

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No I 492/ 2012

In the matter between:

MALETZKY AUGUST

PLAINTIFF

and

CLEOPAS ZAALUKA

DEFENDANT

Neutral citation: *Maletzky v Zaaluka (I 492/2009)[2013] NAHCMD 9 (18 January 2013)*

Coram: DAMASEB, JP

Heard: 18 January 2013

Delivered: 18 January 2013

ORDER

1. The matter is postponed to **13 February 2013 at 10H00** for argument, to enable Mr Maletsky to present argument to me on why I should not make an order that

the claim under Case No. I 492/ 2012 should not be dismissed and for referral of the matter to the Inspector general of Police and the Prosecutor General.

2. The Law Society must present argument *amicus curiae* at the hearing of the matter.
3. Heads of argument are to be filed in accordance with the Consolidated Practice Directions.

REASONS

Damaseb JP:

[1] The plaintiff instituted action proceedings on 29 February 2012 and describes himself as an adult male of "African Labour and Human Rights Centre, Continental Building, 2nd Floor, Suite 206, Independence Avenue" suing on the strength of a "cession" purportedly executed in his favourr by a Mr Aktofel Angula, on 6 July 2011. The combined summons was served on the defendant by the Deputy Sheriff on the 8th March 2012 and no Notice of Intention to defend the action has been filed. The cession agreement is attached to the combined summons. The claim is based on a motor vehicle accident allegedly caused by the defendant and which allegedly caused damage to the car of the cedent.

[2] An application for default judgment was filed with the court on the 26 June 2012 and set down for hearing today. It seeks the following relief:

1. 'Payment of the sum of N\$ 53 000-00 with interest at the rate of 20% p.a calculated and capitalized monthly as from date of judgment to date of final payment;
2. Cost of suit; and
3. Further and/or alternative relief'

[3] The law prohibits¹ a person who is not admitted as a legal practitioner in terms of s 3 of the Legal Practitioners Act 15 of 1995 (hereinafter referred to as the Act), from practising law. Such a person is not subject to the discipline of the statutory Law Society, or indeed the court as he or she is not an officer of the court. Because a person who is not admitted does not fall for scrutiny under the Act, they cannot also obtain a fidelity fund certificate so that in the event of negligence or of theft of client's money, members of the public are entitled to compensation from the Fidelity fund created under the Act. For those practitioners practising without a fidelity fund certificate, the court retains the power to discipline them if they act improperly towards a client. One such option is to strike them from the roll. There is therefore a very sound public policy rationale behind prohibiting non-admitted persons from practising law or taking instructions from members of the public and representing them in court.

[4] It appears to me to be in *fraudem legis, a simulated transaction*, for a person to induce a cession and thus create in his favour a right of action in order to circumvent the provisions of the Act. Fraud unravels everything and the court would in such circumstances be entitled to go behind the ruse of a cession and expose its true character. The questions I asked of the cessionary and the answers I got from him suggest, prima facie, that the cession of the right of action in the present case is a ruse intended to circumvent the provisions of the Act.

¹ Section 21 of the Legal Practitioners Act, 15 of 1995 states :

21 **Certain offences by unqualified persons**

(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 candidate legal practitioner shall not accept, hold or receive moneys for or on account of another person in the course of his or her training or attachment to a legal practitioner, or in the course of the conduct of the practice of the legal practitioner to whom he or she is attached.

[5] How else does one explain the fact that he asks for costs? He signs the pleading in his personal name but states that he is from the 'African Labour and Human Rights Centre' a body under which he says he does not render legal service but offers labour law advice. He conceded though that he had adopted this kind of scheme (i.e acquiring cessions from people and thus gaining right of action) in one two or three cases.

[6] If the cession was truly intended to be what he says it is, I have no explanation from him why he gives his official business reference and not, say his personal address or entirely omitting any reference to the official business. Maasdorp CJ stated as follows in *Wilcocks NO v Visser and Another* 1910 CPD 102:

'Two of the essentials of a valid cession are an intention to make over to another what belongs to oneself in order that it may in future belong to that other and not to oneself, and in addition delivery or some legal formality equivalent thereto.'

[7] Ostensibly in order to meet the second of the two requirements, the cedent and cessionary included in the cession the following terms:

'4. RESTRICTION ON CESSIONARY'S RIGHTS:

The cessionary shall not sell, cede, assign, transfer or pledge the cession to become subject to any lien of whatsoever nature or deliver possession thereof to any other person while the outstanding balances have not been paid in full to the cessionary.

5. TERMINATION OF CESSION AGREEMENT:the

5.1 Notwithstanding anything contained in any provisions of this agreement, the cedent shall be entitled to immediate termination or cancellation of this agreement at any time should the cessionary fail to meet its obligations towards the cedent as agreed upon between the parties in a separate agreement.

5.2 Upon the termination of this agreement the cessionary shall return the all rights ceded herein to the cedent. The termination of this agreement shall have the effect of either party not having any claim against the other arising out of the signature of this agreement.

[8] In the context of this case, the right of reversion to the cedent is in my view an indication that what this cession is is a ruse to enable Mr Maletsky to provide legal services to the cedent. In addition, it is trite that a self-actor is not entitled to legal costs, but the present claim seeks 'cost of suit.' It does not seek disbursements but costs. This

is yet another indication that Mr Maletsky is seeking to do that which the law prevents: acting as a legal practitioner.

[9] The claim as presently instituted by Mr Maletsky in order to give effect to the cession which, in turn, is a ruse to circumvent the Act therefore cannot be given effect to by the court. I come to this conclusion without having been properly addressed on the legal conclusions by Mr Maletsky. He has the right to present argument, and evidence, to change my conclusion if that is justified. I would allow him therefore to fully argue the matter and to show that my conclusion is not justified. I will set the matter down for that purpose and oblige the Law Society on that occasion to present argument to the court as *amicus curiae*.

[10] I make the following order:

1. The matter is postponed to 13 February 2013 at 10H00 for argument, to enable Mr Maletsky to present argument to me on why I should not make an order that the claim under Case No. I 492/ 2012 should be dismissed and for referral of the matter to the Inspector general of Police and the Prosecutor General for contravention of s 21 of the Legal Practitioners Act, 15 of 1995.
2. The Law Society must present argument as *amicus curiae* at the hearing of the matter.
3. Heads of argument are to be filed in accordance with the Consolidated Practice Directions.

P T Damaseb

Judge President

APPEARANCE:

APPLICANT

A Maletskey

African Labour & Human Rights
Centre, Windhoek.