IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 2980/10

In the matter between:

MR PIERRE GERBER Applicant

and

ADVOCATE DIRK UIJS SC Respondent

JUDGMENT DELIVERED ON 3 MARCH 2010

OLIVIER AJ:

1. This is an application in which Mr Gerber seeks to invoke the provisions of section 38 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 (the Constitution). Section 38 of the Constitution stipulates that anyone listed in this section (which would include the Applicant) has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights.

2. The relief sought by the Applicant is *"to compel Respondent to give me written reasons ... why he says my proposed application has no merit 'suing DPP and Another'"*, and a declaratory order is also sought *"on whether my proposed application has grounds in law and merit"*.

3. The application is brought in reliance of section 33 of the Constitution. In his founding affidavit the Applicant concluded as follows:

> *"I respectfully submit that the Constitution is clear, that I have a right to administrative action that is lawful, reasonable and procedurally fair. The Respondent did not apply his mind in not appointing an advocate for me .... as required by section 33(1) of the Bill of Rights.*
>
> *Section 33(2) clearly states I must be given written reasons, when adversely affected by a decision. Clearly as a lay person I am affected. Thus Respondent cannot refuse to give me written reasons for not appointing an advocate.*
>
> *In these premises I respectfully submit my right to administrative action has been infringed and my right to administrative justice is threatened."*

4. The Applicant has brought the application without following the usual long form of notice of motion as it would appear he contends the application is urgent as the *"matter prescribes on the 27th April 2010".* No other grounds for urgency or non-service have been set out in the application.

5. Mr Gerber had apparently moved an earlier application on 1 February 2010 in this Court, which application was removed from the roll as the Court had then apparently suggested that Mr Gerber must first get reasons for the decision through the mechanism provided for in the Promotion of Administrative Justice Act, Act No. 3 of 2000. I have not had the benefit of reading that application or the ruling made by the Court.

6. The Applicant appeared in person – and I note in passing that his application was handwritten and difficult to read – whilst the Respondent did not appear at all. There has been no service of the application on the Respondent, and the only explanation offered for the non-service is that the secretary of the Respondent (Ms Annette van Wyk) had refused to accept service. The function fulfilled by Ms van Wyk is set out below.

7. I glean from the application that the Applicant was referred by the Registrar of the High Court to Messrs Van Tonders, Attorneys. The Registrar did so acting in terms of Uniform Rule of Court 40(1)(a).

8. Rule 40(1) of the Uniform Rules of Court provides as follows:

> *(a) A person who desires to bring or defend proceedings informa pauperis, may apply to the Registrar who, if it appears to him that he is a person such as is contemplated by paragraph (a) of Sub-rule (2), shall refer him to an attorney and at the same time inform the local society of advocates accordingly.*
>
> *(b) Such attorney shall thereupon enquire into such persons' means and the merits of his cause and upon being satisfied that the matter is one in which he may properly act informa pauperis, he shall request the said society to nominate an advocate who is willing and able to act, and upon being so nominated such advocate shall act therein.*
>
> (emphasis added)

9. Mr van Tonder in turn, on 12 January 2010, under cover of a letter addressed to the Cape Bar Council, communicated with the Cape Bar

Council. In his letter, handed up to me by the Applicant, Mr van Tonder stated *inter alia* that:

> *"The background to the matter is that Mr Gerber was dismissed from his employment by Honey Attorneys, where he was employed as a messenger delivering legal documents, for alleged insubordination in that he did not carry out various instructions. Resulting from this insubordination Mr Gerber was subjected to two disciplinary hearings and was dismissed following these hearings. He then approached the CCMA which found that his dismissal was fair. Next he took the matter on review to the Labour Court on account thereof that the Commissioner was prejudiced in that he kept switching off the recordings and allegedly did not apply his mind to the evidence given to Mr Gerber.*
>
> *Mr Gerber's application for a review of the matter was dismissed and he subsequently took the matter on appeal to the Labour Appeal Court. The appeal was also dismissed.*
>
> *What Mr Gerber now wants is to bring civil proceedings against the Director of Public Prosecutions (DPP) for the latter's decision not to prosecute his former employer and two clerks of the Labour Court in Cape Town on a criminal charge laid by him against them for obstructing the course of justice in that his former employer 'disingenuously' twisted the facts concerning certain submissions made in the CCMA review and submissions made in his papers to the review judge and the said clerks refused to render assistance to enable him to bring the review matter. He further states that his former employer also lied in his papers saying that Mr Gerber had not filed his reply to the Respondent's answering affidavit which subsequently turned out to be untrue. He says the basis for his proposed civil proceedings against the Director of Public*

Prosecutions is that the latter did not apply his mind to the matter. The ground for this allegation, if the writer understands Mr Gerber correctly, is that the DPP '... failed to act in the interest of justice by turning a blind eye to bad investigation ...'. A copy of an 'affidavit letter' prepared by Mr Gerber is enclosed for your information.[1]"

"The DPP is not primarily concerned with the investigation and has an unfettered discretion in his decision to prosecute or not.

Mr Gerber had apparently also attempted to prosecute privately but this did also not materialise.

The writer is of the opinion that on the available information Mr Gerber has no prospects of success in his proposed application. The writer spent almost two hours on consultation and is not prepared to embark on an extensive investigation into the Court papers and other documents in order to dig up some far-fetched grounds for Mr Gerber's proposed application. Accordingly it is suggested that if this submission is not properly motivated whoever may be concerned is at liberty to call for a second opinion."

10. The letter reflects that Mr van Tonder had complied with the obligation imposed upon him to enquire into the merits of the Applicant's cause.

11. Mr Gerber was informed by the offices of the Chief Registrar that this letter was faxed to the Registrar's office from *"Advocates 9th Floor"*. Though not stated in the application I take note of the fact that Adv Uijs SC keeps chambers on the 9th Floor of Huguenot Chambers and that he is the

[1] I was not furnished with a copy thereof.

chairman of the Pro Bono IFP (In Forma Pauperis) and Legal Aid Committee, a sub-committee of the Cape Bar Council.

12. I have obtained a copy of the "*Guidelines in relation to the Appointment of Counsel in Pro Bono and IFP matters*" ("the Guidelines") from the Cape Bar Council. The relevant provisions are as follows

> *5. In terms of Rule 40(1) applications for IFP assistance are made to the Registrar of the High Court. If it appears to the Registrar that the person qualifies for IFP assistance, the Registrar refers that person to an attorney and at the same time, informs the Cape Bar of the referral. Presently, this referral is directed to Adv. Dirk Uijs SC's secretary, Annette van Wyk.*
>
> *6. Upon the attorney satisfying himself that the matter is one in which he may properly act in forma pauperis he requests the Cape Bar, represented by Ms. Van Wyk, to nominate an advocate to act IFP,*
>
> *7. The matter is then conducted in accordance with Rule 40."*

13. The Applicant's complaints set out in his affidavit are directed against the decision made by Mr van Tonder. He suggests that Mr van Tonder was acting in bad faith in his letter to the Bar Council dealing with the background and merits of Mr Gerber's proposed application. He points out that the letter does not disclose that:

(a) he was not allowed to cross-examine witnesses *"properly"* in the proceedings before the CCMA;

(b) he was never informed of the hearing before the Labour Appeal Court *("The order was not on special paper that cannot be copied, no indication before which judge this matter was heard, no court seal on order')*;

(c) He suggests that the statement that the DPP has an unfettered discretion is incorrect as the discretion *"is relative to the DPP decision being informed, unbiased, without fear or favour and fair".*

14. In this regard the Applicant suggests that there was insufficient evidence and that the investigating officer was to have gathered further evidence.

15. In his affidavit the Applicant points out that his disciplinary hearing took place in March 2006. He also complains about the wrong advice given to him by one Erik (a security guard), helping the clerks (at the CCMA) with administrative duties.

16. Accordingly, he suggests that any decision (by the Director of Public Prosecutions) in these circumstances would be uninformed, biased and unfair. The complaint then concludes, and now turning to the Respondent, by stating that:

> *"Adv Uijs's decision not to appoint an advocate for me is thus also made in bad faith. This because of the way instructing attorney formulated his opinion and my affidavit letter and letter setting out criminal conduct of accused and grounds for civil action.*

Also Adv Uijs refused to give me written reasons for his decision not to appoint an advocate, not to give reasons for his refusal to give reasons and refusing to accept any servicings from me. This via his secretary, shows a vested interest why Adv Uijs made a bad faith decision not to appoint me an advocate."

17. In their work, Erasmus, Superior Court Practice, Farlam *et al* comments on Rule 40 under the rubric *" the merits of his cause"* that *"it is not part of the attorney's function at this stage to investigate the opposite party's case or to consider where the balance of probabilities lies; he must satisfy himself from the ex parte statement of the applicant with such confirmatory evidence as the latter can conveniently produce and with such evidence as the opposite party may voluntarily put before him that the applicant has prima facie a good cause for the action or for the defence".*

18. It is clear, upon a proper construction of the provisions of Rule 40(1)(b) that the obligation rests upon the attorney to enquire into the merits of the applicant's cause and, only if being satisfied thereof, to request of the advocates' society to nominate an advocate who is willing and able to act. This is mirrored in paragraph 6 of the Guidelines.

19. It is also clear from the letter of 12 January 2010 that Mr van Tonder had performed his obligations in terms of Uniform Rule of Court 40(1)(b) – and, moreover, he had fully spelt out and given reasons for his decision. He directed his letter to the Cape Bar Council who I assume passed it on to Ms van Wyk. She clearly was not expected to nominate an advocate, as

contemplated in paragraph 6 of the Guidelines, as Mr van Tonder had made it clear that there were, in his view, no prospects of success.

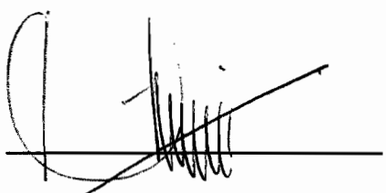
20. All of these steps taken were taken in accordance with the provisions of Uniform Rule of Court 40(1) and the Guidelines.

21. It is not apparent from what the Applicant had put up that Mr Uijs had made any decision with regard to the appointment of an *informa pauperis* advocate to represent the Applicant. It was neither his function to do so, nor was Ms van Wyk obliged to do so in view of Mr van Tonder's letter. Mr van Tonder had already made that decision when he performed his obligations in terms of Uniform Rule of Court 40(1)(b). In the ordinary course any counsel appointed would have to be instructed by attorneys – it is abundantly clear that in this case there would have been no instructing attorney (any possible exception to this rule does not arise in the instant case). Neither Mr Uijs nor Ms van Wyk could nominate an advocate to represent the Applicant without there being an instructing attorney.

22. In summary, it does not appear from the application that Mr Uijs had made any decision and, as set out above, Ms van Wyk was not required to make any. Accordingly, there being no decision, the obligation to give reasons could not arise. Mr van Tonder had already given reasons and they are set out in writing in his letter of 12 January 2010. The Applicant did not seek to impugn the decision made by Mr van Tonder – although it is vehemently criticised in the application.

23. Mr van Tonder had spent two hours in consultation with the Applicant and had prepared a comprehensive letter explaining why there were no prospects of success. Ms van Wyk received a copy of that letter. Neither she nor Mr Uijs were thereafter required to nominate a counsel to act *in forma pauperis* on behalf of the Applicant. In the premises the Applicant has made out no case that any of his rights to lawful, reasonable and procedurally fair administrative action had been infringed.

24. In the premises the application is dismissed with costs.



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