IMMANUEL GARAB V THE LEGAL PRATITIONERS'

DISCIPLINARY COMMITTEE

CASE NO. CA 65/2000 2001/12/03

Maritz, J. *et* Manyarara, AJ.

CIVIL PROCEDURE

Appeal against decision of Disciplinary Committee to dismiss application to hear complaint of unprofessional conduct by practitioner - right to appeal under s.35(3) - not apparent whether Legislature intended "appeal" in ordinary or wider sense of the word - minimum requirement that appeal must be brought on notice to the DC - interests of DC and practitioner concerned in outcome of the appeal.

Application - Declarator to set aside proceedings in magistrate's court leading to the conviction of the applicant - parties that should be joined to such proceedings - failure to comply with other procedures prescribed in the rules and to attach record.

Non-joinder - failure to join necessary parties to the proceedings - effect of - application and appeal struck.

CASE NO. CA 65/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

IMMANUEL GARAB **APPELLANT/ APPLICANT**

and

THE LEGAL PRACTITIONERS'

DISCIPLINARY COMMITTEE **RESPONDENT**

CORAM: MARITZ, J. *et* MANYARARA, AJ.

Heard on: 2001.12.03

Delivered on: 2001.12.03 *(Extempore)*

JUDGMENT

MARITZ, J.:

The matter before us purports to be an appeal against the decision of the Legal Practitioners' Disciplinary Committee not to take disciplinary action against the appellant's former legal representative. It also purports to be an application for a declarator "to nullify the whole court process under which (the appellant) was subjected to during March and April 1995 and to order a retrial as a matter of urgency".

Complaints against the conduct of legal practitioners and the hearing thereof are prescribed in section 35 of the Legal Practitioners Act, 1995. Any person "affected by the conduct of a legal practitioner" may apply to the Disciplinary Committee to require of such practitioner to answer to allegations of unprofessional, dishonourable or unworthy conduct and to hear the application. However, if, in the opinion of the Disciplinary Committee, such an application does not disclose a *prima facie* case against the legal practitioner concerned, it may under subsection (2) summarily dismiss the application without requiring the legal practitioner to answer the allegations and without hearing the application. Subsection (3) affords an applicant, who is aggrieved by the decision of the Disciplinary Committee to dismiss his or her application, the right to appeal to this Court against that decision. The Court may then either confirm the decision or order the Disciplinary Committee to hear the application and to further deal with it according to law.

Whilst it is not apparent from the wording of section 35(3) of the Legal Practitioners Act, 1995, whether an appeal in the ordinary or in the wider sense of the word is contemplated (compare: Baxter, *Administrative Law,* p. 256-261), it must at least be brought on notice to the Disciplinary Committee. A duly served notice of such appeal, setting forth whether the appeal is directed against the whole or only part of Disciplinary Committee's decision and stating the grounds on which the appellant is seeking the appeal, is the very least that is expected from such an appellant.

In casu, the appellant did not comply with even the most basic requirements: There is no notice of an appeal (in any sense of the word) before us - that it is intended appears only from an "Introductory Note". Neither the respondent not the legal practitioner concerned has been cited as parties to the proceedings. They have not been served with any of the documents currently before the Court. They have not been called upon or afforded an opportunity to furnish reasons, to deal with the grounds on which the appellant is seeking to appeal the disciplinary Committee's decision or to oppose the appeal. Although the respondent (not cited in the papers as such) is represented in court today, Mr Cohrssen informed the Court that his appearance is simply a precautionary measure taken to safeguard the respondent's interests in the event of the appeal proceeding.

Much the same applies to the application for a declarator: It is not brought on Notice of Motion as required by rule 6 of the Rules of Court but rather in the form of a "request" incorporated in the "Introductory Note" we have referred to earlier. It has not been served on any person. No one has been cited as a party to the application and no opportunity has been afforded to anyone with a direct and substantial interest in the relief prayed for to oppose the application. The record of the criminal proceedings that the applicant is seeking to set aside has not even been incorporated as part of the record.

Given the serious allegations against the presiding magistrate advanced by the applicant in support of the application and the relief prayed for, both the presiding magistrate and the Prosecutor-General have direct and substantial interests in the outcome of the application.

They are therefore necessary parties to the proceedings and, as such, have a right to be joined and to be heard before the Court grants any order that may prejudice their rights and interests. As Milne, J. pointed out in *Khumalo v Wilkins and Another, 1972* (4) SA 470 (N) at 475A-B, "once it is shown that a party 'is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court' the Court will not deal with those issues without such a joinder being effected, and no question of discretion nor of convenience arises." We agree.

The "appeal" and "application", unprocedural and fraught with defects as they are, have also been set down more that a year ago before other Judges of this Court. The Legal Practitioner who the appellant/applicant engaged on that occasion has since withdrawn and the same defects on the papers before the Court on that occasion are still apparent at this hearing. Mr Cohrssen, who was present at the previous hearing, informs us that he expressly raised some of the shortcomings on that occasion. It is apparent that nothing has been done about them. Without rectification of the procedural shortcomings, citation of the necessary parties and service on them, the appeal and application cannot move forward. The appellant will be well-advised to inform himself of the procedural requirements prescribed by the Rules of Court or to seek legal assistance in that regard - as has apparently been granted by the Legal Aid Directorate of the Ministry Of Justice.

Given the number of affidavits and other documents annexed, the appellant/applicant's failure to remedy the defects and omissions in the

appeal and application since the previous postponement, the admitted lack of effort on the part of the appellant/applicant to inform himself of the requirements of the Rules, the time it takes to peruse the documents in the Court's file and the time set aside for the hearing of this matter, we are of the view that the applicant should not be allowed to set this matter down for hearing on any future date unless he has first applied for and obtained the leave of the Court to do so.

In the premises the following order is made:

1. The matter is struck from the roll.

2. The appellant/applicant may not set the matter down for hearing on any future date, unless he has first applied for and obtained leave of the Court to do so.

CwARITZ, J.V

I agree.

MANYARARA, A.J.

ON BEHALF OF THE APPELLANT/APPLICANT: **IN PERSON**

ON BEHALF OF THE RESPONDENT: **ADV R COHRSSEN**

Instructed by: **Secretary**
Legal Practitioners
Disciplinatry Committee