the sense that the emerging definition of the legal duty relating to confidential information for the purpose of the law of delict arising out of a fiduciary relationship *not* based on contract is not materially different from the emerging definition of the contractual term implied by law arising out of a fiduciary relationship that *is* based on contract. Indeed, it would be surprising if any significant differences were to develop in these two closely related topics'[36]

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[32] 1993 (1) SA 409 (W).
[33] At 426E-F.
[34] At 426I.
[35] At 426I-J.
[36] At 427A-C – emphases in the original.

The development in our law of delict here, he said, has taken place within what Corbett J called 'the broad and ample basis of the *lex Aquilia*'[37] and is along similar lines to the development in English law by way of its principles of equity.[38]

[37] An attorney-client contract, which of course includes that with an advocate if one is briefed, gives rise to a fiduciary duty towards the client. This fiduciary duty precludes a legal professional from acting for two clients with conflicting interests at the same time. What of the position, however, with a former client? The respondents point out that the approach in *Bolkiah* has been adopted by the Competition Appeal Court in two cases.[39] They submit that it should be applied here. In *American Natural Soda Ash Corporation (Ansac)* Davis JP considered the approach in *Bolkiah* and concluded that the appellants had not established sufficient facts to make it applicable.[40] In *Monsanto*, Davis JP accepted a submission that the test for confidentiality outlined in *Ansac* required the appellant to satisfy three requirements, viz.:

'1. Was first respondent given confidential information?

2. Is the information still confidential?

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[37] In *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 218E-F.

[38] At 427F-G. Stegmann endorses the cautionary note sounded by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T) at 179B-C, 185F-H and 190D-191A where he says that it is important to note that the English authorities on confidential information do not deal with a remedy which is based on Aquilian principles (if the source of the legal duty is in delict) or which is necessarily based on an implied contractual term (if its source is in contract). Stegmann says, in *Meter Systems* at 427G-I, however, that 'no inherent conflict of principle or legal policy has yet emerged in this field between the broad and ample basis of the *lex Aquilia* and English notions of equity. Therefore, when English lawyers have analysed and solved a problem in this field on the lines of their rules of equity, it can be of considerable assistance, in analysing and solving a similar problem on Aquilian principles, to have regard to their work. There can be no question of an uncritical or slavish adoption of English precedents in South Africa. Nevertheless, the historical record shows how often it has turned out that a solution similar to that found by an English Court is the appropriate solution according to the principles of our own law in this field.'

[39] *American Natural Soda Ash Corp & others v Botswana Ash & others* [2007] 1 CPLR 1(CAC) at 11; *Monsanto South Africa (Pty) Ltd & another v Bowman Gillfillan & others* [2011] ZACAC 5 (18 August 2011).

[40] At pg 13.

3. Is the information relevant to the merger?'[41]

In neither case is it stated on what basis *Bolkiah* applies in our law. The Competition Appeal Court neither discusses this nor pertinently holds that the principles underlying the use of confidential information in English law are consonant with those in our law. It is therefore necessary to examine the position more closely.

[38] As was mentioned by Stegmann J, our law recognises two contexts within which legal duties concerning confidential information arise. The question is how these relate to the issue at hand. Once the attorney-client relationship has come to an end, the only basis on which any legal duty can remain is if an implied term of the contract provides for this or Aquilian principles impose one.[42] It was held, in *Meter Systems*, that the legal duty in question was 'to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract'.[43] If the legal duty arose from the attorney-client contract, it would be introduced by an implied term. In the case of delict, it would be imported by way of public policy.[44]

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[41] At p10 of the judgment. I have carefully perused the judgment in *Ansac* but have been unable to find any reference to the three requirements which were said to have been accepted in that case as the test.

[42] In my respectful opinion, Stegmann J correctly characterised this as an implied term rather than a tacit term. In other words, in the distinction drawn between these by Corbett JA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D-532G, the term is one 'imposed by the law from without' rather than a tacit term which is an 'unexpressed provision of the contract which derives from the common intention of the parties'. There may, of course, be an express or tacit limitation of the term.

[43] At 426E–F.

[44] There is, as far as I am aware, no precedent recognising the existence of a legal duty in delict arising from attorney-client relationships. Hefer JA, in *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A) at 318D-J, held that the approach to the recognition of a legal duty in a novel area is as follows: 'As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court

[39] The approach to the legal duty in our law thus accords with the approach in *Bolkiah.* In essence the dictum of Stegmann J and the requirements set out in *Bolkiah* mean that a former client would need to prove that:

1. Confidential information was imparted or received in confidence as a result of the attorney-client relationship;
2. It is relevant to the matter at hand; and
3. The interests of the present client are adverse to those of the former client.

The duty is more limited than that recognised in American or Australian law. It also does not approach the question of the onus in the manner of Canadian law. There is no ongoing fiduciary relationship or duty of loyalty owed by the legal practitioner to the former client at however residual a level. Any legal duty to the former client is limited to respecting confidential information acquired during the course of the attorney-client relationship.

[40] With the legal position sketched, it is appropriate to turn to the issues argued before me. The first issue for decision is characterised by the applicants as the *locus standi* point (the issue as to standing). The second is whether, if this is decided in favour of the applicants, the matter should be referred for the hearing of oral evidence to resolve factual disputes. The respondents do not refer to the issue as to standing as the *locus standi* point. They submit, in their heads of argument that the 'applicants…do not have standing to enforce such duties as [the respondents] might owe to Avstar, Rietspruit and Colt'. In argument, the respondents raise three related aspects on this issue. First, that the right to protect any confidential

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conceives to be society's notions of what justice demands. (*Corbett (op cit* at 68); J C van der Walt 'Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak' 1993 (56) *THRHR* at 563-4.)'

information disclosed during the time that the respondents acted for the three companies inheres in the companies themselves and not in the applicants. Secondly, that no attorney-client contract ever came into effect between the applicants and the respondents and thus no fiduciary duty ever arose to them. Thirdly, that the applicants do not in any event make out a case that any confidential information personal to them was divulged to the respondents whilst they represented the companies. The issue as to standing was raised in the respondents' heads of argument and prompted a last-minute application to join Rietspruit and Colt, as applicants, and the liquidators of Avstar, as respondents, in the application. In the face of opposition from the respondents, however, the applicants asked for leave to withdraw that application, which leave was granted without opposition.

[41] *Locus standi* is established if a litigant has a direct interest in the subject matter of the litigation.[45] In an interdict application, this translates into a direct interest in the relief sought. The applicants seek to prevent the respondents from participating in their examination in the s 417 enquiry. The applicants clearly have a direct interest in this relief. They do not seek to interdict the continuation of the enquiry or the involvement of the respondents in examining other persons. They do not suggest that any rights or interests of Avstar, Rietspruit, Colt or the applicants personally will be adversely affected by the enquiry itself. The first issue is, therefore, not properly framed by the applicants as one bearing on the *locus standi* of the applicants in this application. The applicants clearly have *locus standi*.

[42] More properly, the issue as to standing questions whether the applicants have established the first requirement for the grant of a final interdict, viz. a clear right. The right on which the applicants rely is not

[45] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B-I.

clearly formulated by them. I shall revert to this later. For present purposes it suffices to say that they seek to rely upon rights which they say arose from and during the attorney-client relationships of the respondents with Avstar, Rietspruit and Colt. It was agreed that this point should be dealt with initially. It was also agreed that it can be determined on the papers.

[43] The factual matrix is largely common ground. It is accepted that no attorney-client contract was concluded between any of the applicants and any of the respondents. The contracts were with the companies. The contracts also related to disputes in which the companies, not the applicants personally, were involved. None of these disputes in any way bore on that between Billiton and Eurocoal. All communications by Loader and the first applicant were made to the respondents on behalf of the companies. There was no communication between the second and third applicants and any of the respondents at any time. The attorney-client contracts in question are no longer in existence. The companies are not asserting any right to confidentiality.

[44] The first aspect to the issue as to standing is whether the applicants have the right to protect information confidential to the companies. The short answer is that the applicants do not seek any such relief. They seek to protect themselves. It is true to say that the applicants seem to confuse their own interests and rights with those of the companies. The application is largely concerned with confidential information of the companies or privileged communication supposedly made by the officers of the companies on their behalf. Very little is said of information personal to the applicants. The applicants are clearly not entitled to rely on the protection of information confidential to the companies in question or privilege which vests in the companies. As I have said, however, they do not, in any event,

make out a case that any such information was disclosed to the respondents. Privileged communication is mentioned often but nowhere particularised.

[45] Having disposed of the first aspect, the second point on the issue as to standing must be considered. The respondents say that no attorney-client contract ever came into effect between the applicants and the respondents. The applicants accept this. They submit, however, that the first applicant was an 'informal client' of the respondents. They confine their submission in this regard to the first applicant. They do not say what they mean by that in terms hitherto understood in South African law. They do not say whether they rely on a fiduciary duty and, if so, in what context this is said to have arisen. It does not seem to me that they can claim that a contract came into effect between the applicants and the respondents. At best for the applicants it must mean that, in the peculiar circumstances of the matter, a legal duty towards them arose under Aquilian principles.

[46] They rely on an article by Goubran[46] for authority for the submission that the first applicant should be regarded as an informal client. He says that, where a company is the client, '[i]n rare instances…the client's officers will be considered as the client'.[47] Goubran refers to two cases in support of this proposition. The first is *Macquarie Bank Ltd v Myer & others; Toycorp Ltd (Receivers & Managers Appointed) v Myer & others*.[48] Here it was said that:

'[I]f a company retains solicitors by means of instructions given by the then current board, then that current board might, in certain circumstances, be able to claim that although not the client, strictly speaking, it was in "as good as" a position as the client

[46] S Goubran: 'Conflicts of Duty: The Perennial Lawyers' Tale – A Comparative Study of the Law in England and Australia' (2006) 30(1) Melbourne University Law Review 88.
[47] Goubran at p97.
[48] [1994] 1 VR 350.

for relevant purposes. Counsel for the defendants was, I think, correct, however, when he submitted that every case must depend upon its own particular circumstances and that it was not desirable to lay down in advance strict criteria concerning the circumstances when information from the non client might attract the status of information from a client.'[49]

In the first place, this was not held to be the case on the facts in *Macquarie* and is thus *obiter*. Secondly, it is said that it 'might' in 'certain circumstances' be the position. This is doubly speculative language which, at best, is clearly reliant on the facts of each case. Thirdly, the situation clearly arises from the English rules of equity which may well differ from principles concerning Aquilian legal duties.

[47] The second case is *Re a Firm of Solicitors*.[50] In this matter, all three judges accepted, without it appearing to be contested in that matter, that a company should be regarded as 'informal or quasi-clients'[51] of a firm of solicitors or 'as good as their clients and…should be treated accordingly'.[52] The client of a firm of solicitors requested this company to give information to the firm. This was for an investigation which took place over a period of three years at the instance of the client. The client then sued a particular individual who instructed a different department of the firm of solicitors. The defence raised was closely bound up with the matters being investigated and on which the solicitors had been given confidential information by the company in question which would be of value to the defendant. In this regard, Staughton LJ said the following:

'[I]n the unusual circumstances of this case, the duty of the solicitors in relation to that confidential information is the same as if it had been provided by a client of the firm,

[49] Judgment of Jd Phillips J at p10 of the judgment.
[50] [1992] 1 QB 959 (CA).
[51] Per Parker LJ at 970E-F.
[52] Per Sir David Croom-Johnson at 976E-F.

although those who provided it were not in fact clients but rather in dispute with the actual clients at the time…'.[53]

The investigation had attracted great public interest and much discussion in legal circles and in the insurance profession. The real issue in the matter was whether the firm could put in place a sufficient 'Chinese wall' or 'information barrier'[54] so as to prevent confidential information given to the members of the firm who had consulted with the 'informal clients' reaching members of the firm dealing with the litigation from which the solicitors were sought to be barred. The firm had over 100 partners. The court of appeal upheld the injunction with two judges holding that there was a possible, but real, risk that the information barrier was not sufficient and one holding that it was sufficient.

[48] Before considering the vexing question of the legal basis in our law whereby the applicants might be recognised as informal clients, I must find, on the facts, that the first applicant deserves to be treated as an informal client. As mentioned, he claims that his interests are co-extensive with those of the various companies in question but does not say what he means by this. He says that nothing was discussed which was personal or confidential to him. I have dealt above with the vague claims of intermingling of the companies which boil down in argument to disclosure of the financial statements in the Rietspruit and Colt applications. The contact of the first applicant with the respondents differs both in quality and duration from the company in *Re a Firm of Solicitors.* In my view, this comes nowhere near to the situation where the first applicant can be described as having been an 'informal client' or 'as good as' a client as was the case in that matter. Even assuming, without deciding, that the

[53] At 971G-H.
[54] The latter term was preferred by Staughton LJ at 975C-D.

approach suggested by Goubran and applied in *Re a Firm of Solicitors* should apply in our law, it can do so only if the facts warrant it. Since the facts in the present case do not warrant it, whether or not and, if so, the basis upon which this might become part of our law need not detain me further. The vexing question of the legal principles underlying any such recognition can therefore stand over.

[49] The third aspect on the issue as to standing is whether confidential information personal to the applicants was disclosed. I have dealt with this above. I have found that, on the papers, none has been highlighted by the first applicant. I have mentioned that the only information personal to the second applicant disclosed is that he controls Rietspruit and that the first applicant desired that he should be kept out of the application in which Rietspruit was involved at all costs. This is hardly confidential information requiring protection. That concerning his directorship is available from the Companies and Intellectual Property Commission established under s 185 of the Companies Act 71 of 2008. Since the concern expressed by the first applicant was limited to keeping him out of the Rietspruit application, this has no relevance to the s 417 enquiry. Neither of these can therefore conceivably prejudice the second applicant if the respondents examine him in the enquiry. No mention is made of any confidential information disclosed about the third applicant. No case is therefore made out on the papers that any confidential information personal to the applicants was disclosed to the respondents.

[50] This means that, applying the principles of our law as it stands at present, the issue as to standing must be decided in favour of the respondents. Properly construed, it seems to me that the right asserted by the applicants in support of their claim to a final interdict is a right not to

be examined by the respondents in the s 417 enquiry. Within the context of this application on the present state of our law, proof of that right would require proof that:

1. The applicants had a previous attorney-client contract with the respondents;
2. Confidential information of the applicants was imparted or received in confidence as a result of that contract;
3. That information remains confidential;
4. That information is relevant to the matter at hand; and
5. The interests of the present client of the respondents are adverse to those of the former clients.[55]

None of the first four of these requirements is met. In the present case, therefore, no legal duty on the part of the respondents arose towards the applicants or is present now. As a result, the applicants have failed to show on the confidential information approach that they have the clear right which is required to found an interdict. In the context of our law as it is at present, the application must fail on the basis of the issue as to standing raised by the respondents.

[51] The applicants, however, submit that this is too narrow an approach. They say that the inherent jurisdiction approach of Australian law should apply in this matter. I am invited to develop the common law accordingly. The applicants submit that, because our courts have long accepted that they are the ultimate *custos morum* of the legal profession, that development should take place along similar lines to the inherent jurisdiction approach in Australian law. The courts should intervene in situations beyond those which relate only to respecting confidential

[55] These requirements apply the principles derived from *Meter Systems*, *Bolkiah* and *Monsanto*.

information acquired during the course of an attorney-client or even an informal attorney-client relationship.

[52] Our law recognises two general bases for developing the common law. First, our courts have always possessed an inherent power to develop the common law.[56] Secondly this has been made explicit in s 173 of the Constitution which expressly empowers the courts to do so.[57] It has been held that the need to develop the common law might arise in two instances:

'The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.'[58]

This can involve the indirect application of fundamental rights provisions to private law.[59] In addition, the context of confidential information provides a specific basis for development, as has already been mentioned. In *Meter Systems* Stegmann J held that our law is in a state of development as to 'both the content of the contractual term relating to confidential information implied by law in a contract giving rise to a

[56] *Linvestment CC v Hammersley & another* 2008 (3) SA 283 (SCA) para 25.
[57] In *Bogaards v The State* [2012] ZACC 23 (CCT 120/11) 28 September 2012 para 47, the Constitutional Court recently summarised the approach to be taken as follows: 'Section 8(1) of the Constitution provides that the Bill of Rights applies to *all law* in South Africa, which includes the common law. It binds all branches of the State, including the judiciary. There is no law or conduct that is exempt from being tested against the Constitution. Any law that is inconsistent with a right in the Bill of Rights must be declared invalid. Hence, all conduct of the judiciary, including the manner in which the common law is interpreted by judges, must be harmonious with the Constitution. Section 173 of the Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts "to develop the common law, taking into account the interests of justice." Taken together, these provisions oblige the courts to develop the common law where it is inconsistent with the Constitution' (references omitted).
[58] *S v Thebus & another* 2003 (6) SA 505 (CC) para 28.
[59] *Du Plessis & others v De Klerk* & another 1996 (3) SA 850 (CC) para 60. That matter was decided under the 1993 Constitution. The interpretation section in the Constitution, 1996, is to similar effect. Section 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

fiduciary relationship, and also the content of the legal duty relating to confidential information imposed on Aquilian principles'.[60] It is therefore clear that there is no bar to this court developing the common law in appropriate circumstances. It must be decided whether these circumstances are present in this matter.

[53] I do not understand the applicants to say that the law as it presently stands transgresses any aspect of the Bill of Rights or the Constitution as a whole. They do not say that it falls short of the spirit, purport and objects of the Constitution. They accept that the procedure under s 417 has been held to pass constitutional muster.[61] The applicants also do not say whether, on the one hand, the development should take place by developing the content of the contractual term arising from a fiduciary relationship or the legal duty imposed on Aquilian principles or, on the other hand by way of the entirely novel basis of the court interdicting the respondents in its role as ultimate *custos morum* of the profession. I cannot conceive that it could be done along contractual lines for the simple reason that no contract has ever been concluded between the applicants and the respondents. Even if the applicants were to be held to be 'informal clients' this does not give rise to a contract but may set up a basis for a legal duty in delict. The latter seems to me to be the best route for any such development rather than the inherent jurisdiction approach. Before further debating the issue, however, it is as well to evaluate whether the facts in this matter warrant any development at all.

[54] Australian courts invoke the inherent jurisdiction approach in order to serve 'the interests of the protection of the integrity of the judicial

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[60] At 427A-B.
[61] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC).

process and the due administration of justice, including the appearance of justice' where other grounds of jurisdiction do not exist.[62] The applicants say that the participation of the respondents in examining the applicants is calculated to infringe the applicants' right to dignity,[63] privacy,[64] just administrative action[65] and freedom and security of their persons.[66] Since, as I have indicated, they accept that the procedure of s 417 enquiries passes constitutional muster, they rely on the participation of the respondents in this procedure. The only content given to this is that, as mentioned above, they claim that the respondents were conflicted when they simultaneously represented Avstar, Rietspruit and Colt on the one hand and Billiton on the other. This is because, by the time they consulted the first applicant, Billiton and the respondents had formulated a strategy to liquidate Eurocoal, hold an enquiry under s 417 and thereby attempt to establish the personal liability of the first applicant under s 424 of the Act. Apart from the issue of confidential information which I have dealt with above, the submission boils down to the contention that the respondents are armed with knowledge of how best to cross-examine the first applicant. This was dubbed the 'getting to know you' factor. It clearly does not apply to the other two applicants.

[55] The Australian test is whether a reasonably minded person would consider the judicial process and due administration of justice to be threatened if the respondents examine the applicants at the enquiry. For this to be the case, it seems to me that the applicants must show that, if the respondents do so, this will prejudice the applicants. The only basis of which I am aware on which the Australian courts have invoked this

[62] *Kallinicos* footnote 18 para 76, second bullet point in the quotation in para 30 above.
[63] Section 10 of the Constitution.
[64] Section 14 of the Constitution.
[65] Section 33 of the Constitution.
[66] Section 12 of the Constitution.

jurisdiction relates to the possibility of confidential information being misused where no fiduciary duty concerning that information exists. This was the case in *Cleveland* where the applicant did not know, and could not establish, whether confidential information had been disclosed. Another situation may be if it is known that confidential information was disclosed but the applicant is unable to establish what that information might be. The facts in the present matter come nowhere close on either basis.

[56] I was not referred to, nor have I come across, cases where the inherent jurisdiction approach has been applied because the legal representatives have, by consulting witnesses representing companies who are clients, been put in a position to assess their likely performance in the witness box. All that is said by the first applicant in this regard is that the second respondent gained his confidence and was placed in a position to make an assessment of his strengths and weaknesses as a witness. I do not consider even the test in Australian law to be satisfied. In other words, a reasonably minded person in possession of all the relevant facts would not consider the judicial process and due administration of justice to be threatened if the respondents examined the applicants at the s 417 enquiry. In my view the Australian courts would not apply the inherent jurisdiction approach on the facts of this matter. It should be borne in mind that Australian law accepts that this jurisdiction is exceptional and should be exercised with caution.[67]

[57] The need to develop the common law by applying the inherent jurisdiction approach in Australian law has, therefore, not been established in the present matter. In my opinion the interests of justice are adequately served in this matter if the current state of our law is applied. The facts do

[67] *Kallinicos*, footnote 18, para 76, third bullet point in the quotation in para 30 above.

not warrant consideration of any such development. I consider the common law, as applied to the facts, to be in harmony with the 'objective normative value system' found in the Constitution.[68] In other words, even if the inherent jurisdiction approach formed part of our law, the applicants do not make out a case for its application in the present matter. This case is therefore not an appropriate one in which to consider developing our law in the suggested manner. I do not, of course, exclude the possibility that this may be appropriate in different circumstances but it would be unwise to express a positive view on the point.

[58] It was agreed that, if the issue as to standing was not determined in favour of the applicants, the other issues do not arise. There was a dispute as to how to proceed if the issue as to standing was determined in favour of the applicants. The applicants submit that there are factual disputes on the other issues which require resolution by a reference to oral evidence. The respondents disagree.

[59] In case I am wrong on the first issue it is appropriate to deal briefly with whether the question of disclosure of confidential information requires a reference to oral evidence due to factual disputes. The established facts have been dealt with above and a summary will suffice. In the first place, the information disclosed was that of the companies. It related to the three discreet disputes in which the companies were involved at the time. Although the first applicant was clearly challenged by the respondents to mention the nature (as opposed to the actual content) of the confidential information personal to him he claims was disclosed, he does not do so. In fact, he disavows any such information beyond his shared interests with the companies he represented. I have dealt with the question

[68] *Thebus*, footnote 58, para 28.

of personal information concerning the second and third applicants. The information given to the respondents concerning Rietspruit and Colt was made public in the two applications. This leaves Avstar which is in liquidation and does not claim privilege. In any event, as already indicated, no case is made out for any such information having been disclosed. Only genuine, material factual disputes should be referred to oral evidence.[69] I am of the view that there are no genuine, material factual disputes which render it necessary or desirable to refer the matter for oral evidence.

[60] In *National Director of Public Prosecutions v Zuma*,[70] Harms DP said that where a 'version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or … clearly untenable that the court is justified in rejecting it merely on the papers.[71] Stated positively, it has been said that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed'.[72] I have dealt above with the disputes raised by the first applicant. He makes a number of bold assertions. When they are challenged, he retracts them and often attempts to make others. It is clear that many of the assertions are reckless, sweeping and unfounded in fact. One such example is his claim not only to have consulted in the Avstar matter, disclosing confidential information about Avstar, but to have done so with the respondents. It cannot be said that he addressed these facts seriously and unambiguously. Any remaining disputes raised by him can be characterised as clearly untenable and can be

[69] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162, 1165.
[70] 2009 (2) SA 277 (SCA).
[71] *Zuma* para 26.
[72] Per Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

rejected on the papers. In *Kalil v Decotex (Pty) Ltd & another*[73] the court remarked as follows:

'Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.'[74]

In *Bocimar NV v Kotor Overseas Shipping Ltd*,[75] the court held that these observations in *Kalil* apply to applications generally. It is my view that the probabilities favour the respondents on the affidavits and no reference to oral evidence is appropriate.

[61] The applicants have therefore failed to prove the clear right required for an interdict. They have also not proved any injury actually committed or reasonably apprehended. Two of the three requisites for the grant of an interdict are therefore not present.

[62] In the result, the application is dismissed with costs, including the costs consequent upon the employment of two counsel where this was done.

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[73] 1988 (1) SA 943 (A).
[74] At 979H-I.
[75] 1994 (2) SA 563 (A) at 587F.

DATE OF HEARING:	28 September 2012
DATE OF JUDGMENT:	15 November 2012
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FOR THE RESPONDENTS:	W Trengove SC and K Hofmeyr, instructed by NORTON ROSE SOUTH AFRICA, locally represented by LOGIN ATTORNEYS.