THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 798/12

In the matter between:

CHRISTOPH BORNMAN **APPELLANT**

and

NATIONAL CREDIT REGULATOR **RESPONDENT**

Neutral citation: *Bornman v National Credit Regulator* (798/12) [2013] ZASCA 130 (26 September 2013).

Coram: Lewis, Ponnan, Malan, Shongwe and Saldulker JJA

Heard: **16 September 2013**

Delivered: **26 September 2013**

Summary: **National Credit Act 34 of 2005 – debt counsellor – registration of – cancellation of registration by National Consumer Tribunal – s 57 – order for refund of money received in breach of Act and conditions of registrations.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Ranchod and Molopa-Sethosa JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Malan JA(Lewis, Ponnan, Shongwe and Saldulker JJA concurring):

[1] The office of debt counsellor was created by the National Credit Act 34 of 2005 (NCA). The NCA provides not only for the registration of a person as a debt counsellor but also for its cancellation. This appeal concerns the cancellation of the registration of the appellant, Mr ChristophBornman, as a debt counsellor by the National Consumer Tribunal and other orders made on the application of the National Credit Regulator. At all material times the appellant was also admitted and practised as an attorney.

[2] The Tribunal was established by s 26 of the NCA. It conducted a hearing in this matter pursuant to s 57 read with ss 142 and 150 of the NCA. The hearing was conducted by a full panel of the Tribunal (s 31(1)(*b*)). In terms of s 148(2) a participant in the hearing before a full panel, such as the appellant, may apply to the high court to review the decision of the Tribunal or to appeal against it. The appellant appealed against the decision of the Tribunal to the high court. Both his appeal and his application for leave to appeal to this court were dismissed but leave to appeal was subsequently granted by this court.

Debt counselling

[3] Debt counsellors play an integral part in the debt review and restructuring process.[1] Only natural persons may be registered as debt counsellors (s 44(1)). Any person who wishes to act as a debt counsellor must apply for registration (s 44(2)). No one may offer or engage in the services of a debt counsellor in terms of the NCA, nor hold himselfor herself out to the public as being authorised to offer such services unless registered (s 44(2)).Strict personal requirements have to be met before a person may be registered. An applicant for registration must satisfy the prescribed education, experience and competency requirements or do so within the time determined by the Regulator (s 44(3)(*a*) and (*b*) and reg 10). Certain persons are disqualified from registration (s 46(3)).The disqualifications are aimed at enhancing and preserving the integrity of the office of debt counsellor. A duty is further imposed on the Regulator to deregister a person who becomes disqualified after his or her registration (s 46(5)).

[4] The NCA introduced new provisions into South African law aimed at affording consumers who are over-committed a 'second chance' by being declared over-indebted and rescheduling their commitments.[2]A consumer is over-indebted when he or she is unable to satisfy all the obligations under all his or her credit agreements in a timely manner, having regard to his or her financial means, prospects, obligations and history of debt repayment (s 79(1) and reg 24(7)).Debt review is usually initiated by the consumer (s 86(1) (and s 85)), but the crucial determination of over-indebtedness is made by the debt counsellor (s 86(6)). Without this determination the process of debt review cannot proceed and a consumer may well be deprived of the protection of the NCA. The NCA does not prescribe the format of the debt counsellor's determination. But that a determination must be made, and records kept of it, is clear. The appellants failure to make any determination is crucial to this appeal.

[5] Debt review plays an increasingly important role in the credit industry. In the first two years since the provisions of the NCA became fully operational more than 100 000 applications for debt counselling were received. In March 2011 there were more than 240 000 applications and 63 000 consumers were paying rescheduled

[1]See M L Vessio 'What Does the National Credit Regulator Regulate?' (2008) 20 *SA Merc LJ* 227 at 238-240; J M Otto and R-L Otto *The National Credit Act Explained* (2013) at 41-2 and 64-5; Michelle Kelly-Louw with contributions by Philip Stoop *Consumer Credit Regulation in South Africa* (2012) at 137 ff.

[2]Otto and Otto at 64.

debts through payment distribution agencies. By March 2012 there were around 300 000 applications and around 80 000 consumers were making payments through payment distribution agencies. About 65 per cent of consumers under debt review pay their rescheduled debts regularly. In March 2012 there were more than 2 000 registered debt counsellors. Between March 2008 and March 2012 payment distribution agencies had distributed R6,2 billion to credit providers.[3]

Tribunal order

[6] The Tribunal made a lengthy order which may be summarised as follows: First, the appellant was declared to have been in contravention of general conditions A 1, 2, 5, 7, 9 and 11 of his conditions of registration. Second, he was declared to have been in repeated contravention of specific condition B 1 of his conditions of registration. Third, he was declared to have been in repeated contravention of the following sections and regulations of the NCA: s 86(6) read with reg 24(6); s 86(7) and s 86(8) read with regs 24(7) and (8); s 86(8) read with reg 24(10); and reg 24(9). Fourth, the appellant's conduct in repeatedly contravening the general and specific conditions of his registration and his conduct in repeatedly contravening the NCA was declared conduct prohibited in terms of s 150(*a*). Fifth, the appellant's registration as a debt counsellor was cancelled in terms of s 150(*g*) with immediate effect. Sixth, the appellant was ordered –

> 'to refund all of his past and current clients, or consumers, all amounts taken from his trust account as collection commission, or retainer, or legal fees, or under any other description as well as any other charge not provided for in terms of the fee guidelines. The refund shall be paid to each client or consumer within thirty (30) days of the date of this order. If any client or consumer cannot be traced, then in that event, the money shall be paid into (or it shall remain in, as the case may be) the [appellant's] trust account where it shall be kept until it is paid to the client or consumer. The [appellant] is ordered to use his best efforts, in good faith, to locate every client or consumer for the purpose of effecting the refund.'

Seventh, and pursuant to the previous order, the appellant was ordered to report to the Regulator providing details of the amount of repayments, the recipients thereof and the steps taken to locate clients he was unable to trace. Eighth and ninth, the appellant was ordered to refund all debt counselling fees and report to the Regular

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[3]These statistics are based on Otto and Otto at 65.

on his actions in this regard. Tenth, eleventh and twelfth, the third respondent before the Tribunal, ProsperitasBene Carpe CC, was prohibited from providing debt counselling services on behalf of the appellant or any other debt counsellor; ordered to desist from holding itself out as a debt counsellor and declared to have been in repeated contravention of ss 44(1) and (2). Thirteenth and fourteenth, the appellant was ordered to surrender all his client files to the Regulator and furnish it with a list of clients; and the Regulator ordered to furnish his clients who were under debt review with a list of registered debt counsellors who were willing to continue with each client's debt review. No order as to costs was made.

High court decision

[7] The court below (per Ranchod J, and Molopa-Sethosa J concurring) upheld the order of the Tribunal and dismissed the appellant's appeal. Prior to the hearing of this appeal the Regulator abandoned paras 8 and 9 of the Tribunal order which obliged the appellant to refund to all his past and present clients the amounts paid by them as debt counselling fees. Paragraph 8 of the order entitled the appellant, should he contend that he was not obliged to refund a specific consumer, to substantiate his reasons, and authorised an inspector to determine, in his or her discretion, whether the consumer was properly charged a debt counselling fee. If it was found that the consumer was liable for the debt counselling fee the appellant was not required to refund that fee. Paragraph 9 of the order required the appellant to report to the Regulator on the refunds made pursuant to para 8.

Registration of appellant

[8] The appellant was registered as a debt counsellor on 22 February 2008. His conditions of registration included general and specific conditions. General conditions A 1, 2, 5, 7, 9 and 11 were imposed in terms of s 48 on the appellant on registration. They required him to comply with all legislation and regulations applicable to the operation of the business of a debt counsellor (general condition A 1); to perform debt counselling in a manner consistent with the purpose and requirements of the NCA and to act professionally thereby ensuring that he would not bring the Regulator or debt counselling into disrepute (general condition A 2); not to engage in any activity which would conflict with the interests of consumers to whom debt counselling services were provided, and not to enter into any agreement

or engage in any activity which might prevent him from acting in the best interests of the consumers to whom these services were provided (general condition A 5); to submit reports and returns prescribed by the regulations or required by the Regulator (general condition A 7); to

'only charge fees to or recover fees from consumers as provided for in the Act and Regulations. The Debt Counsellor must not receive fees, commission or any other remuneration where such Income may compromise the independence of the Debt Counsellor in respect of debt counselling services to consumers' (general condition A 9);

and to maintain adequate records and keep relevant copies of documentation in order to demonstrate compliance with the NCA and his conditions of registration (general condition A 11). In addition, special condition B 1 further provided:

'The Debt Counsellor may not receive payments from consumers who have applied for debt review or receive payments in respect of debt obligations that were re-arranged in terms of the Act or distribute such payments to credit providers.'

The Debt Counselling Fee Guidelines provide in para 1.7:

'Legal fees, if and when they occur, may be recovered from the consumer provided the amount of such fees are disclosed up-front to the consumer and agreed to in writing by the consumer.'(My emphasis).

The appellant's business

[9] The appellant is registered as a debt counsellorand is alsopractisingas an attorney under the name Bornman& Associates.In February 2010 the appellant, in his capacity as debt counsellor, had 4808 consumers under debt review. The debt reviews of 1674 of the appellant's customers were terminated by credit providers under s 86(10). The appellant required his debt counselling customers to complete a Declaration which included an Acknowledgment of Obligation. The Declaration was usually signed on the same day the Form 16 application for debt review was completed by the consumer. It recorded the following:

'I declare as follows:-

1. I undertake to comply with all requests from the debt counsellor to assist him/her to evaluate my state of indebtedness and the prospects for reasonable debt restructuring.

2. I hereby consent to the submission of my information to all registered credit bureaus by thedebt counsellor.

3. I also consent that the debt counsellor may obtain my credit record from any/all credit bureaus and … other registers which may contain any of my credit information.

4. I undertake not to enter into … further credit agreements, other than a consolidated agreement, with any credit provider until one of the following events has occurred:-

a. Debt counsellor rejects my application;
b. The court determines I am not over-indebted; or
c. All my obligations under credit agreements as re-arranged are fulfilled.

5. I confirm that the information obtained in this document is to the best of my knowledge true and correct.'

[10] The appellant procured the conclusion of an Acknowledgment of Obligation with every consumer. In this document the consumer consents to the debt counsellor charging certain fees, inter alia an application fee, a rejection fee, a restructuring fee, a restructuring fee on withdrawal from the process after completing restructuring negotiations and an 'after-care fee'. The after-care fee was to be equal to five per cent of the monthly instalment of the debt re-arrangement plan (with a maximum of R300) for a period of 24 months after which it would be reduced. In certain instances it was recorded that –

'an additional collection fee of 10% of the monthly instalment will be collected by Bornman& Associates, with a maximum of R1 000,00 per month.'

[11] Bornman& Associates also obtained a mandate and power of attorney from consumers, who were referred to as 'clients'. The mandate records that –

'WHEREAS the client has indicated that he/she is not able to maintain his/her full monthly obligations to his/her creditors;

AND WHEREAS the client has requested that the attorneys act on his/her behalf with regards to the client's creditors;

WHEREFORE the client hereby grants to the attorneys a mandate to inter alia:

1. To obtain any records from the client, his/her creditors and/or credit bureaux to assist with the compilation of a schedule of payment and determining a budget;

2. Accept all payments made by the client into the attorneys' trust account for purposes of voluntary debt programme;
3. Have a payment schedule drawn for the creditors;
4. Make an offer of payment to the creditors in accordance with the said schedule – and any amendments thereof in a total discretion of the attorneys;
5. Make payments to the creditors in accordance with the schedule(s) or at the discretion of the attorneys;
6. That the attorneys will at all times ensure the well-being of the client's financial affairs in as far as this mandate is concerned; including all that is reasonably and legally necessary to assist the client in relieving and/or settling his/her indebtedness to a creditor(s);
7. Will enter into negotiations with creditors on the client's behalf, including litigation with a creditor where it is necessary, also opposing of any collection proceedings that a creditor may institute against the client.'

Debt counsellor and attorney

[12] The appellant's customers instructed him both as debt counsellor and as attorney. Although there may appear to be some overlapping of the work that the appellant had to do as an attorney and as a debt counsellor, the two mandates are fundamentally different. As a debt counsellor the appellant had to proceed in terms of the NCA and had to determine whether the consumers, his customers, were over-indebted. As a debt counsellor he also had to consider a voluntary re-arrangement of the consumer's obligations (see s 86(7)(*b*) and 8(*a*)). This latter course he also had to pursue in terms of clause 4 of the mandate. But here the apparent similarity ends. The duties of a debt counsellor are contained in the NCA and the voluntary re-arrangement referred to is part of the statutory debt review process. But any offer to credit providers that he may make pursuant to his customer's mandate does not form part of the debt review process. Moreover, the appellant may in terms of the mandate be required to litigate on behalf of the consumer by opposing collection proceedings (clause 7 of the mandate). This is not reconcilable with the debt review process. The seeds of a conflict of interestwere thus inherent in the two sets of instructions given to the appellant. As I will show, the appellant did not perform his duties under the NCA but instead, as he stated himself, attempted a 'more informal conciliatory process by trying to obtain universal acceptance and consent' because the 'court process was totally dysfunctional'. No evidence of the non-functioning of

the magistrates' court was presented by him, nor of any application made by him to that court.

[13] Neither the NCA nor the Attorneys Act 53 of 1979 prohibits a person from practising both as a debt counsellor and as an attorney. When doing so he or she is entitled to but subject to the rights and duties applicable to him or her in those capacities.[4] He is entitled to carry out the legal work required by the NCA and to charge a fee.[5] He is entitled to both a debt counselling fee qua debt counsellor and to a fee as an attorney for legal work done. But this does not absolve him from complying with his conditions of registration as a debt counsellor or observing the duties incumbent on an attorney where he acts in those capacities.

Contravention of the NCA and Regulations

[14] The appellant was declared to have been in repeated contravention of the following sections and regulations of the NCA: s 86(6) read with reg 24(6); s 86(7) and s 86(8) read with regs 24(7) and (8); s 86(8) read with reg 24(10); and reg 24(9).

[15] Section 86 read with reg 24 prescribes the procedure to be followed when a consumer applies for debt review. A consumer may apply to a debt counsellor to be declared over-indebted (s 86(1) read with reg 24(1)). In doing so he must submit a completed Form 16 (Schedule 1 to the regulations) or provide the debt counsellor with the information detailed in reg 24(1)(b). Within five business days of receiving the application, the debt counsellor must deliver a completed Form 17.1 to all credit providers that are listed in the application and to every registered credit bureau (s 86(4) read with reg 24(2)). The consumer and every credit provider addressed in Form 17.1 are required to comply with any reasonable request of the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness (s 86(5)). The debt counsellor must verify the information provided in Form 16 (reg 24(3)). This may be done by requesting documentary proof from the consumer or the credit provider. Should the credit provider fail to provide the debt counsellor within five days of the verification requested, the debt counsellor may accept that the information provided by the consumer is correct (reg 24(4)).

[4] See*African Bank Ltd v Weiner* 2005 (4) SA 363 (SCA) para 21.
[5]Ibidpara 22.

[16] The debt counsellor is thereafter required to determine within 30 business days of receiving the consumer's application whether the consumer appears to be over-indebted; and, if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless (s 86(6) read with regs 24(6), (7) and (8)).

[17] The debt counsellor must then, as a result of his assessment, make one of three determinations (s 86(7)). First, that the consumer is not over-indebted, in which event he must reject the application for debt review even if he has concluded that any of the credit agreements was reckless at the time it was entered into (s 86(7)(*a*)). Second, although the consumer is not over-indebted, the debt counsellor may conclude that he is nevertheless experiencing or likely to experience difficulty satisfying all his obligations under credit agreements. In such event, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and in writing (reg24(9)) agree on a plan of debt-rearrangement. If acceptable to the parties, it may be filed as a consent order in terms of s 138 (s 86(8)(*a*)). If not acceptable, the debt counsellor must refer the matter to the magistrate's court with his recommendation (s 86(8)(*b*)). Third, the debt counsellor may conclude that the consumer is over-indebted, in which case he may issue a proposal that the magistrate's court make either or both of the following orders: (a) that one or more of the consumer's credit agreements be declared reckless credit; or (b) that the consumer's obligations be re-arranged in any of the ways specified in s 86(7)(*c*)(ii). After completion of the assessment the debt counsellor is required to submit Form 17.2 to all affected credit providers and all registered credit bureaux within five days (reg 24(11)).

[18] The appellant deviated from the procedurerequired by s 86. He used what he described as an 'expedited' form of process. After a consumer applied for debt review, receipt of his application was acknowledged. A Form 17.1 notification would then be transmitted to credit providers within the prescribed time (five days). In some cases a combined Form 17.1 and 17.2 was sent. (A Form 17.2 should be transmitted only after completion of the over-indebtedness assessment (reg 24(11)). In most cases the appellant did nothing after transmission of Form 17.1. In addition, some of the Form 17.2 notifications contained the following:

'If no written correspondence is received within 7 days from the date of this notice, the consumer(s) and the debt counsellor will have assumed the offer to be deemed acceptable [to the credit provider].'

It is clear that the appellant's inaction after transmitting Form 17.1 constitutes a contravention of the remainder of s 86 and reg 24. Moreover, he had no right to assume that credit providers to whom thecombined Form was sent had accepted the proposal contained in it. He could not impose on credit providers a restructuring plan they had not agreed to.Moreover, Form 17.1 cannot be combined with Form 17.2. The first is transmitted within five days of the consumer's application to all credit providers and every registered credit bureau (reg 24(2)), the second within five days after a determination of over-indebtedness is made, ie within 30 days of the consumer's application (reg 24(6)).

[19] Pending the appellant's 'restructuring' of his customers' obligations they continued making payment into Bornman& Associates' trust account. From August 2009 to January 2010 Bornman& Associates received and paid over to the debt transmission agent (DC Partners) some R36 million after deduction of the collection fee.As I have said, there was no evidence before the Tribunal that the appellant lodged any court application. Moreover, the appellant was paid some R1.7 million in 'after care' fees without making determinations in terms of s 86(6). He has not demonstrated that he performed any 'after care' services.

[20] A determination in terms of s 86(6) could only have been made after verification of the information requested in terms of s 86(5)(*a*). There is no evidence of any determination made. The appellant was required to maintain adequate records to demonstrate compliance with the NCA (general condition A11). He did not. Although no format is required, any determination of over-indebtedness had to be in writing: this follows from s 87(6)(*b*) and (*c*) and s 86(8)(*a*) and (*b*) providing for the consent of a credit provider and the referral to the magistrate's court of the debt counsellor's recommendation. Whatever uncertainty there might have been before the judgment in *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP), it did not affect the appellant's obligation under s 86(6) to determine whether the consumer 'appears to be over-indebted' and whether any of the consumer's credit

agreements ‘appear to be reckless’. By failing to make these determinations the appellant deprived the consumers of the benefits of a proper debt review.

[21] In these circumstances the Tribunal was correct in declaring that the appellant had been in repeated breach of general conditions A1, 2, 11 and ss 86(6), (7), and (8) read with regs 24(6),(7), (8), (9) and (10) and in finding that the said conduct was prohibited by the NCA.

Collection fee

[22] The appellant’s conditions of registration as a debt counsellor required him not to engage in any activity which would conflict with the interests of consumers to whom debt counselling services were provided, and not to enter into any agreement or engage in any activity which may prevent him from acting in the best interests of the consumers to whom these services were provided (general condition A 5). One of the conditions requires him to charge or recover fees only as provided for in the Act and Regulations, and not to receive fees, commission or any other remuneration where such income may compromise his independence as a debt counsellor (general condition A 9). Special condition B 1 is quite specific and prohibits a debt counsellor from receiving payments from consumers who have applied for debt review and from receiving payments in respect of debts that were re-arranged. The Debt Counselling Fee Guidelines, in addition, make it quite clear when legal fees may be recovered by a debt counsellor.[6]

[23] In terms of the Acknowledgment of Obligation ten per cent of the monthly payments made by the consumers had to be deducted and paid into the Bornman& Associates’ trust account as a ‘collection fee’. The balance was paid over to the payment distribution agent.[7]The appellant, however, stated that no ‘collection fee’ was involved and explained that the fee was really a retainer for an eventual court application. He said that the words ‘collection fee’were used because his software was pre-programmed to refer to the ‘retainer’ as a ‘collection fee’. Both the Tribunal and the court below rejected this explanation and found that the collection fee was indeed a collection commission. I agree with these findings but whether commission

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[6]Para 8 above.
[7]See J W Scholtz, J M Otto, E van Zyl, C M van Heerden and N Campbell *Guide to the National Credit Act* (2008) at 5-9.

is termed a collection fee or a retainer for an eventual court application is irrelevant. The appellant in accepting the collection fee acted in clear contravention of general condition A 5 and special condition B 1. He also contravened para 1.7 of the Debt Counselling Fee Guidelines.

[24] Neither the NCA nor the regulations provide for the building up of a retainer for an eventual court application. Nor were any court applications launched by Bornman& Associates on behalf of the consumers: the appellant blames the shortcomings in the NCA for his attempting 'a more informal conciliatory process by trying to obtain universal acceptance and consent …'. Nor does it matter that the retained amounts were called 'collection fee' or 'legal fees': their deduction was not authorised by the NCA or regulations.

[25] The appellant stated that hehad determined that the collection fee be collected and paid into the trust account of Bornman& Associates. The appellant was asked by the Tribunal whether he had made this decision as a debt counsellor or as an attorney. His response was as follows:

'The debt counsellor it's debt counselling fees and the debt counsellor makes that determination.… Those fees, the dc fee as well as the legal fees are a retainer. A retainer that is earned … in the capacity as a debt counsellor, not as an attorney.'

So the attorney is holding the fees for the debt counsellor?

Yes.

The fees are held for the debt counsellor. The fees. The fees is not the consumer's money any longer.'

He further said:

'So the 10%, the legal fees are held to do work for, legal work for the consumer. So it's actually yes, it's held on his behalf to do legal work.'

He continued:

'Uhm, it was for the retainer, it was not taken out, it was for retainer for work that had to be done … at this stage. That is to ensure that payment would be made. Many consumers just stop their payments and you do the legal work and you have no guarantee that you will be paid.'

[26] These responses make it clear that the appellant accepted the collection feeas a debt counsellor. It was held in trust for him in that capacity.But, as I have shown, he was not entitled to receive it. It follows that it must be repaid. The Tribunal was therefore correct in holding that the appellant was in breach of general conditions A1, 2, 5 and 9 and specific condition B 1, and that the conduct constituted prohibited conduct for the purposes of s 150(*a*).

Repayment of collection fee

[27] The appellant was ordered 'to refund all of his past and current clients, or consumers, all amounts taken from his trust account as collection commission, or retainer, or legal fees, or under any other description as well as any other charge not provided for in terms of the fee guidelines'. The appellant contended that the Tribunal lacked the power to make this order. Section 150 empowers the Tribunal to make orders –

'(h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or

(i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.'

The order made is entirely appropriate: the appellant was never entitled to the collection fee and an order for a refund is indeed the only one justifiable. The collection fee was collected in terms of the Acknowledgment of Obligation, that is, an 'agreement' as referred to in s 150(*h*) and which is defined, not as a 'credit agreement', but as 'an arrangement or understanding between two or more parties, which purports to establish a relationship in law between those parties'.

[28] In the result the appeal should be dismissed.

<u>Order</u>

The appeal is dismissed with costs.

F R MALAN
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:H J van der Linde SC (with him C van Rooyen)

INSTRUCTED BY:	Bornman& Associates c/o Vorster & Brandt Inc Pretoria
CORRESPONDENTS:	Symington & De Kok Bloemfontein
FOR RESPONDENT:	J A Babamia
INSTRUCTED BY:	Norton Rose SA c/oMothleJoomaSabdiaInc Pretoria
CORRESPONDENTS:	Webbers Attorneys Bloemfontein