Aspects of practice • Praktyksbrokkies

Hierdie bydrae het betrekking op die tydperk 1 Augustus 1998 tot 31 Desember 1998.

JOHN MIDDLETON
Pretoriase Balie

Snowball on the slopes of justice

Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA); [1998] 3 All SA 577 (A)

The tragic facts of this short decision of the Supreme Court of Appeal speak for themselves and need not be recapitulated here. Beginning with the submission of an account to the Legal Aid Board for a trifling amount and ending with the name of one advocate being struck from the roll and another advocate being temporarily suspended from practice, this case illustrates the necessity for scrupulous honesty on the part of counsel in relation to:

(a) their submission of accounts to the Legal Aid Board (even in respect of trifling amounts);
(b) their dealings with the Bar Council; and
(c) testimony in court.

Costs against counsel

Southern Cape Car Rentals CC t/a Budget Rent a Car v Braun 1998 (4) SA 1192 (SCA)

In the course of refusing two petitions for condonation in respect of an inadequate record submitted to the Supreme Court of Appeal, Schutz JA (at 1195F - J) made the following observation:

> "Practitioners have been warned repeatedly of the consequences of presenting inadequate records – see, for example, *Ensign-Bickford (South Africa) (Pty) Ltd and Others v AECI Explosives & Chemicals Ltd* 1998 (2) SA 1085 (SCA) at 1091D-E. A case with a long record which had been set down for two days was postponed, with the appellants being ordered to pay wasted costs on the attorney and client scale (at 1087E). They may have been lucky, as the Court indicated that a similar failure in future might lead to an appellant being debarred from proceeding with his appeal (at 1091E). *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 186J - 187D was an instance of a long record without a proper index. A warning was issued that such a record might be rejected altogether or, should it mistakenly be accepted, that the attorney might be ordered to pay costs *de bonis propriis*. In *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) a series of flagrant breaches of the Rules led to condonation being refused, irrespective of the prospects of success. The appellant's attorney was ordered to pay certain of the costs *de bonis propriis*. These are just some of the more recent cases. Progressively this Court is being driven to action and not mere warning. A practitioner who does not do his work properly should realise that, apart form other consequences, he may find himself having to account to a client with a meritorious appeal that has been thrown away."

In this regard mention may also be made of the unreported New Zealand judgment of Giles J in *McDonald v FAI (NZ) General Insurance Co Ltd.* (24 September 1998, HC Auckland CP 507/95). The Court concluded, *inter alia,* "that the plaintiff's counsel had pursued a hopeless case without providing the objective and independent advice to which the plaintiff was entitled" which conduct was, in the circumstances of the case, regarded as being "unreasonable, improper and negligent." In the circumstances the Court decided that it would be appropriate for the plaintiff to be indemnified in respect of costs to the extent of $65,000, and made an order that the solicitors and counsel were jointly and severally liable for this amount.

Application of sec 15(1) of the Final Constitution in relation to admissions to practice.

Prince v President of the Law Society, Cape of Good Hope and Others 1998 (8) BCLR 976 (C)

In this matter the applicant brought an application before the Cape Provincial Division of the High Court seeking an order:

"(1) reviewing and setting aside the decision of the Law Society to object to the registration of his contract of community service and,
(2) directing the Secretary of the Law Society to register his contract with effect from 15 February 1997."

The Secretary of the Law Society confirmed in her answering affidavit that the Council's decision not to register the applicant's contract of community service was "based solely on (applicant's) previous convictions for possession of cannabis and his stated intention to continue to use cannabis in spite of the fact that it is a criminal offence to do so." In the light of this the Council of the Law Society considered that the applicant was not "a fit and proper person" for admission to the profession.

The applicant's attack upon the Council's decision was based, *inter alia,* on the ground that the applicant is a proponent of the Rastafarian religion and that the use of cannabis is an integral part of the Rastafarian religion and, as such, constitutionally protected in terms of sections 15(1) and 31(1)(a) of the 1996 (final) Constitution.

Having found that:

(a) the use and possession of cannabis is prohibited in terms of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992;
(b) that the applicant's use and/or possession of cannabis was not justified in terms of any one of the proviso's contained in sub-sections 4(b)(i)-(vi) of the Act; and
(c) that there are sound reasons for the existence of the prohibition contained in section 4(b) of the Act,

Friedman JP (at 992D-F) observed:

> "In considering whether a law is contrary to any of the provisions of the Bill of Rights the Court cannot disregard section 36 (of the

Constitution). Section 36 is an integral part of the Bill of Rights. If any law of general application infringes one or more of the rights in the Bill of Rights, that infringement would not be unconstitutional if the limitation imposed by such infringement were justified in terms of the provision of section 36.

"As the constitutional infringements relied on by applicant have all, for the reasons indicated herein, been found to be justified in terms of section 36, the constitutional right which applicant is said to possess because of his stated intention to possess and use cannabis for purposes of his religion, do not render him free from prosecution in terms of section 4(b) (vi) of the Drugs Act. His possession and use of cannabis would therefore not be lawful."

In the light of the applicant's avowed intention to persist in this unlawful conduct the application was dismissed. (The Court emphasised, however, that in all other respects the applicant was "a fit and proper person".)

Practice Rules

Practice Direction No 3 – Land Claims Court Date 22/06/1998

The President of the Land Claims Court has issued the following practice direction:

1 Urgent applications

1.1 Any person wishing to bring an urgent application must make use of rule 34(3). Failure to do so may result in a judge not being available to hear an application and the matter having to be postponed.

1.2 The Land Claims Court's telephone number is (011) 781 2291.

1.3 If problems are experienced with this line and the matter is urgent, you may try (011) 781 2590 (Judge Bam's registrar, Ms N de Matos).

1.4 If it is after hours and the matter is urgent, you may contact Ms de Matos on 083 769 3715.

1.5 Please note that this contact number may change in future, in which event, a further practice direction will be issued.

2 Additional sets of documents

Parties are reminded that all documents issued out of or filed with the Land Claims Court must be:

2.1 in quadruplicate in the case of a matter referred to in rule 19(4); and

2.2 in duplicate in any other matter.

This paragraph replaces that part of Practice direction No 2 which deals with additional sets of documents.

3 Handing up of documents to the bench during a hearing

If documents have to be handed up to the bench during a hearing, parties have to ensure that sufficient copies are provided. The original document must be handed to the registrar. A copy must be made available to each of the judges and assessors on the bench.

4 Notify registrar of settlements and postponements

As soon as parties are aware that a matter will not, or is unlikely to, be heard on the day on which it has been set down for hearing, they must inform the presiding judge's secretary. The reason why the case will not, or is unlikely to, be heard must be given.

Practice Direction No 4 – Land Claims Court Date 22/09/1998

The President of the Land Claims Court has issued the following practice direction:

Heads of argument

1 The applicant's legal representative must file heads of argument no later than ten court days before the hearing of any opposed application.

2 The Respondent's legal representative must file heads of argument no later than five court days before the hearing of any opposed application.

3 Where the nature of the application does not allow sufficient time to comply with the time periods referred to in paragraphs 1 and 2, the applicant's legal representative must approach the presiding judge for a direction as to the time periods for the filing of heads of argument.

4 The applicant's legal representative must communicate the direction to the respondent's legal representative in writing and a copy must be filed with the Registrar of the Land Claims Court.

5 The presiding judge may excuse the parties' legal representatives from compliance with this direction where appropriate.

Nota

Die volgende ongerapporteerde sake wat in die laaste uitgawe bespreek is, is nou gerapporteer:

Standard Bank of South Africa Ltd v Carports For Africa CC and Another [1998] 3 All SA 448 (W); 1998 (4) SA 811 (W).

Joaquim Augusto De Freitas & Another v The Society of Advocates of Natal and Another 1998 (11) BCLR 1345 (CC)

Access to the Bar

A new system of direct access to barristers for members of a wide range of organisations has been proposed in a consultation paper published by the Bar Council of England and Wales. *Contracts and access to the Bar* was produced by a working group headed by James Munby QC.

It suggests the possible extension of access to the Bar's services through a system of direct licensed access for employees of organisations such as building societies, housing associations, trade unions, educational bodies and financial services providers.

Overall, the paper takes a wide-ranging look at barristers' work, where it comes from, the impact of block contracting and new technology, contractual relationships with lay clients and their impact on direct access and the cab-rank rule. James Munby said that the working group was 'entirely open-minded' about the way ahead for the Bar, while wanting to promote debate about specific options.

"We believe that the Bar may not be well served by the status quo if it wishes to respond to the twin challenges of economic and legislative change. Equally, we do believe that it is desirable to retain a real and perceived difference between barristers' and solicitors' work."

1998 November *Counsel*

Constitution). Section 36 is an integral part of the Bill of Rights. If any law of general application infringes one or more of the rights in the Bill of Rights, that infringement would not be unconstitutional if the limitation imposed by such infringement were justified in terms of the provision of section 36.

"As the constitutional infringements relied on by applicant have all, for the reasons indicated herein, been found to be justified in terms of section 36, the constitutional right which applicant is said to possess because of his stated intention to possess and use cannabis for purposes of his religion, do not render him free from prosecution in terms of section 4(b) (vi) of the Drugs Act. His possession and use of cannabis would therefore not be lawful."

In the light of the applicant's avowed intention to persist in this unlawful conduct the application was dismissed. (The Court emphasised, however, that in all other respects the applicant was "a fit and proper person".)

Practice Rules

Practice Direction No 3 – Land Claims Court Date 22/06/1998

The President of the Land Claims Court has issued the following practice direction:

1 Urgent applications

1.1 Any person wishing to bring an urgent application must make use of rule 34(3). Failure to do so may result in a judge not being available to hear an application and the matter having to be postponed.

1.2 The Land Claims Court's telephone number is (011) 781 2291.

1.3 If problems are experienced with this line and the matter is urgent, you may try (011) 781 2590 (Judge Bam's registrar, Ms N de Matos).

1.4 If it is after hours and the matter is urgent, you may contact Ms de Matos on 083 769 3715.

1.5 Please note that this contact number may change in future, in which event, a further practice direction will be issued.

2 Additional sets of documents

Parties are reminded that all documents issued out of or filed with the Land Claims Court must be:

2.1 in quadruplicate in the case of a matter referred to in rule 19(4); and

2.2 in duplicate in any other matter.

This paragraph replaces that part of Practice direction No 2 which deals with additional sets of documents.

3 Handing up of documents to the bench during a hearing

If documents have to be handed up to the bench during a hearing, parties have to ensure that sufficient copies are provided. The original document must be handed to the registrar. A copy must be made available to each of the judges and assessors on the bench.

4 Notify registrar of settlements and postponements

As soon as parties are aware that a matter will not, or is unlikely to, be heard on the day on which it has been set down for hearing, they must inform the presiding judge's secretary. The reason why the case will not, or is unlikely to, be heard must be given.

Practice Direction No 4 – Land Claims Court Date 22/09/1998

The President of the Land Claims Court has issued the following practice direction:

Heads of argument

1 The applicant's legal representative must file heads of argument no later than ten court days before the hearing of any opposed application.

2 The Respondent's legal representative must file heads of argument no later than five court days before the hearing of any opposed application.

3 Where the nature of the application does not allow sufficient time to comply with the time periods referred to in paragraphs 1 and 2, the applicant's legal representative must approach the presiding judge for a direction as to the time periods for the filing of heads of argument.

4 The applicant's legal representative must communicate the direction to the respondent's legal representative in writing and a copy must be filed with the Registrar of the Land Claims Court.

5 The presiding judge may excuse the parties' legal representatives from compliance with this direction where appropriate.

Nota

Die volgende ongerapporteerde sake wat in die laaste uitgawe bespreek is, is nou gerapporteer:

Standard Bank of South Africa Ltd v Carports For Africa CC and Another [1998] 3 All SA 448 (W); 1998 (4) SA 811 (W).

Joaquim Augusto De Freitas & Another v The Society of Advocates of Natal and Another 1998 (11) BCLR 1345 (CC)

Access to the Bar

A new system of direct access to barristers for members of a wide range of organisations has been proposed in a consultation paper published by the Bar Council of England and Wales. *Contracts and access to the Bar* was produced by a working group headed by James Munby QC.

It suggests the possible extension of access to the Bar's services through a system of direct licensed access for employees of organisations such as building societies, housing associations, trade unions, educational bodies and financial services providers.

Overall, the paper takes a wide-ranging look at barristers' work, where it comes from, the impact of block contracting and new technology, contractual relationships with lay clients and their impact on direct access and the cab-rank rule. James Munby said that the working group was 'entirely open-minded' about the way ahead for the Bar, while wanting to promote debate about specific options.

"We believe that the Bar may not be well served by the status quo if it wishes to respond to the twin challenges of economic and legislative change. Equally, we do believe that it is desirable to retain a real and perceived difference between barristers' and solicitors' work."

1998 November *Counsel*