REPORTABLE

CASE NO SA 32/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between

NATIONWIDE DETECTIVES AND PROFESSIONAL PRACTITIONERS CC **APPELLANT**

And

STANDARD BANK OF NAMIBIA LIMITED **RESPONDENT**

Coram: Shivute, CJ, Strydom, AJA *et* Chomba, AJA

Heard on: 02/04/2008

Delivered on: 24/10/2008

APPEAL JUDGMENT

SHIVUTE, CJ: [1] This appeal raises an important question in our law of whether a member of a close corporation who is not a legal practitioner is in law

precluded from representing the corporation in legal proceedings in our superior courts.

[2] The appellant, a close corporation, was a party to an action instituted against it in the High Court (Heathcote, AJ) by the respondent in which the respondent claimed *inter alia* repayment of a sum of money allegedly mistakenly deposited in the bank account of the appellant by employees of the respondent and which amount the appellant allegedly appropriated. For some reason the respondent withdrew the action against the appellant but the notice of withdrawal did not embody consent to pay appellant's costs in the action as envisaged in Rule 42(1)(a) of the Rules of the High Court.[1] Consequently, the appellant applied to the Court *a quo,* as it was entitled to do, for an order for costs in terms of Rule 42(1)(c) of the Rules of the High Court. The appellant furthermore sought an order that prohibited the respondent from instituting any action against the appellant until such time that it had paid the appellant's costs in the action that it had withdrawn.

[1] Sub-rules (a), (b) and (c) of Rule 42 (1) of the Rules of the High Court provides:
(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.
(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.
(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[3] The appellant was represented in its application by Mr AM Kamwi, the sole member of the applicant, who is not a legal practitioner. Mr Kamwi had also represented the appellant in the action that was subsequently withdrawn.

[4] The respondent opposed the application and took the point that since Mr Kamwi was not a legal practitioner, the appellant was not entitled to any costs, save its actual disbursements taxed by the Registrar. With regard to the prayer to bar the respondent from instituting any action against the appellant prior to paying the costs, the respondent argued that a Court normally exercises a discretion whether or not to impose a stay on a litigant to proceed with an action against another party and that for the Court to be in a position to exercise such a discretion, it must be in possession of facts, which facts the appellant allegedly neglected to place before the court.

[5] The Court *a quo* agreed with counsel for the respondent's submission and held that a lay litigant acting in person was not entitled to costs other than actual disbursements reasonably incurred. With regard to the prayer for the prohibition to institute proceedings until costs had been paid, the learned Judge found that no case had been made out for the prayer and declined to grant it.

[6] Aggrieved by the decision of the Court *a quo*, Mr Kamwi lodged the present appeal purporting to act for and on behalf of the appellant. He did so on the following grounds:

"1. The Honourable Acting Judge erred in law and in effect when he found that a lay litigant is not entitled to his costs including expenses for his/her labour whereas decided cases by the above Honourable Court found that the issue of disbursement only applies where there is no order of Court for costs.

2. The Honourable Acting Judge misdirected himself by basing his finding on the tariffs for legal practitioners prescribed by the Rules of the High Court of Namibia whereas decided cases show that the tariffs prescribed in the rules of the High Court cannot deny a lay litigant from claiming his costs.

3. He misdirected himself when he found in his judgment that appellant relied on the authority of *Webb v Union Government* whereas appellant relied on the authority of the above Honourable Court delivered on 29 March 2007 as well as secondary legal materials followed by the courts which the acting judge avoided in his judgment.

4. The Honourable Acting Judge erred in law and in effect when he found that Appellant was not substantially successful whereas in fact and in law she (*sic*) was substantially successful."

[7] Mr Kamwi accordingly argued the appeal on behalf of the appellant while Mr Mokhatu appeared for the respondent.

[8] The respondent filed application for condonation for the late filing of its heads of argument, which was initially opposed, but the opposition having been abandoned, the Court found that a case had been made out and it accordingly granted the application.

Points *in limine*

[9] Mr Mokhatu takes several points *in limine,* two of which if found to be sound in law, would have the consequences that the appeal is not properly before us and stands to be struck from the roll. We nevertheless allowed the parties to argue the appeal including the merits and reserved judgment in respect of both the points *in limine* and the merits. It therefore becomes necessary to first consider the points *in limine,* starting with the two points *in limine* that call for consideration in greater detail in view of their potential to curtail the proceedings in the appeal.

[10] The first point concerns the alleged existence of a legal impediment to Mr Kamwi noting and arguing the appeal on behalf of the appellant. It is argued that by virtue of Rule 16(2)(a) of the Rules of the High Court[2], a party to court proceedings in the High Court or Supreme Court has to act in person or alternatively through a legal practitioner. Mr Mokhatu also referred the Court to section 35(1) of the Supreme Court Act, 1990.[3] Furthermore, Mr Mokhatu

[2] There is no rule in the Rules of the Supreme Court equivalent to rule 16(2). Mr Mokhatu submits correctly that rule 17 of the Rules of the Supreme Court is therefore applicable in a situation where there is no equivalent rule in the Rules of the Supreme Court. Rule 16(2)(a) of the Rules of the High Court reads: "Any party represented by counsel in any proceedings may at any time, subject to the provisions of rule 40, terminate such counsel's authority to act for him or her, and thereafter act in person or appoint another counsel to act for him or her therein, whereupon he or she shall forthwith give notice to the registrar and to all other parties of the termination of his or her former counsel's authority and if he or she has appointed a further counsel so to act for him or her, of the latter's name and address, and the further counsel so appointed shall forthwith file with the registrar a power of attorney authorizing him or her to so act."

[3] Which reads as follows:
"35. (1) Notwithstanding the provisions of any other law, the parties in any proceedings before the Supreme Court may appear in person or be represented by any legal practitioner who –

contends that as a juristic person, the appellant can only be represented in Court by a legal practitioner as it is incapable of acting "in person". Mr Mokhatu relies on South African cases of *Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC and Others;*[4] *Yates Investments v Commissioner for Inland Revenue;*[5] *Dormehl's Garage (Pty) Ltd v Magagula*[6] and *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd and Another,*[7] as alleged authority for the proposition that a corporation cannot be represented in court proceedings by persons other than legal practitioners.

[11] A reading of the cases cited by Mr Mokhatu shows, however, that only *Yates Investments v Commisioner for Inland Revenue (supra*); *Dormehl's Garage (Pty) Ltd v Magagula (supra)* and *Arma Carpet House* case (*supra*) support the contention advanced by Mr Mokhatu in this regard. The *Volkskas Motor Bank* case (*supra*) concerned an attempt by a natural person who was not a legal practitioner to represent two other natural persons and not a corporate entity as is the case *in casu*. Mahomed, J (as he then was) found that since the applicable South African Rule 19(1) of the Uniform Rules of Court required a defendant, within a specified time, to deliver a notice of intention to defend 'either

(a) had the right of audience in the former Supreme Court of South West Africa prior to the date of Independence; or
(b) has the right of audience in the High Court; or
(c) is granted the right of audience in the Supreme Court in terms of any other law or the rules of court; or
(d) is in respect of any particular proceedings before the Supreme Court granted special leave to appear in such proceedings by the Supreme Court on the grounds of such person's particular qualifications or the special nature or circumstances of the relevant proceedings."

[4] 1992 (2) SA 50 (WLD) at 53G-H
[5] 1956 (1) SA 346 (A)
[6] 1964 (1) SA 203 (T)
[7] 1977 (3) SA 448 (W)

personally or through his attorney', the notice of intention to defend filed by a defendant in respect of defendants other than the defendant who had given the notice was irregular and invalid.[8]

[12] The principle established in the *Yates Investments v Commissioner of Inland Revenue* case (*supra*) and many other cases regarding the requirement that a corporation must be represented by a legal practitioner in court proceedings was stated by Margo, J in the *Arma Carpet House* case (*supra*) as follows in relation to the application of the rule in South Africa at the time of the judgment:[9]

> "In appearances before the Court the position, on the authorities, is that a litigant who does not appear in person must be represented by an advocate, and in certain very exceptional circumstances may be represented by an attorney, but that a company, being an artificial person, may not appear in person. In pleadings the Rule is that such must be signed by an advocate and attorney, or by the litigant in person; but, on the decided cases, a corporation, being an artificial person, cannot sign 'in person'."

[13] The above rule of practice is to be found not only in South African common law, but also in that of Zimbabwe, Republic of Ireland and Commonwealth jurisdictions such as England, Australia, New Zealand as well as

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[8] At 54D

[9] See *Mittal Steel SA t/a Vereenging Steel v Pipechem CC* 2008 (1) SA 640 (CPD) at 643 for the current legal position regarding the signing of pleadings in South African law. Also see *Fortune v Fortune* [1996] 2 All SA 128 (C). Also reported at 1996 (2) SA 550 (C)

Canada[10]. That this is also a rule of practice in our jurisdiction is plain seeing that our common law and that of South Africa and Zimbabwe are in substance the same. The real question is whether the rule can be sustained in all circumstances in the light of constitutional developments.

[14] It is common cause that the appeal in this matter was drafted, signed and lodged by Mr Kamwi who, as previously stated, purported to act for and on behalf of the appellant. Mr Mokhatu contends that by drafting, signing and/or lodging the notice of appeal on behalf of the appellant, Mr Kamwi has not only acted contrary to a rule of practice of this Court, but that his purported representation of the appellant amounted to a contravention of section 21(1)(c) of the Legal Practitioners Act (Act 15 of 1995) as amended by Act 4 of 1997.[11] Accordingly, so Mr Mokhatu submits, the notice of appeal drafted, signed and lodged by Mr Kamwi is a nullity in law.

[15] Mr Kamwi resists this submission and contends that as the sole member of the appellant, he was entitled to represent the appellant in his capacity as a

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[10]See the collection of authorities to this effect in *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd 1999* (4) SA 1119 (ZSC) at 1125E *in fine* and the detailed exposition of the history of the rule in *California Spice and Marinade (Pty) Ltd and Others: In re Bankorp v California Spice and Marinade (Pty) Ltd and Others; Fair O'rama Property Investments CC and Others ; Tsaperas; and Tsaperas* [1997] 4 All SA 317 (W) where Wusch J came to the conclusion, *inter alia*, that the rule had not been part of the South African substantive common law, but that it had its origins in the English common law.

[11]Section 21(1)(c) as amended states:

> "A person who is not enrolled as a legal practitioner shall not –
> (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 of or on behalf of any other person, except in so far as it is authorised by any other law."

duly authorised organ or *alter ego* of the appellant. He expressly disavowed any suggestion that he lodged the appeal by virtue of the appellant being a paralegal acting in person as he seemingly contended in paragraphs 5.5 and 5.7 of his written heads of argument. Mr Kamwi relies for the proposition that as a duly authorised organ of the appellant, he was entitled to represent the appellant on the Zimbabwean case of *Lees Import and Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd (supra)*.

[16] In the *Lees Import and Export* case (*supra*) the Supreme Court of Zimbabwe had occasion to consider whether a rule of practice that a corporation had no right to be represented in the conduct of proceedings in Court except by an admitted legal practitioner breached the constitutionally guaranteed rights to the protection of the law and to a fair hearing. Gubbay, CJ who wrote the unanimous judgment of the Court traced the origin of the rule and found that the continued existence of the rule in modern times was justified on grounds including the concern that should lay persons be allowed to represent corporations in court proceedings, superior courts would be denied an opportunity to be served by legal practitioners who are subject to the rules of their profession; who are subject to a disciplinary code and who are familiar with the methods and scope of advocacy which are followed in the presentation of a court case. Gubbay, CJ described the other policy considerations justifying the adherence to the rule as follows:

> "Moreover, such a prohibition gives effect to the fact that an unqualified and inexperienced person may do more harm than good to the person he assists; if only because his ignorance of the law may support his opponent's cause.
>
> Yet another observation is that, save for the rule, corporate officers could cause impecunious companies to litigate hopeless causes without fear of personal liability. Litigants in person, through lack of experience, often pursue irrelevant matters *ad nauseum,* unduly prolong proceedings and require indulgences from the court and from their opponents to meet their non-professional approach.
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> Further, it is pointed out that, whereas a litigant in person can make decisions as to whether factual admissions and denials are to be made, a company's agent, even if validly appointed to act on its behalf, from time to time would require to obtain authority to make decisions in the course of the proceedings. Litigation would be rendered very difficult if courts were concerned at every step as to the authority of the person conducting the case to make the relevant decision."[12] (Reference to authorities omitted).

[17] Gubbay, CJ observed that some of these policy considerations may not be sufficiently persuasive as to warrant adherence to the rule. This is particularly the case when the policy considerations tend to deny audience to persons that are organs of the corporate entity. He pertinently remarked:

> "Certainly the denial of the right of audience to persons who are organs of the company, as distinct from merely agents, is criticised somewhat cynically in Gower's *Modern Company Law* 4th ed at 212 as appearing to 'achieve no useful purpose other than to protect the monopoly of barristers and solicitors.'"[13]

[12] At 1124 I in fine
[13] At 1125D

[18] After a careful review of authorities, Gubbay, CJ concluded that the rule was too entrenched in many jurisdictions, for it to be impugned on the basis other than that its enforcement may infringe a constitutional right of access to the courts.[14] Yet what the decisions wherein the rule was consistently stated overlooked was the caveat placed on the rule, namely that the rule was subject to the discretionary powers of superior courts to regulate their proceedings subject to the legislative imperatives and in the interest of justice to allow a person who is not a legal practitioner to appear before court on behalf of a corporation.[15]

[19] Article 78(4) of the Namibian Constitution provides that "the Supreme Court and the High Court shall have the inherent jurisdiction …, including the power to regulate their own procedures…".

[20] Furthermore, section 37(2) of the Supreme Court Act, 1990 states:

> "Nothing in this section contained shall preclude the Supreme Court from dealing with any matter before it, in such manner and on such principles so as to do substantial justice and to perform its functions and duties most effecially (*sic*)."

The word "efficially" is clearly a slip of the drafter's or legislator's pen.

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[14] At 1124E
[15] At 1126B

[21] Counsel for the respondent in *Lees Import and Export v Zimbabwe Banking Corporation* (*supra*), argued that the right of audience was incapable of being vested in a juristic person insofar as the right to a fair hearing under subsection (9) of section 18 of the Constitution of Zimbabwe included of necessity the right to stand up and speak before superior courts, something that a natural person evidently is incapable of doing. To that end therefore, so it was submitted, the term "person" must be confined to natural persons. Counsel for the respondent in that case relied on the South African case of *Hallowes v The Yacht* Sweet Waters[16] where Hurt, J dealt with the contention by one Mr Labuschagne, an employee of the close corporation Hallowes, to the effect that as the corporation was indigent and therefore unable to procure the services of an advocate to represent it, a refusal by the court to hear him on behalf of the close corporation amounted to a denial of the corporation's right to be heard as enshrined in section 22 of the then South African interim Constitution Act, 1993.

[22] Disagreeing with the submission, Hurt, J stated the following in the passage that counsel for the respondent in the *Lees Import* case (*supra*) relied on for the proposition he advanced above:

> "Although s 22 of the Constitution Act plainly includes, within its ambit, the right of the 'person' to stand up in Court and argue his (or her) own case, this (as has been said in numerous judgments on the subject) is something which a juristic person is incapable of doing. It follows, in my view, that the right to present one's own case is a right which cannot vest in a juristic person, since it is, by nature,

[16] 1995 (2) SA 270 (D) [Also reported at 1995 (2) BCLR 172]

> not a right which the juristic person can exercise. The consequence is that, in terms of s 7(3) of the Constitution Act, this is not one of the rights enshrined for juristic persons."[17]

[23] Gubbay, CJ found himself unable to agree with Hurt, J's reasoning on this score and pertinently and aptly stated the following in levelling criticism at the rationale:

> "True, a juristic person, being a purely legal concept, is incapable of being physically present at any place and must always act through an agent. This is what the corporation Hallowes sought to do through Mr Labuschagne. It would seem, however, that Hurt J regarded a juristic person as lacking the capacity to exercise the right to present its own case before him, even if it were to do so through an organ or *alter ego*. This, I think, was to confuse the content of the right with the manner of its exercise."[18]

[24] He made the following further observations:

> "If the premise is correct that where the *alter ego* of a company acts it is effectively the company itself which does so, the substantive point at issue is whether it may elect to exercise its right to a fair hearing under s 18(9) of the Constitution (including its rights of audience) either through the agency of a practising legal practitioner or by means of its *alter ego*.
>
> The organic or *alter ego* doctrine recognises that in some situations the acts, intentions and knowledge of certain persons are the acts, intentions and knowledge of the company. This is because the company is not a visible person. It has no physical existence, no body parts or passion, no mind or will of its own.

[17] At 278B - D
[18] At 1128I – 1129A

> It has 'no body to kick and no soul to damn and the only way of ascertaining its intentions is to find out what its directors acting as such intended' (*per* Centlivres CJ in *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956(1) SA 602 (A) at 606 G). Such persons therefore are the directing mind and will of the company and control what it does; the very *ego* and centre of its personality; its embodiment. They do not act or think on behalf of or for the company as its agents. Rather they act and know and form intentions through the *persona* of the company. See *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1956] 3 All ER 624 (CA) at 630 D - F; *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127 (HL) at 131h - j; *El Ajou v Dollar Land Holdings plc and Another* [1994] 2 All ER 685 (CA) at 695g - 696a; and, to the same effect, such South African authorities as *Levy v Central Mining & Investment Corporation Ltd* 1955(1) SA 141 (A) at 149 H -150 A; *Ensor NO v Syfret's Trust and Executor Company (Natal) Ltd* 1976(3) SA 762 (N) at 763 E - H; *Harris v Unihold (Pty) Ltd and Others* 1981(3) SA 144 (W) at 147 D." [19]

[25] In the consideration of the application by natural persons seeking to represent the corporation it is therefore of crucial importance to establish the status of such persons in order to determine whether they have the status and authority which in law makes their acts, intentions and knowledge those of the company so as to treat them as the company itself.

[26] In *Lees Import and Export* case (*supra*), Gubbay, CJ concluded that the common law rule offended against section 18(9) of the Constitution of Zimbabwe to the extent that it prohibited the duly authorised organ or *alter ego* of a company the right to appear in the person of the company before the superior courts of Zimbabwe. The right given to "every person" under subsection (1) and

[19] At 1129B-F

(9) of section 18 of the constitution of Zimbabwe includes within its reach a corporate body appearing through its *alter ego*.[20]

[27] The provisions in the Namibian Constitution equivalent to those contained in subsections (1) and (9) of section 18 of the Constitution of Zimbabwe are reflected in Articles 10 and 12(1)(a) of the Namibian Constitution.[21] Mr Kamwi submits, in effect, that if he is not granted permission to represent the appellant, the appellant would effectively be denied access to the Courts seeing that the appellant is allegedly impecunious and cannot afford the services of a legal practitioner.

[28] Counsel for the respondent in this appeal contends that the case of *Lees Import and Export (supra)* is of no assistance to the appellant as counsel doubts if the word "persons" in the relevant provisions in the Namibian Constitution would include artificial persons. Counsel argued, in any event, that persons that are not legal practitioners should not be permitted to represent corporations in legal proceedings in the superior courts for the consideration that juristic persons who may find themselves in a state of impecuniousness may apply for legal aid,

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[20] At 1130H-I

[21] Art 10 provides:
"(1) All persons shall be equal before the law.
(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

Art 12(1)(a) states:
"In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society."

since so counsel contends, the Legal Aid Act, 1990 makes provision for application by corporate entities.

[29] These submissions are clearly untenable. In the first place it is difficult to comprehend the basis upon which counsel expressed doubt whether word "persons" in the Namibian Constitution would include artificial persons given the nature of the right accorded to "persons" in the two Articles. Evidently the right to equality before the law and to a fair trial are applicable to and can be enjoyed by natural persons. The Namibian Constitution employs the word "persons" which is wide enough to encompass artificial persons. Where a right in the Constitution is not accorded to "persons" the class of individuals to whom the right accrues is specified. One finds, for example, that "men and women" have the right to marry (Art 14); "children" have the right to a name, nationality etc. (Art 15); "citizens" have the right to participate in peaceful political activity (Art 17(1)). One searches in vain for a provision in the Legal Aid Act that explicitly states that natural persons may apply for legal aid as contended for by Mr Mokhatu. The right to so apply is accorded to "any person", which expression I assume, without deciding, includes natural persons.

[30] In my respectful view, Gubbay, CJ's analysis of the law and the conclusion he had arrived at in the *Lees Import* case (*supra*) as regards the denial of the right of a corporation to be represented by its *alter ergo* has application to the Namibian situation since the constitutional provisions that stood to be considered

in that case are similar to those *in casu* and the value judgment that has to be made in both situations is essentially the same. I find his reasoning to be persuasive and in my respectful view should be followed by this Court.

[31] As previously alluded to, it is common cause that Mr Kamwi is the sole member of the appellant. To deny him audience in the circumstances where it is apparent that he is the *alter ego* of a small, one-person corporation that either prefers to litigate without legal representation or is unable to do so due to cost thereof would result in the appellant essentially being denied its constitutionally guaranteed right of access to the Court.[22]

[32] The interpretation giving access to the courts to small, one-person corporations is consistent with the constitutional jurisprudence of our Courts that entails a broad, liberal and purposive interpretation of the constitution so as to ensure that the spirit and tenor of the constitution "presides over and permeates the process of judicial interpretation and judicial discretion".[23]

[33] I am of the opinion that Mr Kamwi was entitled to lodge the appeal on behalf of the appellant and that he should be allowed to represent the appellant in this appeal.

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[22] See also *Nationwide Detectives and Professional Practitioners CC v Telecom* (unreported judgment of the High Court delivered on 14/08/2006) where Mtambanengwe, AJ came to the same conclusion.
[23] *S v Acheson* 1991 NR 1 at 10A-B. See also, for example, *Government of the Republic of Namibia v Cultura* 2000 1993 328 at 340 B-C; *S v Kandovazu* 1998 NR 1 (SC) at 3H; *Ekandjo-Imalwa v The Law Society and Another; The Law Society of Namibia and Another v Attorney General of the Republic of Namibia and Others* 2003 NR 123 (HC) at 132F

[34] I am fortified in this view by the approach of South African Courts in cases such as *Navy Two CC v Industrial Zone Ltd*[24] (reaffirming Wunsch, J's reasoning in *California Spice and Marinade (Pty) Ltd and Others* (*supra*); *Mittal Steel SA Ltd t/a Vereenging Steel v Pipechem CC* (*supra*) as regards the application of the rule in that jurisdiction, *viz*. that in South Africa the rule is not inflexible and a court should be entitled, in an appropriate case and to avoid injustice, to allow at least a one-person company to be represented at court hearing by its *alter ego*. The court should weigh up the inconvenience caused to the court as a result of an unqualified person appearing before it against the injustice of a juristic person being denied access to the Courts and if a choice were to be made between a court enduring the inconvenience of having a corporation represented by its member or shareholder-director instead of a qualified practitioner and the injustice that could follow if the litigant is unable to appear or present its case at all, in an appropriate case, the court should choose to suffer the disadvantage.[25]

[35] In any event, as Gubbay, CJ observed in the *Lees Import and Export* case (*supra*) and which view I share, allowing an *alter ego* of a corporation to represent the entity does not at all undermine the rule of practice:

> "It merely provides an exception to it. For it does not permit a company to appear before the superior Courts through someone who is a mere director, officer, servant or agent. … Companies, which cannot be said to be the embodiment of any human body, will not qualify under s 18(9) because no

[24][2006] 3 All SA 263 (SCA)
[25]Cf. *California Spice and Marinade* case at 336i-j

> human being personifies the company 'in person'. In general, small companies should be able to avail themselves of the exception."[26]

[36] Nor does the exception in my view offend against the provisions of section 21(1)(c) of the Legal Practitioners Act, 1995 which as previously noted, criminalises specified activities if performed by persons who are not enrolled as legal practitioners. The section in no way implies that any person who does any of the prohibited acts with leave of Court in the exercise of its discretion to regulate its procedure "so as to do substantial justice" commits a crime. On the contrary, the section embodies an exception, *viz*. "in so far as it is authorised by any other law", which includes both statute and common law. As Gubbay aptly stated in *Lees Import and Export* case (*supra*):

> "Under the latter regime [meaning common law], as already mentioned, the disability of a company to appear in proceedings by its officer may be lifted under the inherent power in Superior Courts to control their proceedings".

[37] I conclude then that as the *alter ego* of a one-person close corporation and as previously mentioned, Mr Kamwi was entitled to lodge the appeal on behalf of the appellant and that he was properly allowed to argue the appeal for and on behalf of the appellant. It follows that the first preliminary point raised on behalf of the respondent must fail.

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[26] At 1130I - 1131A

[38] Having found that the appellant is properly represented, I pass to consider the next point *in limine*, namely that the appellant should have obtained leave of the *Court a quo* or in the event of leave being refused by that Court, leave of this Court, to appeal. It is contended that the judgment or order appealed against squarely falls within the ambit of section 18(3) of the High Court Act, 1990 which reads as follows:

> "(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court." (Underlining supplied)

[39] It is common cause between the parties that no such leave had been sought.

[40] The basic rule is that an award of costs is in the discretion of the court. In *Kruger Bros & Wasserman v Ruskin,*[27] a decision that has been consistently followed by South African Courts, Innes, CJ said the following in respect of this basic rule:

> "… the rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised; but it

[27] 1918 AD 63 at 69

> cannot be challenged, taken alone and apart from the main order, without his permission."[28]

[41] The learned author Cilliers also points out that even the general rule, namely that costs follow the event, is subject to the above overriding principle.[29] It seems to me that when a Court considers issues relating to whether or not to grant an order as to costs and the extent to which such costs are awarded, it exercises discretion. It appears also implicit in the appellant's application in the court below for an order of costs in the wide sense that it essentially prayed for the court to exercise its discretion. It is true that the court *a quo* held that when dealing with an award of costs in favour of a lay litigant, a court must specify that such costs are limited to disbursements, but it seems to me that disbursements are but a genus of costs, the other being fees and that in specifying the extent of the costs to be paid to the lay litigant, the court is making "an order as to costs left to the discretion of the court."

[42] Furthermore, as far as the order to stay the proceedings where previous costs remain unpaid is concerned, the making of or refusal to make such an order is undoubtedly discretionary. Cilliers, for example, makes the following statement in this regard:

> In *Strydom v Griffin Engineering Co* [1927 AD 552 at 553] the Appellate Division held that there is no hard and fast rule as to when costs incurred in earlier

[28] At 69. See also *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F-G and other authorities cited by AC Cilliers, *Law of Costs* 3rd Ed. Page 2-5 paragraph 2.03, footnote 1

[29] *Op. cit*. Paragraph 2.03, page 2-5

> proceedings in a case must be paid before a litigant will be allowed to proceed further. If the non-payment of the costs is vexatious, oppressive or *mala fide*, the court will not allow the litigant to proceed before paying the earlier costs. If there is a mere inability to pay, the court may grant its indulgence to the applicant; but even where an inability to pay exists and where there is no bad faith or intention to act vexatiously, the court is still entitled to look to all the surrounding circumstances and then in its discretion determine whether or not the earlier costs should be paid. This statement, it was later held, seems to widen the principles upon which the court will act so much that it can be said that the matter is entirely in the discretion of the court.[30] (Emphasis added)

[43] It follows then that leave of the Court *a quo,* to appeal against the order of costs in this case should have been sought and obtained and that in the event that leave was refused, leave of this court should have been obtained before the appellant could lodge the present appeal. I am unable to see that there is a real answer to the point *in limine*. It is certainly no answer to this preliminary point for Mr Kamwi to argue as he has done in oral argument, that the appellant did not know that he should have first obtained leave. As the representative of the appellant, he should have taken the trouble to familiarize himself with the relevant statutory provisions and rules of the Court the appellant chose to litigate in. It appears that the second point *in limine* is well-taken and must be upheld. The appeal stands to be struck from the roll.

[44] Mr Mokhatu also raised other points *in limine* relating to the record of appeal. The points, perhaps technical in nature, do not dispose of any issue or

[30] *Op. cit.* paragraph 6.04 at page 6-5

portion of issue in the appeal. As such I do not find it necessary to consider those points *in limine* for the purposes of this appeal.

[45] The finding that leave to appeal should have first been obtained effectively disposes of the appeal and in view of the fact that the appeal stands to be struck from the roll, it is not necessary to express any opinion on the merits of the case although we have heard full argument thereon.

[46] Accordingly the following order is made:

The appeal is struck from the roll with costs.

_____
SHIVUTE CJ

I concur.

_____
STRYDOM AJA

I also concur.

_____
CHOMBA AJA

ON BEHALF OF THE APPELLANT:	In Person
COUNSEL ON BEHALF OF THE RESPONDENT:	Mr. L.B. Mokhatu
Instructed by:	Metcalfe Legal Practitioners