

MEMORANDUM

To: ENS Africa

Attention: Mr Edward James

Re: The Bridging Finance Association of South Africa

From: Francois van Zyl SC

Date: 17 August 2018

Dear Edward

I considered the response you received from Mr Morkel and discuss the points raised *seriatum* hereunder.

1. Response A, paragraph 1

- 1.1 If the attorney was mandated (directly or impliedly) by his client to obtain bridging finance for him/her, the provisions of Rule 32 of the Rules for the Attorneys Profession will be applicable, as stated in the first sentence of paragraph 7 of the opinion.

- 1.2 The rest of paragraph 7 of the opinion deals with a factual situation where the attorney is not so mandated but he becomes aware of his client's need for bridging finance and he then refers his client to a BFC, whereafter the client can decide whether to apply for bridging finance with that BFC or not, without any further involvement of the attorney. If the attorney were to become involved directly between the client and the BFC, it is likely that obtaining the bridging finance would form part of the mandate of the attorney (and therefore Rule 32 would likely apply).

2. Response A, paragraph 2

2.1 As I understand the contents of this paragraph, it sets out the facts on the basis of which it can be concluded that the attorney was mandated by his client to obtain bridging finance for him/her. I agree that in these circumstances Rule 32 will be applicable, as stated in the first sentence of paragraph 7 of the opinion.

3. Response B

3.1 The factual matrix dealt with in the opinion is one where the secretary/paralegal acts on a frolic of his/her own, i.e. in an unauthorised manner. That is why section 3 of the Corruption Act may be applicable, as discussed in the opinion.

3.2 If the secretary/paralegal acts in this manner on instructions of the attorney(s) employing him/her, Rule 32 may be applicable (accepting that the client mandated the attorney to find bridging finance for him/her).

4. Response C

4.1 The opinion deals with the possibility of a conflict of interest and the legal ramifications thereof if this is not disclosed to the client in paragraphs 11, 12 and 24 thereof. I confirm what is stated therein.

5. The Early Paying of Commissions to Estate Agents

5.1 Rule 45 of the Rules for the Attorneys Profession reads as follows:

"A member may not effect payment, directly or indirectly, of agent's commission in advance of the date upon which such

commission is due and payable, except out of funds provided by the person liable therefore and on the express authority of such person."

- 5.2 Should Consultant have evidence that an attorney has breached this rule by paying early commissions to an estate agent, it should be reported to the relevant law society for action.

Regards

Francois

CONSULTANT: BRIDGING FINANCE ASSOCIATION OF SOUTH AFRICA

OPINION

**Francois van Zyl SC
Chambers
CAPE TOWN
26 June 2018**

INTRODUCTION

1. I have been provided with the following factual background:
 - 1.1 Consultant is a voluntary association of approximately 20 bridging finance companies. Membership of Consultant is not a requirement for bridging finance companies ("BFC's") to operate and many small BFC's that operate in South Africa are not members.
 - 1.2 A large component of the business of BFC's consists of the provision of bridging finance to persons between the sale and purchase of properties. This inevitably brings BFC's into close contact with conveyancing attorneys.
 - 1.3 Certain members of Consultant have noted concerning practices in the industry, which concerning practices fall into the following scenarios:
 - 1.3.1 Scenario 1 - A secretary or paralegal who works for conveyancers, becomes aware of a client's need for bridging finance. The secretary or paralegal refers the client to a BFC in exchange for a commission. The commission may be in cash, cash equivalent (such as a gift card), or some other less direct reward (such as being entered into a lucky draw to win a luxury holiday).
 - 1.3.2 Scenario 2 - A conveyancer becomes aware of a client's need for bridging finance. The conveyancer himself refers the client to a BFC in exchange for a commission (paid to the firm of attorneys). The client may or may not

be aware of the commission and the cost thereof may or may not be borne by the BFC.

- 1.3.3 Scenario 3 - A conveyancer becomes aware of a client's need for bridging finance. The firm of attorneys for whom the conveyancer works, provides the client with the bridging finance. This may be done directly by the firm or through a wholly owned subsidiary or a separate company owned by the partners of the firm.

ADVICE REQUIRED

2. Consultant requires advice on the following:
- 2.1 The legality or otherwise of each of the scenarios detailed above, subject to the specific iterations detailed below. Consultant does not require me to consider the internally applicable rules or policies of the BFC's or firms of attorneys but rather the generally applicable laws of South Africa as well as the specific laws or rules that apply to firms of attorneys.
 - 2.2 In scenario 1, would the position differ if the firm of attorneys for whom the secretary or paralegal works is aware of the commission payment?
 - 2.3 In scenario 2, would the position differ if the client is informed of the fact that the firm of attorneys receives the commission, and if so, what would constitute adequate evidence of the client's awareness (an actual or implied approval)?
 - 2.4 In scenario 2, would the position differ if the BFC carries the cost of the commission and it is not passed onto the client?

- 2.5 In scenarios 1 and 2, would the position differ based on the values, frequency and nature of the commissions? For example, would the situation involving the secretary or paralegal be different if the commission was not a cash or cash equivalent payment, but rather entry into a lucky draw to win a cash prize or luxury holiday?
3. Consultant also seeks practical guidance on its potential right of recourse against BFC's and/or firms of attorneys who may be acting unlawfully. In this regard Consultant requires guidance in respect of the following:
- 3.1 Does Consultant, as a voluntary industry association, have *locus standi* to take legal action against the non-member BFC's and/or firms of attorneys? If not, could the individual members of Consultant take legal action against other BFC's and/or firms of attorneys?
- 3.2 Based on the legal analysis conducted, what specific rights of recourse could Consultant (or individual members) pursue against BFC's and/or firms of attorneys who are acting unlawfully? In this regard Consultant is cognisant of the fact that there may be different remedies that range from opening a criminal case to making a complaint with a relevant law society, and it seeks your practical guidance of the best available remedies.
- 3.3 In order to pursue the rights or recourse, what type of evidence would Consultant need to collate?

DISCUSSION

Attorneys and Commissions

4. Rule 32 of the Rules for the Attorneys Profession, which came into operation on 1 March 2016, reads as follows:

"32. Subject to section 83(6) of the Act and to the provisions of rule 31.1, a member shall not, in connection with any mandate which he or she has accepted, agree or arrange to receive from or share with any agent or other third party any commission, fee or other reward, without having disclosed such agreement, arrangement, receipt or sharing to his or her client in writing and without having received his or her client's written consent thereto and to the retention by him or her for his or her own account of such reward."

(Section 83(6) and Rule 31.1 are not relevant for present purposes)

5. The question arises whether a conveyancer who refers a client, who needs bridging finance to a BFC for commission, does so in connection with the mandate he holds from his client to transfer property.

5.1 In S v Bissessue¹ the appellant was convicted of fishing without a licence and his motor car and two fishing rods were declared forfeited to the State in terms of a section of the applicable Ordinance which empowered a court which convicted a person, to declare any implement of fishing, vehicle, vessel, boat or other means of conveyance or other device, article or thing "used by such person in, for the purposes of or in connection with the commission of the offence" forfeit to the State. In interpreting the words "in connection with the commission of the offence" the court found that the thing must play a part, in a reasonably

¹ 1980(1) 228 (NPD)

direct sense, in those acts which constitute the actual commission of the offence.

5.2 In Lipshitz N.O. v UDC Bank Ltd² the Court made it clear that the words "in connection with" may, given their literal meaning, have a very wide connotation, but that it is seldom used in legislation in their wide literal sense. The Court preferred an interpretation that limited the wide range of association to a closer, or more direct form of association indicated by the context.

5.3 In S v Mpheta & Others³ the Court stated that the term "in connection with" is an elastic one and the context and purpose of the statutory provision must be considered in order to assess the degree of elasticity appropriate to the case.

6. It follows from these decisions that the specific mandate given by the client to the attorney will have to be examined in the light of the facts of each case, to decide whether there exists a reasonably direct association between the mandate given to the attorney by the client and the attorney's conduct to refer the client to a BFC to apply for bridging finance.
7. If an attorney had been mandated by his client to obtain bridging finance for him from a BFC, the provisions of rule 32 will certainly be applicable. However, when the client's mandate to the attorney was to attend to the transfer of property and the attorney becomes aware of the client's need for bridging finance and he then refers him to a BFC, it may be argued that there is a nexus between the client's mandate to the attorney to transfer the property, the attorney becoming aware of the client's need for bridging finance and the

² 1979(1) SA 789 (A)

³ (1) 1982(2) SA 253 (CPD)

attorney referring the client to a BFC, but the nexus is rather tenuous and cannot be said to be a reasonably direct association in the sense discussed above. In this regard it must be borne in mind that the attorney merely refers the client to a BFC, whereafter the client can decide whether to apply for bridging finance or not without any involvement of the attorney. In my view the attorney is then not required to disclose the fact that he will be earning a commission on the referral to his client.

8. I also do not think that it can be said that the attorney is making a secret profit against his client in these circumstances. Compare in this regard Robinson v Randfontein Estates Gold Mining Company Co Ltd 1921 AD 168 at p 177 to 178 and Volvo SA (Pty) Ltd v Yssel 2009(6) SA 531 (SCA).
9. I must also point out that where the attorney becomes aware of a client's need for bridging finance and refers the client to a BFC, I do not regard the attorney as acting as an intermediary as referred to in section 27 of the Consumer Protection Act, 68 of 2008.
10. Where a conveyancer becomes aware of a client's need for bridging finance and the conveyancer's firm provides the client with the bridging finance, whether directly or through a wholly owned subsidiary or separate company owned by the partners of the firm, the position may be different. (I accept for purposes of this opinion that the firm/company is fully compliant with the legislation pertaining to credit providers)
11. On this factual basis, rule 32 does not, in my view, find application as the conveyancing attorney, or the firm, does not receive a commission from an agent or third party. It provides the bridging finance itself. It is accepted for purposes of this opinion, that in this factual matrix the firm

of attorneys makes a profit out of the provision of bridging finance to its client. This fact must, in my view, be disclosed to the client. I say this for the following reasons:

11.1 The conveyancing attorney stands to his client in a position of trust which involves the duty to always act in his client's best interest. In Robinson v Randfontein Estates Gold Mining Company Ltd 1921 AC 68 at 177-178 it was stated that:

"Where one man stands to another in a position of confidence involving a duty to protect the interests of the other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty"

(See also Volvo SA (Pty) Ltd v Yssel 2009(6) SA 531 (SCA))

11.2 Although it is a grey area, and the facts may differ from case to case, I hold the view that where bridging finance is provided to a client by the conveyancer's firm itself or by a subsidiary or by a company in which the partners have an interest, the conveyancer's interest in making a profit from the provision of the bridging finance and his duty to act in the best interests of his client may conflict. In these circumstances and on the basis of Robinson v Randfontein Estates and Volvo v Yssel, I am of the view that the attorney has a duty to disclose his interest in the transaction to his client.

12. In S v Gardener & Another⁴ the Court dealt with circumstances under which a failure to disclose an interest in an transaction may amount to fraud as follows:

⁴ 2011(1) SACR 570 (SCA) at paragraph [30]

"[30] With regard to the question whether non-disclosure is criminally fraudulent, Coetzee J in *S v Burstein* 1978 (4) SA 602 (T) at 604G-605B stated the law in this regard as follows:

The question whether non-disclosure is criminally fraudulent is not an easy one. As pointed out by Hunt in *SA Criminal Law and Procedure* vol 2 at 716, silence may well constitute civil fraud without constituting criminal fraud. The distinguishing feature lies mainly in the presence or absence of the necessary intention to defraud. There are very few cases of criminal non-disclosure. The most comprehensive judgment on this topic is that of Trollip J (as he then was) in *S v Heller and Another* (2) 1964 (1) SA 524 (W) at 536-538, which I adopt, with respect, as an authoritative statement of the law. For the purpose of dealing with the facts of the present case more conveniently, I would summarize the requisites of this type of fraud, as discussed by the learned Judge, as follows:

- (a) A duty to disclose the particular fact;
- (b) A wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of the fact;
- (c) An intention to defraud which involves
 - (i) Knowledge of the particular fact;
 - (ii) Awareness and appreciation of the existence of the duty to disclose;
 - (iii) Deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice;
- (d) actual or potential prejudice of the representee."

13. In the scenario discussed above, where the attorney has a duty to disclose his interest in the transaction to his client, I do not think that a criminal prosecution for fraud against the attorney concerned will have any prospect of success. It will, in the circumstances postulated, be virtually impossible to prove beyond a reasonable doubt that the attorney failed to disclose his (and his firm's) interest in the provision of the bridging finance to his client, with the necessary intention to defraud.

The Secretary/Paralegal employed by Attorneys

14. A secretary/paralegal employed by attorneys is not subject to the provisions of the rules for the attorney's profession.
15. One can, however, accept that they are employed on the basis of an employment contract which may contain terms prohibiting such a secretary/paralegal from conduct such as referring clients to other businesses and earning commissions on such referrals. Although such conduct may constitute a breach of the employees' contract of employment and may constitute a basis for dismissal or other less severe sanction, it is for the employer, exclusively, to decide what steps, if any, it wishes to take against the employee.
16. However, depending on the factual circumstances, the secretary/paralegal may commit an offence in terms of the Prevention and Combating of Corrupt Activities Act, no 12 of 2004 ("the Corruption Act"). Similarly, the BFC who pays a commission to the secretary/paralegal, may also commit an offence in terms of the Corruption Act.
17. Section 3 of the Corruption Act reads as follows:

"3. **General offence of corruption.** - Any person who, directly or indirectly -

- (a) Accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself for herself or for the benefit of another person; or
- (b) Gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

In order to act, personally or by influencing another person so to act, in a manner -

- (i) That amounts to the -
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the

exercise, carrying out or performance of any powers, duties or functions arising out of constitutional, statutory, contractual or any other legal obligation;
- (ii) that amounts to-
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result; or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption."

18. If one assumes that the secretary/paralegal is not authorised in terms of his/her contract of employment to earn a commission of this nature, the secretary/paralegal may be guilty of contravening section 3 of the Corruption Act as he/she received "gratification":
- 18.1 in order to act in a manner that amounts to misuse or selling of information or material acquired in the course of the carrying out of his/her duties arising out of a contractual obligation, or;
- 18.2 that amounts to the violation of a legal duty or a set of rules.
19. It matters not that the "gratification" received is cash, a gift card or some other less direct reward. Gratification is extremely widely defined in section 1 of the Corruption Act as follows:

"gratification", includes -

- (a) money, whether in cash or otherwise;
- (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
- (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
- (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

- (f) any forbearance to demand any money or money's worth or valuable thing;
 - (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
 - (h) any right or privilege;
 - (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
 - (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage;"
20. The secretary/paralegal, again depending on the facts, may also be in contravention of section 10 of the Corruption Act which reads as follows:

"10. Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship. - Any person -

- (a) who is party to an employment relationship and who, directly or indirectly, accepts or agrees or offers to accept from any other person any unauthorised gratification, whether for the benefit of that person or for the benefit or another person; or
- (b) who, directly or indirectly, gives or agrees or offers to give to any person who is party to an employment relationship any unauthorised gratification, whether for the benefit of that party or for the benefit of another person,

in respect of that party doing any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering an unauthorised gratification."

21. However, depending on the terms of the contract of employment of the secretary/paralegal, accepting such a commission for a referral may not be in breach of the contract of employment. Acceptance of such commission may also specifically be authorised by the employer. If that is the position, no offence in terms of the Corruption Act is committed by either the secretary/paralegal or the BFC making the payment.
22. As a result of what is discussed above, I do not deem it necessary to discuss individually each of the points raised in sub-paragraphs 2.1 to 2.5 above.


Practical Guidance

23. I do not see any basis for Consultant itself to take legal action against the non-member BFC's and/or firms of attorneys. Neither do I see how individual members of Consultant can take such legal action.
24. At best and if client is in possession of the necessary facts to support such an allegation, Consultant can bring it to the attention of the relevant Law Society that a conveyancer acted in conflict with his duty to his client, in those instances where the conveyancer's firm or a company in which the conveyancer has an interest provides the bridging finance and the fact that the conveyancers has an interest in the transaction is not disclosed to the client. Normally this is the type of complaint typically brought to the notice of the Law Society by the client involved. Should Consultant lodge such a complaint, the allegation will be made that Consultant has a financial interest in the

complaint, as no other reason exists for Consultant's complaint. Consultant will also have to be very careful that it has the necessary factual basis for such a complaint, as the possibility of defamation looms large.

25. As to the laying of criminal complaints against secretaries/paralegals and BFC's for contravening section 3, and possibly section 10, of the Corruption Act, Consultant can report its suspicion to the SAPS with the request that it be investigated. Again, this may prove a hard row to hoe, as the secretary's/paralegal's employer will have to depose to an affidavit to state that he/she is, in terms of his/her contract of employment, not authorised to refer the client and to receive the commission.

26. I advise accordingly.


Francois van Zyl SC

26/6/2018