CASE NO. A 194/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE REGISTRAR OF FRIENDLY SOCIETIES Applicant

and

LIBERTY FRIENDLY SOCIETY 1ST Respondent

AUGUST MALETZKY 2nd Respondent

CORAM: VAN NIEKERK, J

Heard: 3 June 2008

Delivered: 7 July 2008

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JUDGMENT

VAN NIEKERK, J:

[1] The parties are involved in litigation before this Court, the first respondent ("the Society") having been placed under provisional curatorship at the instance of the applicant ("the Registrar"). The second respondent ("Mr Maletzky") is the principal officer of the Society.

[2] On 29 November 2007, the return date for hearing the application for a final order ("the curatorship application"), Mr Maletzky applied for the recusal of the presiding judge, PARKER, J. In his affidavit, which is in the Court file before me, Mr Maletzky motivated his application for recusal as follows:

> "2. I attached hereto a copy of page 6 of The Report To The Namibian People on the Crisis of the Namibian Judiciary. The report is critical of Judge Parker and was delivered to inter alia, the Judge President and same was mentioned at the parliamentary standing committee which was chaired by the honourable Hage Geingob on the 6th November 2007.
>
> 3. I co-authored the said Report.
>
> 4. This very critical report is constantly expanded and published both in Namibia and internationally.
>
> 5. We are at present campaigning for the removal from the Bench of amongst other Judge Parker on the grounds of our perceptions and in defence of our constitution."

[3] At the recusal hearing Mr Maletzsky handed in a complete copy of the Report mentioned in his affidavit. On the cover thereof it is stated that the Report was prepared by the Workers Advice Centre, Windhoek. At the end of the report provision is made for it to be signed by three persons, namely one Hewat Beukes, one Jacobus Jossob and one Hendrik Christian, although the report is actually signed by Beukes only.

[4] PARKER, J dealt with the application for recusal as follows in his ruling:

> "I have perused the application for recusal though the papers do not meet the requirements of an application in terms of our rules. But as Mr Coleman said, since the applicant or second respondent is a lay litigant, it need be accepted as an application.
>
> I have given careful thought to the submissions by Mr Coleman and the applicant (second respondent) and the authorities cited. What the applicant and second respondent says are merely speculation and conjecture, and they cannot found bias or likelihood or bias known in our law. But in virtue of the *ad hominem* attacks, though unsubstantiated and unjustified, by the applicant or second respondent, I think it will be proper in the circumstances that I do not sit on the main application.
>
> As a mark of displeasure at the fact that the so-called application does not meet the requirements of the rules of this Court, and the view I take of that so-called application I make no order as to costs."

[5] On 14 January 2008, Mr Maletzky filed a "NOTICE OF APPLICATION FOR THE ARRAIGNMENT OF APPLICANT FOR CONTEMPT OF COURT" in which he claims the following relief:

> "1. Ordering applicant to desist from publishing any advertisement against respondents.

2. Declaring applicant's conduct in the advertisement in annexure 'AM1' hereof as contempt of Court and referring the matter to a criminal court.

3. Ordering applicant to publicly retract the said advertisement.

4. Ordering applicant to publish a relevant apology towards the Honourable Court and to second respondent for the said advertisement and for any inconvenience suffered.

5. Ordering applicant to pay the costs of this application.

6. Further and/or alternative relief."

[6] In his affidavit filed in support of the application Mr Maletzky states *inter alia* the following:

"11. While proceedings in the above matter [i.e. the recusal application] had taken place entirely within the ambit of the law and the precincts of the Court, Applicant falsely advertises in the said advert that I had in malice made a 'campaign' against their 'respected' judges.

12. Applicant in the said advert chastises myself for bringing their 'respected' judges in disrepute.

13. Applicant patently and blatantly seeks to negotiate for itself an advantageous position in Court by seeking an unbecoming camaraderie with their 'respected' judges and to create judicial hostility and bias to myself.

14. It will be my submission that applicant has in punishable contempt of court sought to adversely influence the public, in particular the judiciary, against myself.

15. It is further my submission that in the above premises a fair trial is not possible without the Court satisfactorily resolving the issue by practically demonstrating its disapproval of applicant's contemptuous conduct.

16. It is further my submission that in the above premises a fair trial is not possible without the Court satisfactorily resolving the issue by practically demonstrating its disapproval of applicant's expenditure of public money on a personal vendetta against myself and to influence public opinion.

.....

17. Applicant usurped the power of the Court by advertising on the legal options exercised by myself in Court and declaring them contemptuous and undermining their "respected" judges, intimating that I had no respect for the judiciary nor their "respected judges."

18. Applicant conducted itself clearly in a manner designed to prejudice the judiciary against myself and to inform the public of my purported emasculation of the Namibian Judiciary.

.....

.....

It will be my respectful submission that the Court must find that the advertisement 'AM1' was meant to adversely influence the judiciary and the public against myself, to establish a intimacy and camaraderie between the judiciary and applicant, and to anticipate a favourable outcome for itself in the collective mind of the public." [the insertion in para. 11 of the quotation is mine]

[7] The advertisement complained of reads as follows:

"**Press release**

Liberty Friendly Society

Background

NAMFISA and the provisional curator of Liberty Friendly Society ("the Society") have been inundated by enquiries regarding the status of the society and the rights of the current and past members.

NAMFISA undertook to inform the public of the status of this matter once the matter was heard on the 29th of November 2007, which is hereby done.

Current status

The Society is currently under provisional curatorship. The curator, Mr Derek Wright, remains in control of the affairs of the Society until such time as a court makes a final ruling in this matter. The curator has already filed his report with the High Court, which is open for public inspection. The report contains the preliminary findings of the forensic inspection done by Price Waterhouse Coopers into the manner in which the affairs of Liberty Friendly Society has been conducted, as well as a report by an actuary on the sustainability of the Society.

Report on the court proceedings on 29 November 2007

Mr August Maletzky, the second respondent in the application brought by NAMFISA, represented himself as well as the Society, in his capacity as Principal Officer of Liberty Friendly Society. Mr Maletzky made application for he presiding Judge to remove himself from hearing this case. Mr Maletzky submitted to the court that he was a co-author of a document that was in essence a 'campaign" (according to Mr Maletzky) against one or more of Namibia's learned judges. On the basis of what appears to be personal attacks by Mr Maletzky, and others, on the respected members of our Judiciary, the Honourable Judge presiding over the proceedings, apparently also being attacked in the alleged

> document, decided to withdraw from hearing the application by the Registrar for the granting of a final order placing the business of the Society under curatorship.
>
> **The way forward**
> NAMFISA regrets that its attempts to protect the rights of the public in the instance can to date not be properly argued before a court of law, but shall continue its commitment to protect the public interest. Members of the Society shall be informed of the progress in this matter after a new court date for its hearing has been obtained from the Registrar of the High Court on the 25th of January 2008."

[8] The Registrar opposes the application before me on several grounds. He has also filed a counter-application. Mr Maletzky argued strenuously that the answering affidavit is in fact no answering affidavit as it does not answer a single averment or the "factual submissions" in the founding affidavit. As such, he submitted, the application is in fact unopposed. I do not agree. Many of the factual allegations specifically those contained in paragraphs 7, 8, and 9, are clearly irrelevant to the application and need no reaction in the affidavit. To the extent that they are not disputed, they must be taken to be admitted, but this does not assist Mr Maletzky, because they are irrelevant. The factual allegations in paragraphs 4, 5, 6 and 10 are clearly common cause. The contents of paragraphs 12 - 18 and the other unnumbered paragraphs of the founding affidavit constitute inferential reasoning and submissions. They do not contain allegations of fact. Paragraph 11 does contain

factual allegations but the Registrar's denial in paragraph 7 of his affidavit that the advertisement contains anything that is incorrect or that justifies the relief claimed clearly constitutes an answer to these allegations. I therefore reject Mr Maletzky's submission that his application stands unopposed.

[9] It was contended on behalf of the Registrar that the application is fatally defective because it does not comply with the requirements of rule 6(5) in that it was not couched in the form set out in Form 2(b), but in the form set out in Form 2(a), of the Schedule to the rules. Furthermore, it was not served on the Registrar, but on his legal practitioners. A further cause for complaint was that a date for the hearing of the matter was determined by Mr Maletzky upon 9 days' notice, which is not in accordance with rule 6. No condonation for non-compliance with the rules was sought on the basis of urgency.

[10] To this Mr Maletzky replied that his application is in order as it is an interlocutory application in terms of rule 6(11) and that he does not rely on urgency. Rule 6(11) exempts from the operation of, *inter alia* rules 6(1) and 6(5), "interlocutory and other applications incidental to pending proceedings." In my view the present application seeking a final prohibitory interdict as well as a declaration that the Registrar's conduct amounts to contempt of court is clearly not interlocutory. Neither is it

incidental to pending proceedings because it is "not subordinate or accessory wile at the same time being distinct from" the application for the final placing under curatorship (*Massey-Ferguson (SA) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T) 214G-H). The present application is an application for substantive and final relief entirely distinct from that of the curatorship application (cf *Antares (Pty) Ltd v Hammond* 1977 (4) SA 29 (W) 30; *Da Silva v Pillaty NO and Another* 1997 (3) SA 760 (D) 770H-771A).

[11] In the result I find that the wrong form of notice was adopted by Mr Maletzky. However, it has been decided that the use of the wrong form of notice under rule 6 does not lead to a nullity and may be condoned (*Mynhardt v Mynhardt* 1986 (1) SA 456 (T) and approved in *Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (Nm) 123). The Registrar did not bring a rule 30 application. He filed an answering affidavit and although he reserved his "right to address the allegations by Mr Maletzky in more detail should it become necessary", the Registrar did not complain of any embarrassment or prejudice as a result of the wrong form being used or because the application was improperly served. In the light hereof and bearing in mind that I am of the view that the application is without merit, I propose to dispose of it at this stage in spite of the procedural irregularities.

[12] Mr Maletzky prays that the Registrar be finally interdicted from "publishing any advertisement against the respondents". As Mr Philander on behalf of the Registrar pointed out, there is no basis on which Mr Maletzky can at this stage make applications on behalf of the Society. Furthermore, it is trite that in order to obtain a final prohibitory interdict, an applicant must show that (i) he has a clear right; (ii) that he has suffered injury or that injury is reasonably apprehended ; and (iii) that no similar protection may be provided by any other ordinary remedy (*Setlogelo v Setlogelo* 1914 AD 221 at 227). The applicant clearly has no right to generally interdict the Registrar from publishing advertisements concerning him. It would depend on their content, which is impossible to determine at this stage.

[13] As far as the specific press release is concerned, Mr Maletzky makes inaccurate allegations concerning its contents in his affidavit. He states that the Registrar *"falsely advertises in the said advert that I had in malice made a 'campaign' against their 'respected' judges"* and that the Registrar *"chastises"* him for bringing *"their 'respected' judges into disrepute."* There is no allegation whatsoever of malice or any inference to be drawn pointing to malice in the press release. The word *"campaign"* in the press release is in inverted commas indicating that it is a quotation and is in fact used by Mr Maletzky himself in his application for recusal. The word is also used in the Report (foot of page

2). There is no part of the press release which could reasonably be interpreted as a chastisement of Mr Maletzky. As far as the words *"our Judiciary"* are concerned, I see nothing improper in the use of this expression, although Mr Maletzky appears to insinuate that the meaning intended by the Registrar is that the judges are "theirs" in the sense that they are in an improperly friendly relationship, from there his reference to an alleged *"camaraderie"*. In every day language one often finds that persons will refer to "our government" or "our legislature" or "our courts", meaning the government, or legislature, or courts of the country or the people. The use of the word *"respected"* is in my view another way of saying "honourable", which is an accepted and traditional description used to refer to the judiciary. Indeed, the expression "respected judges" is used in the Report itself of which Mr Maletzky is the co-author.

[14] When one compares the press release with the ruling made by PARKER, J, the contents of the former are in accordance with the latter. Considering the stated motivation for the press release, namely to inform the public in accordance with previous undertakings, and the fact that the press release accurately relates and reflects the common cause events on 29 November 2007 and the ruling itself, I have no hesitation in finding that the press release is not contemptuous. It does not comment in any way on pending proceedings in a manner which has the tendency to prejudice the outcome of the proceedings.

[15] The Registrar filed a counter-application to which he attached a full copy of the Report and claimed an order in the following terms:

> "1 That second applicant/respondent is in contempt of court by relying on and association himself with the allegations in the document entitled *"THE CRISIS OF THE NAMIBIAN JUDICIARY"* and is called upon to show cause why he should not be committed, or punished alternatively.
>
> 2 In the alternative to prayer 1, that the matter is referred to the Prosecutor General to investigate charges of contempt of court, or alternative or additional charges against second applicant/respondent based on his reliance and association with the document entitled *"THE CRISIS OF THE NAMIBIAN JUDICIARY".*
>
> 3 That second applicant/respondent is ordered to pay the costs of this application on an attorney and client scale."

[16] I have difficulty with the *locus standi* of the Registrar to move for the relief in prayer 1 in a matter in which he has no interest. It is not a case of a litigant complaining of a court order in his favour being disobeyed or a contempt being perpetrated by means of which he is prejudiced. It seems to me that the Registrar is acting in the role of an informer to the Court (cf *Cape Times Ltd v Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N); *Makiwane v Die Afrikaanse Pers Bpk* 1957 (2) SA 560 (W); *Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 (4) SA 618

(A); *Naude v Searle* 1970 (1) SA 388 (O)). When I put my difficulty to Mr *Philander*, I was informed that the Registrar does not persist with the relief claimed in prayer 1.

[17] The further problem that I have is that, while I intend referring the matter of the Report to the Prosecutor General as the contents of the Report seem to me to be contemptuous, I am not able to award the Registrar his costs. The reason is that the Report has already been brought to the Court's notice by Mr Maletzky himself.

[18] In the result I make the following order:

1. The application by second respondent is dismissed with costs.

2. The Registrar of this Court is ordered to place (i) a copy of the Report entitled "THE CRISIS OF THE NAMIBIAN JUDICIARY" prepared by the Workers Advice Centre; (ii) a copy of the application for recusal of Parker, J and the record of proceedings in that application; and (iii) a copy of this judgment before the Prosecutor-General to consider the institution of criminal charges against the authors and distributors of the Report.

3. There shall be no order as to costs in respect of the counter-application.

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VAN NIEKERK, J

APPEARANCE FOR THE PARTIES:

FOR APPLICANT: Mr R Philander

Instructed by LorentzAngula Inc

FOR SECOND RESPONDENT: In person