REPORTABLE
CASE NO.: SA21/2008

IN THE SUPREME COURT OF NAMIBIA

In the ex party application of Alex Mabuku Kamwi

and

In the matter between

ALEX MABUKU KAMWI **APPELLANT**

and

THE LAW SOCIETY OF NAMIBIA **RESPONDENT**

CORAM: Shivute, C.J., Strydom, A.J.A. *et* Mtambanengwe, A.J.A.

HEARD ON: 10/06/2009
DELIVERED ON: 20/10/2009

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] In this matter Mr. Kamwi appeals against two judgments of the High Court delivered on 24 May 2004, and on 9 March 2005. One of the judgments was delivered by Van Niekerk J and the other by Gibson J on the respective dates.

[2] The two matters are closely related, the first being an application brought *ex parte*

by Mr. Kamwi and the second being an application brought by the Law Society of Namibia against Mr. Kamwi as first respondent and two entities called Nationwide Detectives CC and Central Investigation CC respectively as second and third respondents.

[3] In the first matter (the admission application) Mr. Kamwi sought what in essence are three separate instances of relief, namely

a) "to be authorized to practice (sic) as a Paralegal Professional;

b) for the High Court to order the relevant Ministry to amend the acts and Rules of the Namibian Courts to accommodate Paralegal Professionals;

c) for the said order to be gazetted and to be published in the local media for the Public to know that Paralegals are Legal Professionals and are authorised to practice (sic) according to their specialties."

[4] In the second matter (the interdict application) the Law Society of Namibia sought and obtained an interdict in the following terms:

"1. Interdicting and restraining the respondents from practicing, or in any manner holding themselves out as or pretending to be legal practitioners.

2. Interdicting and restraining the respondents from making use of the title legal practitioner, paralegal, paralegal practitioner, professional practitioner or any word, name, title designation or description implying or tending to induce the belief that they and more specifically the 1st Respondent, is a legal practitioner or paralegal practitioner or is recognized by law as such.

3. Interdicting and prohibiting the Respondents from issuing out any

summons or process to 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.

4. Interdicting and prohibiting the Respondents from performing any act, which in terms of the Legal Practitioners Act (15 of 1995), or any regulation made under section 81(2) (d) of that Act, they are prohibited from performing.

5. Interdicting and prohibiting the Respondents from drawing, preparing or causing to be prepared any will or other testamentary instrument, any contract, deed or instrument relating to the creation or dissolution of a partnership or the variation of the terms thereof, any contract, deed or instrument for the acquisition, disposal, exchange or lease of immovable property for any other persons, other than a contract for the lease of immovable property for a period less than five years, or the preparation or drawing of the memorandum or articles of association or prospectus of a company.

6. An order for immediate cessation of all business activities of the 2nd and 3rd respondents, which are in contravention of the Legal Practitioners Act of 1995.

7. That the First, Second and Third Respondents be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved."

[5] In the one matter (the first) Mr. Kamwi bases his claim, to be entitled to be authorised to practice as a paralegal with the right to do all those things the Legal Practitioners Act 15 of 1995 (the Act) reserves to be done by admitted legal practitioners, and to have the Act amended, on Article 21(1) (j) of the Constitution. In the second matter his whole opposition to the grant of the interdict sought by the Law Society is

similarly based on the premises that Article 21(1) (j) entitles him to practice his calling as a paralegal professional and to do all the things the Law Society sought to prevent him from doing without let or hindrance.

[6] Mr. Kamwi's *ex parte* application was dismissed, and the Law Society's application was granted with costs. Hence the appeal to this Court, seeking the setting aside of the orders made in both cases. He sets the grounds of appeal as follows:

> "1. Honorable Ms. Justice Van Niekerk J erred in law and in fact when she failed to note that the constitution is the supreme law of the Republic of Namibia and in the absence of any law regulating paralegals, appellant has the right by virtue of the supreme law to practice his profession.
>
> 2. Both Honorable Ms. Justice Van Niekerk J and Honorable Ms. Mavis Gibson erred in law and in fact when they failed to note the amendments No. 4 of the legal practitioners' Act of 1997.
>
> 3. The interdiction order by Honorable Ms. Justice Gibson J is inconsistent with the constitution of the Republic of Namibia.
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> 4. The Honorable Ms. Justice Gibson J erred in law and in fact when she failed to take note of fraudulent documentations by law society despite the admission on record made on the 4th of February 2005 in court before her.
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> 5. The Honorable Ms. Justice Gibson J erred in law and in fact when she failed to note that law society was not party to the proceedings and that it did not comply with the rules of the High Court in opposing appellant's ex

party notice of motion.

6. The honorable Ms. Justice Gibson J erred in law and in fact when she failed to note that the letter dated 2 February 2005 instructing the registrar of the High Court to remove a document from the court file was defeating or attempting to defeat the cause of justice or alternatively corrupting the court."

I deal with grounds 4 and 5 first because these deal with certain preliminary points which Mr. Kamwi raised in his submissions before Gibson J, and these can be disposed of easily.

[7] Ms. Margaretha Steinmann as director of the Law Society of Namibia deposed to the founding affidavit in the interdict application. The affidavit was sworn to before the hearing of the *ex parte* application on 12 May 2004. One of the annexures to the affidavit is annexure "MS2" intended to show that Mr. Kamwi had, in the application for admission, applied to be "admitted as a paralegal or legal practitioner."

[8] Mr. Kamwi vigorously denied authorship of the Notice of Motion "MS2" containing in paragraph (c) thereof the sentence:

> "To all these criteria's (sic) set by the above act I find myself to be fit to be authorised to practice either as a full Legal Practitioner or as a Paralegal as titled by the College I studied at."

In his vehement denial of the same, Mr. Kamwi went as far as accusing the Law Society of fraudulently obtaining that document as, he says, the admission application was never served on the Law Society.

[9] Though Mr. Dicks who appeared for the Law Society before Gibson J admitted that the document annexure "MS2" differed materially (and it does in several respects) from Mr. Kamwi's affidavit in the admission application, it will be noted that both his purported affidavit in notice of motion "MS2" and his affidavit in the admission application conclude with the following identical sentence:

> "Lastly, I affirm here that I am a qualified Legal Professional on the level of a Diploma and therefore pray that I be granted that status of recognition and authorization to practice (as is) as a Paralegal or full Legal Practitioner."

This sentence could not have escaped the attention of Mr. Dicks, the Court and, definitely, Mr. Kamwi himself. Therefore nothing really turns on Mr. Kamwi's challenge that annexure "MS2" was forged, since in his affidavit in support of the Notice of Motion which he filed in the admission application he states the same thing as in that annexure. In these circumstances Mr. Kamwi suffered no prejudice from the use of annexure "MS2" instead of the correct affidavit. In any case the said annexure "MS2" was not the only ground on which the interdict application was based as Mr. Kamwi appeared to say in argument before Gibson J and continue to submit before this Court.

[10] The other objection, *in limine*, to the interdict application, assumes that the interdict application, heard as an opposed matter on 9 March 2005, almost a year later, was still in opposition to the admission application. In her replying affidavit, filed on 3 June 2004. Ms. Steinmann explained:

> "2.2 the application of the applicant was filed in opposition to the application for admission of first respondent and it was intended to be an application to be heard on the same day

(in the form of a counter application). Although this might not have been indicated in so many words in the affidavit that was the intention. The idea was always that the application for admission should be dismissed, and that the first respondent (and other respondents) be prohibited, on the same day to continue with any of the acts stipulated in the applicant's Notice of motion.

2.3 in any event, and in as far as it is necessary, the applicant applies for condonation for using the short form. I respectfully submit that

2.3.1 the transgressions of the respondents are so material that the non-compliance of the applicant with the Rules (in respect of the long form) should be condoned;

2.3.2 in any event, the first respondent does not and cannot suffer any prejudice as a result of any such non-compliance. In this regard I particularly point out that the parties have now agreed to file papers. The first respondent has already filed his opposing affidavit, as well as his 'argument'. He has also filed his opposing affidavit on behalf of the second and third respondents."

[11] Mr. Kamwi's submission in this regard is that he initially treated the interdict application as a separate matter, and filed his opposing affidavit accordingly. He only discovered the application was in opposition to his admission application when Ms. Steinmann's replying affidavit was filed. He insisted that in that case the Law Society should have complied with Rule 6(4) (b) of the High Court Rules which requires that any person having an interest in any application being brought *ex parte* may deliver a notice of an application by him or her for leave to oppose supported by an affidavit setting forth the nature of such interest and the grounds upon which he or she deserves to be heard.

He submitted before Gibson J that the application should be dismissed for

lack of compliance with the said Rule.

[12] The record reflects no ruling on this point by Gibson J, nor does her judgment show she considered the application to dismiss the Law Society's application or that the condonation application was formally made and ruled upon. All that the court said in this connection was;

> "Ms. Steinmann says as Director of the Law Society, she has to keep records of the Society. From these she knows that the first respondent is not registered as a candidate Legal Practitioner nor is he admitted as a legal practitioner under the provisions of the Act. In spite of this handicap, the first respondent has launched an application before this Court seeking to be admitted as a paralegal or legal practitioner. Ms. Steinmann has annexed copies of the application to the application and makes it clear, and right, that in terms of the objectives of the society; set out hereinbefore the applicant was obliged to intervene."

It is clear from her judgment that Gibson J treated the Law Society's application as a separate substantive application. Indeed Mr. Dicks pointed out in answer to the various complaints raised by Mr. Kamwi in his submissions, that:

> "This application… is a separate substantive application to interdict unlawful conduct."

[13] At the stage when the application was heard, the application for admission had become a thing of the past. Therefore proceeding in terms of the Rules relied on by Mr. Kamwi would have been an exercise in futility, as such a step had become redundant. The same considerations would apply to Mr. Kamwi's complaint that if the Law Society's application was meant as a counter-application to his admission application, Rule 6 (7) (a) and (b) of the Rules of the High Court should have been followed.

[14] The ground of appeal listed as number 6 in Mr. Kamwi's Notice of appeal is, to say the least, frivolous. The letter he refers to states the following.

> "The Council of the Law Society received information that a letter by Mr. Kamwi has been placed in the Court file.
>
> The matter is on the roll on Friday, 4th February 2005.
>
> We are of the opinion that letters addressed to the Registrar and/or Judge-President should not remain on the court file for public record as they do not form part of the proceedings.
>
> Members of the press might interpret letters, such as the one mentioned, out of context which can lead to unfair and/or false reporting. These in turn may damage the reputation of a legal practitioner.
>
> We kindly request you to remove the letter from the court file referred to above."

The court file referred to was in the matter between the Law Society of Namibia and Alex Kamwi and the second and third respondents i.e. the Law Society interdict application. How a request to remove from the file a letter addressed to the Registrar or Judge-President, and not filed as a document in the proceedings concerned, could amount to defeating or attempting to defeat the course of justice or to corrupting the court beggars belief.

[15] Grounds numbers 1 and 3 form the crux of Mr. Kamwi's complaint in respect of the two orders made by the two Judges whose judgments are concerned in this appeal. He unqualifiedly relies on Article 21 (i) (j) of the Constitution. That unqualified reliance on Article 21 (i) (j) is stated in so many words in his submissions before Gibson J, and to this Court. As Mr. Dicks rightly observed in submission before that court:

> "Mr. Kamwi believes that there is freedom in this country to practice any occupation you wish, if one wants to practice as a legal practitioner there should be nothing stopping you from

> doing so, one should have the freedom to do so. Unfortunately that freedom is curtailed by Article 21 (2) of the constitution which he conveniently fails to refer to."

[16] The required qualifications to be admitted as a legal practitioner were stated in Ms. Steinmann's affidavit, in Mr. Dicks heads of argument and in Gibson J's judgment. They need not be repeated here. While Mr. Kamwi vigorously denies that he applied to be admitted as a legal practitioner, in essence he contradicts this denial in many ways. For example, during his submissions in this Court he was pertinently asked to specify the things he was seeking to be authorized to do. In substance he listed all the things which a person who is not admitted as a legal practitioner is forbidden to do by Section 21 of the Legal Practitioners Act. Mr. Kamwi identifies himself as one with second and third respondents, in paragraph 6.1.7 of his heads of argument in this appeal he baldly states:

> "If a paralegal firm's memorandum of Association / founding statement is incorporated in terms of section 4 of Act 61 of 1973 / section 13 (1) and 14 (2) of Act 26 of 1988 as amended and he or she is issued with a certificate to commence his or her business by that law he or she may prepare summons or process or commence, carry on or defend any action, suit or other proceedings in any court of law in the name of or on behalf of any other person. See Article 98 (2) of our Constitution." (My underlining)

[17] Gibson J dealt with the provisions of Article 21 as a whole and concluded that Mr. Kamwi's interpretation of "the meaning of the word" profession in sub article (i) (j) of Article 21 is incorrect. I agree.

[18] Except for a few quibbles (e.g. about who issues a summons, the registrar/clerk of court or the legal representative of a party) Mr. Kamwi does not deny doing what the Law

Society complains he and the other entities he represents do. He claims he does all that on the authority of Article 21 (i) (j). He submits in paragraph 4.7 of his heads of argument: (in respect of his ex parte application)

> "I submit that the Court erred in law for finding that there is no basis in Law on which to grant me the relief sought, I say so because in terms of Article 1 (6) of our constitution, the Namibian Constitution which provides in Article 21(i) (j) that all persons shall have the right to practice (as is) their profession or carry out any occupation, trade or business, is the Supreme Law of Namibia. It is the most authoritative and thus binding source of law. Therefore, to say that there is no basis in law is a fantasy because no law in Namibia or elsewhere is above our Constitution."

One only needs to imagine Mr. Kamwi advising a lay client along such lines to see the real danger to the public posed by an unadmitted person purporting to act as a legal practitioner. It is from such dangers that the Law Society is duty bound to protect the public. In her founding affidavit Ms. Steinmann referred to other professions which prescribe qualifications to be acquired before a person can be authorized to practice, and regulations governing the practice of such professions. The legal profession is not an exception.

[19] In paragraph 10 of his heads of argument Mr. Kamwi makes the following submission:

> "Further, it is submitted that, the Court *a quo* failed to bear its mind on the question because a proper reading of Article 21 and 22 of our constitution entails that all persons shall have the right and shall be free to practice any profession, or carry on any occupation, trade or business,

> unless where any law regulating that profession, occupation trade or business reasonably restricts (or which restricts practicing as a paralegal in any manner) any person to practice as a paralegal practitioner and in the absence of such law, the appellant was and is entitled by virtue of the Supreme Law Article 21 (i) (j) to practice as a paralegal practitioner and the court was supposed to uphold this right and freedom."

The answer to this broadside submission is first, the submission by Mr. Dicks before Gibson J, (with which I agree), that

> "The applicant is not asking for the second and third respondents to cease business altogether in terms of paragraph 6 of the Notice of Motion we are only asking for them to cease with those activities which are illegal (or which fall foul of the laws of this country.")

Secondly the answer lies in the observation of Gibson J when she correctly observes in her judgment:

> "It would seem that the first respondent too has certain doubts about his entitlement to practice. I say so because of the nature of the relief he sought in his application of 2004, namely that the High Court should order the relevant Ministry to amend the Acts so as to permit 'paralegal' to be allowed to practice.
>
> As a student of the Constitution the first respondent should be the first to realize that under the doctrine of separation of powers, the courts and the judiciary have no role to play in the making and amendment of the laws. Therefore it is up to him as an interested member of the public to approach members of the legislature and lobby for the change in law that he undoubtedly needs."

[20] In respect of his ground of appeal number 2, namely that both Van Niekerk J and

Gibson J failed to note the amendments introduced by Act No. 4 of 1997 (the Legal Practitioners Amendment Act), Mr. Kamwi filed supplementary heads of argument in which he purportedly relies on the amendment of section 22 of the principal Act by section 3 of the amending Act. Sect 3 (2) provides that the provisions of section 22 (as amended) shall not apply to –

> "a) ……..
>
> b) any person in the employment of the state or anybody corporate established by any law, preparing or drawing up any of the documents or instruments concerned in the course of his or her official duties;
>
> c) a person acting in the capacity of trustee of an insolvent estate or executor, administrator or curator, or liquidator or judicial manager of a company or close corporation, or deputy sheriff or messenger of the court by virtue of an appointment by a competent authority in terms of any law, drawing up or preparing any of the documents concerned in the course of his or her statutory duties and receiving such fees as may be allowed by law.
>
> d) ……."

Section 22 of the Act as substituted reads:

> "22(1) Any person, not being a legal practitioner, who prepares or draws up for or on behalf of any other person any of the following documents, namely-
>
> a) a will or other testamentary instrument;
>
> b) any contract, deed or instrument relating to the

creation or dissolution of a partnership or a variation of the terms thereof;

c) any contract, deed or instrument for the acquisition, disposal, exchange or lease of immovable property or a right relating to immovable property, other than a contract for the lease of immovable property for a period of less than five years.

d) The memorandum or articles of association or prospectus of a company and who charges, demands or receives any fee or reward, whether in cash or in any other form, or knowingly permits any other person to charge, demand or receive any such fee or reward, for services rendered by him or her in connection with the preparation or drawing up of such document, 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."

Mr. Kamwi's purported reliance on the amendment need no serious consideration because it is hedged in a way that shows that he himself does not believe a paralegal is thereby empowered to do what the Act forbids to be done by a person who is not a legal practitioner. Thus, in paragraph 6 of his supplementary heads he concludes.

> "In the premises it is my submission that Respondent's provisions relied on in the legal practitioners Act 1995 prohibiting Appellant to render legal services because he is not an admitted lawyer should be declared repugned and struck out, or alternatively a provision in section 2 of the legal practitioners amendment Act No. 4 of 1997 is inserted reading that: except for a Paralegal Practitioner, or for a person who in so far as he

> or she is authorized by any other law such as the company Act or close corporation Act or any other law. It is also my submission that a provision in section 3, subsection 2 be inserted which provides that: "the provision for subsection (1) shall not apply (e) to a Paralegal Practitioner, or a certified person owning a private company in terms of company Act 61 of 1973 or close corporation Act 26 of 1988 as amended to draw up or prepare any document referred to in section 3, subsection 22 (1) (a) (b) (c) and (d). It is also my submission that while the judgment may reserved the Honorable Court allow Appellant to continue rendering the incorporated services in terms of that law under which the services are incorporated." (Underlining is mine)

[21] I was obliged to quote, as I did, the remarks by Gibson J, because the same argument, that the Court should play the role of amending the law, was advanced by Mr. Kamwi in so many words before this Court. He talked about the Court compiling a dossier in the matter as the High Court should have done;

> "to do away with the colonial practice and laws that denied us our fundamental rights and freedom .."

It would appear that, in this connection, Mr. Kamwi's submission was based on a definition of a paralegal taken from a source which he did not identify, namely:

> "'a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily but exclusively performed by a lawyer, and this person may be retained or employed by a lawyer, law office, government agency, or other entity or may be allowed by administration, statutory or court authority to perform this task independently." (Underlining mine)

And in the next paragraphs of his submission, following the above definition, Mr. Kamwi

quoted “South Africa’s legal draft bill” as defining a paralegal practitioner as:

> “a person who may render legal services by representing other persons in a court of law.”,

and then went on to submit that in South Africa “paralegals are hired by the Justice Department to work in Courts to give advice to the people in need”.

[22] That there may be need for legislation in this country to enable paralegals to do what they are allowed by legislation to do in other countries is undoubted. For example, one of the documents Mr. Kamwi produced before this court, entitled “Access to Justice in South Africa,” says, on the Australian experience,:

> “To its credit the Federal and state governments recognized the value of paralegals working within these communities and passed legislation entitling paralegals to appear in the courts of Australia on behalf of Aboriginal people who would otherwise have had no representation. Legal aid offices were often not established in remote areas. It frequently happened that the average paralegal was better versed in the application of the criminal law than the latest law school graduate entering the service of one or other law practices.”

In his submissions to Gibson J, I note, Mr. Kamwi dwelt at length on what he obviously believes were the injustices of the past, and the need for a political order that addresses the wrongs suffered by the majority of the people in this country. He seems to derive inspiration from, *inter alia,* the speech of the Minister of Justice in her address on the occasion of the 2007 start of the Legal Year wherein she said, *inter alia*;

> “Ultimately, the jurisprudence that must develop must evince the total independence of the country’s law courts and to deepen and strengthen democracy while serving the needs of all the people and not just an elitist class.”

In this regard it is only pertinent to remind Mr. Kamwi that the Legal Practitioners Act No 15 of 1995 is a post-independence piece of legislation that saw the need to regulate the legal profession in this country and that, as submitted by the applicant in the interdict

application, several other professions in this country are similarly regulated. In any case, to the extent that Mr. Kamwi seeks amendment, or declaration of invalidity of sections of the Legal Practitioners Act, such an application is not properly before this Court for the simple reason that interested parties like the Attorney-General or the Minister of Justice who is responsible for its administration have not been cited.

[23] For the various reasons discussed in this judgment the appeal against both orders must fail, and I make the following order:

1. The appeal against the orders respectively made by Van Niekerk J on 24 May 2004 and the order made by Gibson J, on 9 March, 2005 is dismissed.

2. Both orders are confirmed.

3. Mr. Kamwi is ordered to pay respondent's costs of appeal.

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MTAMBANENGWE, AJA

I concur.

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SHIVUTE, CJ

I also concur.

_____
STRYDOM, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	IN PERSON
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