COMPANIA ROMANA DE PESCUIT (SA) v ROSTEVE FISHING (PTY) LTD & ANOTHER

In Re: ROSTEVE FISHING (PTY) LTD v THE MFV "CAPTAIN B1", HER OWNERS AND ALL OTHERS INTERESTED IN HER

CASE NO. AC 12/1999

2002/03/07

Maritz, J.

PRACTICE

Rule 6(5) – Form 2(b) – Notice of motion to be signed by the applicant personally or by his or her counsel – requirement ingrained in rules of practice in this Court – looseness of practice not to be allowed – Notice of motion signed on behalf of an applicant by a person who is not a legal practitioner in Namibia – notice a nullity.

S.21(1)(c) of Legal Practitioners Act, 1995 – prohibition that any person other than a legal practitioner may sue out process commencing legal proceedings – public interest, protection of its members, integrity of the legal profession and considerations relating to the administration of justice underlying the legal objectives of the enactment – given the peremptory language used, the severe sanction prescribed, the scope of the section and the legislative purpose thereof, Legislature intended nullification for disobedience

Interpretation of statutes – imperative and directory enactments discussed – even if formulated in peremptory terms, the court still required to ascertain the Legislature's intention.

CASE NO. AC 12/1999

IN THE HIGH COURT OF NAMIBIA

(exercising its admiralty jurisdiction)

In the matter between:

COMPANIA ROMANA DE PESCUIT (SA) **Applicant**

versus

ROSTEVE FISHING (PTY) LTD **Respondent**

TSASOS SHIPPING NAMIBIA (PTY) LTD **Intervening Respondent**

In Re:

ROSTEVE FISHING (PTY) LTD **Plaintiff**

versus

THE MFV "CAPTAIN B1", HER OWNERS AND ALL OTHERS INTERESTED IN HER Defendants

CORAM: MARITZ, J.

Heard on: 2002/03/01

Delivered on: 2002/03/07

JUDGMENT

MARITZ, J.: After protracted proceedings (which I have detailed in an earlier *extempore* judgment dismissing an application for postponement), the respondent obtained judgment *in rem* against the MFV "Captain B1", her owners and all interested in her. The applicant is the owner of the vessel and, although it defended the action *in rem* and instituted a counterclaim, judgment was granted in its absence because it failed to put up security, to maintain legal representation within this Court's jurisdiction and to appear when the matter was called for trial. The respondent subsequently obtained leave of the Court to sell the vessel by public auction. When it sought confirmation of the sale of the vessel to the intervening respondent on 13 December 2001, the applicant purported to launch an application in which it gave notice that it would seek the following relief on 21 January 2002:

> "1. Granting leave to the Applicant to lodge this application.
> 2. That the sale of the vessel "MFV Captain B1" that took place on 7 December 2001 (hereinafter the "sale of the vessel") not be confirmed.
> 3. That the sale of the vessel "MFV Captain B1" be set aside.

4. That the default judgement obtained by the Applicant in the above Honourable Court on 8 October 2001 be declared null and void and/or be set aside.
5. Ordering the Respondent to pay the costs of this application."

The "Notice of Application" was signed by one Dickenson on behalf of "DJ Dickenson & Associates" as "Legal Practitioners for the Applicant". One Valentin Donciu, a "barrister of law in Romania", deposed to the founding affidavit. He purported to rely for his authority on a mandate given to him by one Iordan, an "ex. director" of the Romanian fishing fleet, currently under judicial management. Expressly reserving all its rights, the respondent consented to a postponement of the application for confirmation *sine die* and an arrangement whereby service of documents on the applicant in the recission-application could be effected on Dickenson until the appointment of a local legal practitioner by 15 January 2002. It was accordingly so ordered.

In its answering affidavits, the respondent raised three points *in limine*: That the application is a nullity because the "Notice of Application" had been issued under the hand of a person not qualified in law to do so; that the deponent Donciu failed to demonstrate that he had been properly authorised to bring the application on behalf of the applicant

and the applicant had failed to comply with the order of this Court as regards the appointment of a local legal practitioner. Those are also the issues pressed by the respondent's Counsel at the outset of his argument and which the Court is called upon to decide *in limine*.

It appears from the respondent's answering affidavit that Dickenson is not admitted as a "legal practitioner" as defined in the Legal Practitioner's Act, 1995; that DJ Dickenson & Associates is not a firm conducting the business of a legal practitioner in Namibia and that no Fidelity Fund Certificate has been issued in respect of such a practice or practitioner. Although the applicant failed to file a replying affidavit timeously or at all, those allegations do not seem to be in issue – that presumably being the reason why the applicant sought a special arrangement regarding the service of process pending the appointment of "a local legal practitioner". Had Dickenson been a legal practitioner admitted and enrolled to practise law in this country or had he conducted a legal practice in Namibia under the name or style of DJ Dickenson & Associates, such an arrangement would not have been necessary.

The Rules of Court contemplate that process of Court must be signed either by a litigant personally or by his/her/its counsel. That much is

apparent from the forms prescribed by the Rules. So, for instance, does Rule 6(5)(a) stipulate that "every application …shall be brought on notice of motion as near as may be in accordance with Form 2(b) of the First Schedule…". Form 2(b) expressly provides for the signature of the "applicant or his or her counsel".

This salutary requirement has become so ingrained in the law of practise and procedure of this Court over many decades that it almost goes without saying. As Innes CJ remarked in *Donovan v Bevan*, 1909 TS 723 at 725 about a similar requirement in Rule 9(b) of the Transvaal Rules of Court, "it is undesirable that there should be any looseness of practice in that regard". The full bench of that Court (Solomon J and Curlewis J concurring) held on appeal that a petition, having been signed by a person other than the petitioner or his attorney, constituted a fatal defect and dismissed the appeal on that ground alone. In a subsequent judgment handed down in *Incorporated Law Society v Bukes*, 1910 TS 150, Innes CJ restated the position (at 155):

> "Of course, if a plaintiff conducts his case in person, then he may indorse the process in a manner contemplated by the rule; but he cannot employ an unqualified person to do so."

The *ratio* in Donovan's case was approved and followed in that jurisdiction in the matters of *Oosterhuis v Lazerson's Trustee and Another*, 1916 TS 561 at 565, *Lewis & Ross v Litnaitzky & Meyerson*, 1922 TS 128 at 129 and *The Master v Zick,* 1958 (2) SA 539 (T); in Natal in the case of *Estate Amod Jeewa v Kharwa*, 1911 NPD 371 at 382 and in the Eastern Cape in *Schneider v Robberts*, 1917 EDL 416 at 417. In the latter case, Sampson J referred to one of the reasons underlying the rule when he said the following regarding a process issued by an attorney who was not admitted in that Division of the Supreme Court of South Africa:

> "With regard to the second objection, it was necessary that the defendant should be brought into Court in some manner. He has been brought into Court upon notice. Now for that notice to be legal, it must either be signed by the client himself, or signed by some recognised person acting on his behalf. The notice in this case is signed by Mr. Legg, attorney for plaintiff. As pointed out by Mr Walker, and confirmed by the Registrar, Mr. Legg is not an attorney of this Court. The question therefore arises can the signature in question be regarded as sufficient in a proceeding for bringing the respondent into this Court, seeing that the notice is signed by one who is not an attorney of this Court? … But it is quite clear that, this Court wou1d have no jurisdiction over an attorney, if he were not an officer of the Court. I suppose it is this fact which led to the rule requiring attorneys to be admitted to this Court. I am not prepared to allow parties by waiver to admit

an attorney to practise in this Court without his being duly admitted here. ¨.

There are many other reasons relating to the administration of justice and the protection of the public and the profession that underlie the rule. So compelling are they that the Legislature has seen it fit to specifically address the matter in s.21 of the Legal Practitioner's Act, 1995. The section reads as follows:

"(1) A person who is not enrolled as a legal practitioner shall not-

(*a*) practise, or in any manner hold himself or herself out as or pretend to be a legal practitioner;

(*b*) make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such;

(*c*) issue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of law in the name or on behalf of any other person, except in so far as it is authorised by any other law; or

(*d*) perform any act which in terms of this Act or any regulation made under section 81 (2) (*d*), he or she is prohibited from performing.

(2) A person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not

> exceeding N$100 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment." (*the underlining is mine*)

By issuing the "Notice of Application" under his signature, claiming to the "Legal Practitioner for the Applicant" and to practice as such as DJ Dickinson & Associates at an address in Namibia, Dickinson appears to have acted in contravention of paragraphs (a), (b) and (c) of subsection (1) of section 21 of the Legal Practitioners' Act, 1995.

It is with these considerations and provisions in mind that one must assess the legal effect, if any, of the "Notice of Application" that Dickinson issued in the name of the applicant. Section 21 is formulated in peremptory terms and a contravention of its prohibitive provisions constitutes an offence carrying with it a severe punishment. Whereas an act in contravention of a statutory provision so formulated is, as a general rule, regarded as a nullity. The general rule notwithstanding, a Court cannot decide the legal status of such an act simply by reference to the "peremptory" or "directory" labels that may be attached to the legislative formulation of the enactment. It is compelled in every instance to seek the intention of the Legislature in the "language, scope and purpose of the enactment as a whole" (per Trollip JA in

Nkisimane and Others v Santam Insurance Co Ltd, 1978 (2) SA 430 (A) at 434A. Compare also: *Standard Bank v Estate Van Rhyn*, 1925 AD 266 at 274).

The language used in the section is of an imperative nature. As Van Den Heever JA remarked in *Messenger of the Magistrate's Court, Durban v Pillay*, 1952 (3) SA 678 (A) at 683D-E with reference to the use of the word "shall" in an enactment:

> "If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity."

Limited semantic support for that inference may also be found in the negative or prohibitory form in which the provision has been couched (See: *Sutter v Scheepers*, 1932 AD 165 at 173).

The legislative purpose behind the section is clear: it seeks to protect the public against charlatans masquerading as legal practitioners who seek to prey on their misery and money of it members; it serves the public interest by creating an identifiable and regulated pool of fit, proper and qualified professionals to render services of a legal nature and it is aimed at protecting, maintaining and enhancing the integrity

and effectiveness of the legal profession, the judicial process and the administration of justice in general.

It is not difficult to envisage a plethora of highly prejudicial, irregular and disagreeable consequences that may follow if a person unlawfully holds him- or herself out as a legal practitioner. Some of those consequences are apparent from reported cases. So, for example, did one De Jager by theft and subterfuge gained admission to the Society of Advocates of the Orange Free State and Transvaal under the assumed identity of one Pienaar, who was an admitted advocate in Namibia. Although he had studied law and had the requisite academic qualifications to apply for admission as an advocate, he was never admitted to practise. During 1983 and 1984 he appeared *pro deo* in no less than 21 criminal cases. Four of the cases in which the accused were convicted of murder and certain other crimes went on appeal and were collectively dealt with in the judgment of Kumleben AJA in *S v Mkhise; S v Mosia; S v Jones; S v Le Roux,* 1988 (2) SA 868 (A). In its judgment the Appellate Division of the Supreme Court of South Africa dealt with some of the reasons why the accused persons should only have been represented by a duly admitted legal representative. Referring to the interests of the public, the profession and the Courts and concluding that the authority to practise is essential to the proper

administration of justice, the Court held that representation by a person not admitted to practice in those instances constituted a fatal irregularity in the proceedings. It arrived at that conclusion without considering whether the accused had suffered any actual prejudice during the trial and notwithstanding the regrettable but unavoidable hardship of a trial *de* novo.

One shudders to think the disrepute that would have befallen the administration of justice had the death sentence imposed on one of those appellants (Mkhise) been executed. Fortunately, he had received an executive reprieve. Although these cases may be extreme examples of the interests at stake, the financial prejudice that may be brought about when a member of the public acts on the advice of a bogus "legal practitioner" may be just as devastating. In *Oliver en 'n Ander v Prokureur-Generaal, Kaapse Provinsiale Afdeling, en Andere*, 1995 (1) SA 455 (C) at 464H – 465A Fagan AJP mentioned another consideration when he set aside the convictions and sentences of an accused who had been represented by a candidate attorney in a Court where the latter had no right of audience:

> "Ek meen dat die vertroue van die publiek in die regstelsel wel skade kan ly waar die Hof nie optree in 'n geval waar 'n onbevoegde

> persoon vir hom voorgedoen het as iemand wat 'n ander kan regsverteenwoordig nie. Geregtigheid moet nie net geskied nie, dit moet gesien word om te geskied."

In similar circumstances, the convictions and sentences of accused persons were also quashed in *S v La Kay*, 1998(1) SACR 91(C), *S v Gwantshu and Another,* 1995(2) SACR 384(E) and *S v Kahn*, 1993(2) SACR 118(N).

Given the compelling policy considerations behind s. 21(1) of the Legal Practitioners Act, 1995 and the formulation, scope and object of the section, I am of the view that the Legislature intends that if a person, other than a legal practitioner, issues out any process or commences or carries on any proceeding in a court of law in the name or on behalf of another person, such process or proceedings will be void *ab initio*. The view I have taken corresponds with the rules of practice in this Court. Any "looseness" in the enforcement of the well-established practice and of the Rules of Court in that regard is likely to bring the administration of justice in disrepute, erode the Courts authority over its officers and detrimentally affect the standard of litigation.

Both Mr Heathcote and Mr Wragge (counsel for the applicant and respondents respectively) have drawn the Court's attention to a further

"Notice of Application" dated 13 December 2001 and filed on 22 February 2002. The "Notice", except for the address and signature at the foot thereof, is identical to the one I have referred to earlier. Being filed without an explanation, its purpose is not entirely clear. It is presumably intended to substitute the invalid "Notice of Application". Mr Wragge argues that the irregularity is incurable and that the notice should be ignored.

Mr Heathcote, on the other hand, submits that if the Court were to compare the signature appearing on the most recently filed notice with that appearing on the notice of set down, the Court is entitled to conclude that the signature is that of one Erasmus, a legal practitioner of this Court practicing in partnership under the name and style of Van Der Merwe-Greef. Hence, he contends that the defect in the original notice has been cured by the filing of the later notice.

Even if I assume I favour of the applicant that it is the signature of Mr Erasmus appearing on the later notice and (without deciding) that the irregularity is capable of being cured, I am not satisfied that it has been so cured. The signature of Mr Erasmus purports to have been affixed on 13 December 2001. It is clear from the affidavits before the Court that he had no authority on that date to act on behalf of the applicant.

The applicant only appointed Messrs Van Der Merwe-Greef by special power of attorney on 5 February 2002 to act on its behalf. That firm came on record by Notice of Representation filed as late as 12 February 2002. Moreover, it appears from a reading of the "Notice of Application" that Mr Erasmus signed it on behalf of DJ Dickenson & Associates "c/o Van Der Merwe and Associates". As I have mentioned before DJ Dickenson & Associates is not a firm of legal practitioners practicing in Namibia and the reference to "Van Der Merwe–Greef" appears only to be an address for the service of documents – as was the address given in the original notice: i.e. "c/o Law Society".

For these reasons the first point raised *in limine* succeeds. It is therefore unnecessary to decide the remaining points.

As regards costs, it must follow the result. I considered whether Dickenson should not be ordered to pay the costs *de bonis propriis.* I have decided against such an order simply because the Court does not have sufficient information about the specific communications between him and the applicant. His conduct, however, should be brought to the attention of the Law Society of Namibia. It is the appropriate body to consider whether criminal proceedings should not be initiated against

him and whether he should not be reported to a competent disciplinary body in the Republic of South Africa.

In the result, the following order is made:

1. The first preliminary point that the proceedings instituted by the applicant on “Notice of Application” on 13 December 2001 are void, is upheld and the application is struck.

2. The applicant is ordered to pay the respondent’s costs occasioned by that application.

3. The Registrar is directed to bring this judgment to the attention of the Council of the Law Society of Namibia.

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MARITZ, J.

ON BEHALF OF THE PLAINTIFF:

Instructed by:

ON BEHALF OF DEFENDANT:

Instructed by: