Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 7630/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ABSA BANK LIMITED N.O. in its capacity as the Trustee for the FOUNTAINHEAD PROPERTY TRUST **Plaintiff**

and

BARINOR NEW BUSINESS VENTURE (PTY) LTD **Respondent**

JUDGMENT DELIVERED THIS DAY OF 17 JUNE 2011

BINNS-WARD, J:

[1] The plaintiff has applied for summary judgment against the defendant. The defendant has delivered an affidavit made in opposition to the application, which raises a great number of points. The conclusion I have reached makes it necessary to determine only one of them.

[2] The point that requires consideration is the contention by the defendant that the combined summons in terms of which the action was instituted is

fatally defective for want of compliance with uniform rule 18(1). Uniform rule 18(1) prescribes that:

> A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party.

[3] It is common ground that the combined summons in the current matter was signed by an attorney with the right of appearance in terms of the Right of Appearance in Courts Act 62 of 1995 ('the Act'), but who has not been enrolled by the registrar of this court, in terms of s 20(3) of the Attorneys Act 53 of 1979, as an attorney thereby entitled, in terms of s 20(4) of that Act, '*to practise ...and have all the rights and privileges and be subject to all the obligations which he would have had and to which he would have been subject had he been admitted and enrolled by* [this] *court*'. The defendant's contention that the summons is consequently fatally irregular is supported by the judgment of Tshabalala JP in *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services v Pillay and Others* 2007 (3) SA 89 (D).

[4] The plaintiff's counsel submitted, however, that *Zeda*'s case had been wrongly decided. Counsel founded his argument in this connection on what he submitted was the proper construction of the Act; and, in particular, the effect of s 4(4) thereof. Section 4(4) provides that any attorney who has been granted right of appearance in terms of the statute '*shall be entitled to appear in any court throughout the Republic*'. Counsel argued, correctly in my judgment, that the effect of s 4(4) - which was inserted into the Act in terms of

s 7 of the Judicial Matters Amendment Act 22 of 2005 - was to override the judgment of Lombard J (Pretorius AJ concurring) in *S v Sewnandam* 1999 (2) SA 1087 (O); [1999] 2 All SA 397, in which it was held that an attorney could exercise a right of appearance in the High Court in terms of the Act only if he or she had been enrolled by the registrar of *that* court as an attorney with the right of appearance. Thus it is now clear that an attorney to whom a certificate in terms of s 4(2) of the Act has been issued by the registrar of any one of the High Courts may exercise the consequently bestowed right of appearance in any of the superior courts of the Republic.

[5] *Sewnandam*, however, was a case in which an attorney sought to exercise a right of appearance before a High Court at which he had not been enrolled in terms of s 20(3) of the Attorneys Act. This case, by contrast, like *Zeda*, does not concern an appearance before the court by an attorney who is enrolled at a different court; it concerns the discharge by such attorney in proceedings before this court of a different function - one that had routinely been discharged by attorneys, *qua* attorney, even before they were ever given the opportunity to obtain the right of appearance which had, during most of the twentieth century, been the almost exclusive preserve of the advocates' profession.[1] Tshabalala JP was cognisant of the insertion, post *Sewnandam*, of s 4(4) into the Act, but was not persuaded that the provision afforded an

[1] A notable exception was the dispensation in the then Natal province which until 1937 permitted practitioners there to be contemporaneously enrolled on both the roll of advocates and the roll of attorneys. Persons thus enrolled before 1937 were permitted by subsequent legislation to continue in dual practice after the abolition of the dispensation. See the Natal Advocates and Attorneys Preservation of Righths Act 27 of 1939.

attorney the authority to sign pleadings in proceedings in any court other than one at which he or she was enrolled in terms of the Attorneys Act.[2]

[6] The argument by the plaintiff's counsel that *Zeda* was wrongly decided requires a close consideration of the import of the Act and of its interrelationship with the Attorneys Act. The long title of the Act indicates that its objects are to '*regulate by Act of Parliament the right of advocates and attorneys to appear in courts in the Republic, and to extend the existing right of attorneys so to appear; and to provide for matters connected therewith*'. The Act thus expressly maintains the established dichotomy in the legal profession between advocates and attorneys. Cf. *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA), at para 1.

[7] Section 2 of the Act confirms the pre-existing right of any advocate to appear in any court in the Republic. Section 3 of the Act provides in effect that only an attorney who has been issued with a certificate in terms of s 4(2) of the Act shall have the right of appearance in '*the Supreme Court*' and in the Constitutional Court. The term '*Supreme Court*' is specially defined in s 1 of the Act to mean '*the Supreme Court of the Republic of South Africa contemplated in section 101 of the Constitution*'. The Constitution in place when the Act was enacted was the Interim Constitution of 1993 (the Constitution of the Republic of South Africa Act 200 of 1993). Section 101(1) of the Interim Constitution provided: '*There shall....be a Supreme Court of South Africa, which shall consist of an Appellate Division and such provincial and local divisions, and with such areas of jurisdiction, as may be prescribed*

[2] See *Zeda* at para 22-24.

by law'. The Appellate Division and the provincial and local divisions there referred to were the constitutional predecessors of the currently established Supreme Court of Appeal and the various High Courts, respectively.

[8] Section 4 of the Act prescribes the qualifications required of an attorney who wishes to obtain right of appearance in the superior court and the procedure he or she must follow to obtain it. An applicant who satisfies the prescribed requirements may apply to the registrar for a certificate of right of appearance. '*Registrar*' is not a term defined in the Act, but in context it is clear that it denotes any registrar of a provincial division of the '*Supreme Court*', as defined (see s 3(2) of the Act). Thus, in the context of the current structure of the superior courts, the term '*registrar*' means the registrar of a High Court.

[9] In terms of s 4(2) of the Act, if the registrar is satisfied that the application complies with the provisions of the Act, he or she shall issue a certificate to the effect that the applicant has the right of appearance in the '*Supreme Court*', as defined. By virtue of the provisions of s 3(3) of the Act, the holder of such a certificate *ipso facto* also obtains the right to appear in the Constitutional Court.

[10] Section 4(3) of the Act provides as follows:

> Section 21 of the Attorneys Act, 1979 (Act No. 53 of 1979), which requires rolls of attorneys to be kept, shall apply *mutatis mutandis* in respect of attorneys who have been granted the right of appearance in the Supreme Court.

This entails that the registrar who issues an attorney with a certificate in terms of s 4(2) is required to enter the attorney's name on an alphabetical register to be kept for the purpose, and to record against the name so entered the date on which the certificate was thus issued to that person.

The effect of s 4(3) is not, however, as considered by Tshabala JP[3], following in that respect the reasoning of Lombard J in *Sewnandam*, at 1093H-J, that an attorney wishing to exercise right of appearance in the superior courts must obtain the enrolment of his or her name by the registrar of each and every court in which he or she wishes to exercise the right to appear. Section 4(4) of the Act, discussed above,[4] makes that clear. But in my view that was the import of the Act from its commencement. I consider that the insertion of s 4(4) was merely expositionary. The purpose of expositionary legislation is not to alter the effect of an existing statutory provision, but merely to express it more clearly and to put its meaning and effect beyond debate.[5] The construction given to s 4(3) by Tshabalala JP and Lombard J in *Zeda* and *Sewnandam*, respectively, failed, with respect, to sufficiently acknowledge the contextual setting of the provision. It was a construction that gave rise to an absurdity, which it could never have been the legislature's intention to create. On their construction, an attorney, having been issued with a certificate and enrolled on the register kept at a single High Court, could thereafter, without further formality, exercise right of appearance before the Supreme Court

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[3] See *Zeda*, at para 18-20.
[4] At para [3].
[5] Cf. e.g. *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at para 66; *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) at 493A-F.

Appeal and the Constitutional Court, being higher tier courts, but could not do so before a different High Court, being an equivalent tier court, without going through the procedure of obtaining enrolment there.

[11] The very purpose of the certificate issued in terms of s 4(2) is, and always was, in my view, to afford sufficient evidence of the holder's right to appear in any superior court in the country. The register required to be maintained at the office of the registrar who issues the certificate is evidently intended to provide a repository in which the authenticity of the certificate could be verified, if ever the need were to arise.

[12] However, there is nothing in the Act that suggests a legislative intention to derogate from the general provisions of the Attorneys Act, or, in particular, from those of ss 20 and 21. Section 20(1) of the Attorneys Act provides:

> Any person admitted and enrolled as an attorney, or a notary or conveyancer under this Act may in the manner prescribed by subsection (2), apply to the registrar of any court other than the court by which he was so admitted and enrolled to have his name placed on the roll of attorneys or of notaries or of conveyancers, as the case may be, of the court for which such registrar has been appointed.

One of the requirements that an applicant for enrolment at the seat of a different court from his or her original enrolment as an attorney in terms of s 20 of the Attorneys Act must satisfy is that the fees prescribed in terms of s 80(h) of that Act have been paid. Could it be that the legislature intended that by obtaining a certificate of right of appearance in terms of Act 62 of 1995, an attorney could effectively circumvent the obligation to pay the prescribed fees ordinarily attendant on the ability to practise in a different

jurisdiction from that in which he or she was originally enrolled? I hardly think so. This is but one of the factors that confirms the narrow ambit of the Right of Appearance in Courts Act. The Act is directed at the regulation of only one aspect of the work and practices of the attorneys' profession: appearances in the superior courts and matters directly or closely connected therewith. The Act does replace or amend the Attorneys Act; the two statutes fall to be read alongside each other. That much is confirmed, for example, by the express references in the Act to the Attorneys Act. The Act makes an express reference to s 21 of the Attorneys Act. Section 21 of the Attorneys Act, in turn, expressly refers to s 20. The legislature cannot have overlooked the import of s 20 of the Attorneys Act when it adopted the Right of Appearance Act.

[13] Section 3(4) of the Act, on which the plaintiff's counsel also strongly relied, does not derogate from this conclusion. Section 3(4) provides:

> An attorney who has been granted the right of appearance in the Supreme Court shall also be entitled to discharge the other functions of an advocate in any proceedings in the Supreme Court

In respect of the signature of pleadings, an attorney with right of appearance could therefore sign the pleading *qua* advocate and *qua* attorney. Prior to the substitution of rule 18(1) of the uniform rules[6] that gave rise to the oddity that attorneys exercising the rights conferred by s 3(4) of the Act, had to sign the pleading twice; once in discharge of the prescribed function of the advocate and again in discharge of the prescribed function of the attorney – see

[6] In terms of GN R873 of 31 May 1996.

Fortune v Fortune 1996 (2) SA 550 (C); [1996] 2 All SA 128. Other functions of an advocate which an attorney with right of appearance under the Act might discharge would include, for example, the signature, *qua* advocate, of a statement of case in terms of rule 33; conferring, *qua* advocate, with a judge in chambers in terms of rule 39(23); being appointed to act *qua* advocate *in forma pauperis*, and, *qua* advocate, signing a certificate *probabilis causa*, in terms of rule 40.

[14] The signature of pleadings by a legal practitioner is a function quite discrete from the appearance in court. It precedes the appearance and it is ordinarily done not in court, but in an advocate's chambers or an attorney's office. It was a function undertaken by attorneys, *qua* attorney - as distinct from *qua* advocate - long before that branch of the profession obtained a statutory basis to exercise right of appearance in the superior courts. It is a function which attorneys who do not possess a certificate of right of appearance can, and do, competently discharge.

[15] Rule 18(1) of the uniform rules, quoted above,[7] makes provision that a combined summons must be signed by an advocate and attorney, alternatively, in the case of an attorney with the right of appearance in the Supreme Court, only by such attorney. At first blush that might be read as affording any attorney holding a certificate issued in terms of s 4(2) of the Act the authority to sign pleadings in any court in which he or she has the right of appearance. That is not so. Apart from the fact that the rules could not in law override the effect of the relevant Acts, the term '*attorney*' is in any event is

[7] At para [2].

specially defined in rule 1 to mean '*an attorney admitted, enrolled and entitled to practise as such in the division concerned*'. An attorney admitted, enrolled and entitled to practise as such in the Gauteng High Courts, for example, has the right to appear in the Western Cape High Court and discharge the other functions of an advocate here if he or she has been issued with a certificate of right of appearance by a registrar of the Gauteng High Courts, but he or she may not otherwise practise as an attorney within the jurisdiction of the Western Cape High Court if he or she is not enrolled by the registrar of the Cape Court in terms of s 20 of the Attorneys Act.

[16] In the result I have concluded that the conclusion reached by the learned judge-president in *Zeda* was correct. The point *in limine* must be upheld and the application dismissed. I consider the result to be unfortunate, but one to which I was impelled by the relevant legislative provisions. It seems to me to be the product of outdated formalism in the regulation of the attorneys' profession in the modern unitary state. The issue is perhaps one which might be addressed constructively in the reforms contemplated by the Legal Practice Bill that has been under discussion now for some years.

[17] The application for summary judgment is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court