REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 627/2010

In the matter:

AUGUST MALETZKY **PLAINTIFF/RESPONDENT**

and

ALBERTUS MEMBER GASEB **FIRST DEFENDANT/APPLICANT**

WILFRIED MALETZKY **SECOND DEFENDANT**

Neutral Citation: *Maletzky v Gaseb* (I 627-2010) [2013] NAHCMD 296 (21 October 2013)

Coram: **VAN NIEKERK J**

Heard: 28 September 2010

Delivered: 21 October 2013

Flynote: **Practice** – Rule 30 application - Combined summons signed by plaintiff as legal practitioner for the plaintiff while not an admitted legal practitioner – Such combined summons held to be irregular – Plaintiff

offering no explanation – No application for condonation or leave to amend – Combined summons set aside

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ORDER

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1. The plaintiff's point *in limine* is dismissed.
2. The first defendant's rule 30 application is upheld.
3. The combined summons is set aside.
4. The plaintiff shall pay the first defendant's costs.
5. Unless and until the plaintiff is ever lawfully admitted as a legal practitioner, he shall in future refrain from using the words 'legal practitioner for', or any similar words, in conjunction with his name, whether or not accompanied by the solidus punctuation mark (i.e. the " / " mark), on any process issued under authority of the Registrar of this Court or in any document filed in this Court.
6. A copy of this judgment and the contents of the court file must be provided to the Prosecutor-General who is requested to consider whether any prosecution should be instituted.
7. A copy of this judgment must be provided to the Director of the Law Society of Namibia.

JUDGMENT

VAN NIEKERK, J:

[1] The applicant in this matter is the first defendant in an action instituted by the respondent as plaintiff against him and the second defendant, who does not defend

the action. I shall refer to the applicant as the first defendant and to the respondent as the plaintiff. Before me is a rule 30 application in which the first defendant gave notice of his intention to apply that the plaintiff's combined summons be set aside as an irregularity or be declared a nullity, and therefore void, on the ground that 'when the plaintiff, in person, signed the Combined Summons as a legal practitioner, he contravened Section 21(1)(b) of the Legal Practitioners Act, 15 of 1995.'

[2] The plaintiff opposes the application and raised a point *in limine.* It is to the effect that any decision on a rule 30 application would be premature and ill-advised as it would pre-empt the outcome of a Full Bench decision on a point of law namely, whether prior notice should be given in terms of rule 30(5), which point was set down for argument on 29 November 2009. However, the plaintiff did not complain that he had not been given notice in terms of section 30(5). The view I held at the time was that all rule 30 applications could not, as a general practice, be kept in abeyance pending the outcome of the Full Bench decision. Just as life, litigation goes on. Unless there is good and cogent reason in a particular case to postpone or stay a hearing to await the decision on a point of law by another court, each court must do the best it can to decide the matter before it. In this case there was no such reason. Therefore, and in the absence of a complaint about the lack of notice, the point *in limine* must be dismissed. In any event, the Full Bench decision became available in the meantime on 24 February 2011 and it was decided that no notice in terms of rule 30(5) is required (See *Goseb and others v Minister of Regional and Local Government and Housing and others* 2001 (1) NR 224 (HC)).

[3] I now turn to the merits of the rule 30 application. The combined summons in this matter is dated 5 March 2010 and the following appears under a signature, which, it is common cause, is that of the plaintiff:

> '**August Maletzky**
>
> LEGAL PRACTITIONER FOR PLAINTIFF
>
> CONTINENTAL BUILDING, 2ND FLOOR,
>
> SUITE 206

INDEPENDENCE AVENUE

WINDHOEK

REF: AM./01/2010'.

[3] The same particulars are recorded under the plaintiff's signature on the particulars of claim, except that the words 'LEGAL PRACTITIONER FOR PLAINTIFF' and the reference number are omitted.

[4] In affidavits filed in support of the application the allegation is made that the plaintiff is not a legal practitioner. Indeed, this is common cause. The allegation is further made by Mr Stolze of the first defendant's firm of legal practitioners of record, that the plaintiff signed the combined summons in contravention of section 21 of Act 15 of 1995.

[5] In a further supporting affidavit the first defendant states that the combined summons and particulars of claim were served on him on 15 March 2010. As a result of the information appearing underneath the plaintiff's signature on the combined summons he was under the impression that the plaintiff was a lawfully admitted legal practitioner. He only later learned from his legal practitioners of record that the plaintiff was in fact not an admitted legal practitioner.

[6] In his opposing affidavit the plaintiff undertakes to 'put into true and proper perspective circumstances that led to me issuing the irksome Combined Summons on 5 March 2010.' However, the promised explanation is never given. He merely denies that it is only a legal practitioner that is allowed to sign a combined summons and he further denies that he sought to misrepresent to the prejudice of the opposing party his 'status as a legal practitioner'. Apart from a vague reference to the alleged fact that Act 15 of 1995 is 'up for review' by a Full Bench of this Court, he merely denies any violation of the Act. He states that he signed the combined summons in his personal capacity in order to avoid the costs that he would otherwise have had to incur by instructing a lawyer to appear for him. In response to the first defendant's allegation that the plaintiff well knew that he may sign pleadings in his personal capacity in this matter as he is the plaintiff and that this is evident from the fact that

he signed the summons as legal practitioner while he signed the particulars of claim in his personal capacity, the plaintiff states in paragraph 14 of his affidavit:

> 'Generally, the Plaintiff/Respondent respectfully submits that the first schedule of the rules of this Honourable Court include forms of various legal processes to be instituted. It is absurd to conclude that these forms must at all times be altered to accommodate the slightest variation.
>
> Equally so is to allege that Plaintiff mislead himself by adding the irksome phrase "Legal Practitioner for Plaintiff ["] below his name. It is denied that any violation as contemplated by The Legal Practitioners Act 15 of 1995 occurred as a result of typing Plaintiff's full names above the words "Legal Practitioner for Plaintiff." '

[7] At this stage it is convenient to deal with the plaintiff's reliance on the forms prescribed by the rules of this Court. Firstly, Form 10 setting out the contents of a combined summons does not provide for the plaintiff's signature or that of his lawyer at the foot of the body of the summons itself. It only makes provision for the particulars of claim which is contained in an annexure to the combined summons to be signed by the plaintiff's legal practitioner. It therefore has no use to blame the form. What it means is that the plaintiff must take responsibility for the fact that he or someone acting on his instructions or under his control inserted the 'irksome' particulars in that particular place on the summons.

[8] Secondly, while Form 10 as published in the Government Gazette does contemplate that the signature of the plaintiff's lawyer be affixed on the particulars of claim, rule 17(3) clearly states that 'every summons shall be signed by the counsel acting for the plaintiff .....or, if no counsel is acting, it shall be signed by the plaintiff....'. The plaintiff is well aware of this rule.

[9] Thirdly, it is by no means the 'slightest variation' to insert or to retain the words 'legal practitioner for plaintiff' on a combined summons used by the plaintiff. The inclusion of these words *prima facie* completely changes the capacity in which the combined summons is signed. A third party cannot be blamed for believing that the person by the name of August Maletzky is a legal practitioner who is signing the combined summons on behalf of the plaintiff. The plaintiff is no stranger to litigation

in this Court and he knows very well that he has no legitimate business having such words appear with reference to his name on any of his documents used in litigation.

[10] The plaintiff annexed an affidavit by the second defendant in which he states, *inter alia*:

> '2. I have read all the affidavits filed in this action proceeding and confirm that by no strech (sic) of the imagination am I prejudiced by the fact that the plaintiff in this action personally signed the pleadings and pends (sic) his signature above his name stroke the work Legal Practitioner (*sic*).
>
> 3. It must be emphasized that the plaintiff signed the pleadings for himself in person, and I cannot perceive of a more absurd reason that such practice could have caused prejudice to the first defendant.'

[11] While I take note thereof that the second defendant does not consider himself prejudiced, the second part of paragraph 2 is incomprehensible. Furthermore, the second defendant cannot provide evidence about the intention with which the plaintiff signed the summons. Also, his views about any prejudice caused to the first defendant are irrelevant. Paragraph 3 must therefore be ignored.

[12] During argument Mr *Stolze* focused his argument mainly on the provisions of section 21(1)(b) of Act 15 of 1995 which states that a 'person who is not enrolled as a legal practitioner shall not make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such'. He submitted that the plaintiff acted in contravention of this provision and that the irregularity is not condonable.

[13] Counsel referred to the case of *Minister van Wet en Orde v Molaolwa* 1986 (3) SA 900 (NC) in which the applicant applied for the setting aside of the respondent's combined summons as an irregular proceeding, contending that the summons did not comply with rule 17(3) of the Uniform Rules of Court as it had been signed by an attorney who was not admitted as an attorney of the Northern Cape Division, having been admitted as such in the Transvaal Provincial Division. In that case the

applicable rules defined an attorney as 'an attorney admitted, enrolled and entitled to practise as such in the division concerned.' The court held (at p.902H) that in the circumstances the particular attorney was not entitled to sign the combined summons and that it was an irregular proceeding. The court then proceeded to consider whether the irregularity is condonable and if so, whether it should be condoned. It found that the irregularity did not concern the essence of the action and that it was indeed condonable (at p.905B) and exercised its discretion to condone it. The circumstances which were considered in the exercise of the court's discretion included the following: (i) the attorney concerned was an attorney of the Supreme Court of South Africa and admitted, enrolled and practising in the Transvaal Provincial Provision; (ii) she was acting on behalf of the plaintiff and her name was one of three attorneys whose names appeared in the plaintiff's power of attorney; (iii) the address of a local firm of attorneys was indicated in the summons, which firm acted as local correspondents for the attorney concerned (and the name of an attorney practising in the local firm was also contained in the power of attorney); (iv) there was no allegation or submission that there was any other defect or irregularity in the proceedings; (v) if the summons were set aside there was a possibility of causing serious prejudice to the plaintiff (who was not to blame for the irregularity) as the application for condonation alluded to a possible prescription of the claim should a new action be instituted.

[14] Mr *Stolze* submitted that the *Molaolwa* case is distinguishable from the present as in that case the irregularity concerned the breach of a rule of court, whereas in the present case it is a statutory provision which is being contravened. Moreover, such a contravention constitutes a criminal offence under section 21(2) of Act 15 of 1995 which is punishable by 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. As such, he submitted, the summons is a nullity which cannot be condoned.

[15] The plaintiff, who appeared in person, contented himself to pooh-hoo the application as trivial, petty and absurd and concerned with a mere technicality. He submitted that the purpose of section 21 of Act 15 of 1995 was to prohibit or prevent (i) the procurement by persons not admitted as legal practitioners of certain work

against payment from members of the public; and (ii) the canvassing of business against payment from a third party by persons under the guise of being a duly qualified legal practitioners. He submitted further that, as he was entitled to sign the summons as he was instituting the action in person, he was certainly not misleading himself. I think the plaintiff misconstrues the overall purpose of section 21. It is to protect the public. In the present case it is not the plaintiff that needs protection, it is the first defendant and any other third party who may be mislead into thinking that he or she is dealing with an admitted legal practitioner who is also an officer of the court and from whom he may expect integrity, ethical behaviour and a certain standard of professional conduct. The Act is very strict: even if no person acts to his detriment as a result of being misled, the mere fact that there is a misrepresentation or the false implication of being admitted, or a tendency to induce a mistaken belief, is an offence. In this case it was not only the first defendant who was misled. So was the deputy-sheriff who served the combined summons, because his return of service, in response to the information on the combined summons, states at the foot thereof:

> 'ATTORNEY: AUGUST MALETZKY LEGAL PRACTITIONER
> CONTINENTAL BUILDING, 2ND FLOOR, SUITE 206,
> INDEPENDENCE AVENUE
> WINDHOEK'

[16] While I agree in general with Mr Stolze's submission that *Molaolwa's* case is distinguishable, I prefer for purposes of the instant case to assume, without deciding, that the combined summons is not a nullity. It certainly is irregular. As I have said, the plaintiff has not properly explained how it came about that the combined summons was issued in that form, nor has he prayed for condonation for the irregularity or moved for leave to amend. In the circumstances I agree with counsel for the first defendant that the combined summons should be set aside.

[17] There is a further matter with which I should deal. Both parties filed heads of argument. The plaintiff's heads are signed by himself above the following words:

'**PLAINTIFF: AUGUST MALETZKY / LEGAL PRATIONER** *(sic)* **FOR PLAINTIFF**
AFRICAN LABOUR & HUMAN RIGHTS CENTRE
INDEPENDENCE AVENUE, CONTINENTAL BUILDING, 2ND FLOOR, SUITE 206, WINDHOEK, NAMIBIA'.

[18] Mr *Stolze* points out in his heads of argument that the notice to oppose the rule 30 application is signed by the plaintiff, but on this occasion the following appears below the signature:

'**AUGUST MALETZKY/LEGAL PRACTITIONER FOR PLAINTIFF**
C/O African Labour & Human Rights Centre,
Independence Avenue, Continental Building,
2nd Floor, Suite 206, Windhoek, Namibia.'

[19] Counsel takes issue with this as well, but states that a further rule 30 application was not launched in regard to this notice, as the present application should, in his view, take care of the matter as a whole.

[20] In reply hereto the plaintiff states that the ' / ' sign was used indicating the meaning 'or' or 'alternatively' and implied that there was nothing wrong by indicating that the documents were assigned by the plaintiff or his legal practitioner. The punctuation mark used is called a 'solidus' and according to the *Collins Concise English Dictionary* (3rd ed) it is also called a 'diagonal, separatrix, shilling mark, slash, stroke or virgule' and it is a 'short oblique stroke used in text to separate items of information, such as days, months and years in dates (*18/7/80*), alternative words (*and/or*), numerator from denominator in fractions (*55/103*)'.

[21] In my view the solidus could, in principle, be understood to convey that the notice of opposition is signed by 'August Maletzky, alternatively the legal practitioner for the plaintiff'. In such a case one would then also expect that the words, 'legal

practitioner for plaintiff' be deleted upon signature by the plaintiff in person. However, the words could also be understood to merely separate two pieces of information, in this case, the name and the capacity of the signatory. Bearing in mind that the plaintiff was at pains to point out in no uncertain terms throughout his affidavit, his heads of argument and his submissions that he had every right and intention to institute the action in person, to take care of his legal interests in person and not to make use of any admitted legal practitioner while also frequently referring to the legal fraternity in generally disparaging terms, one searches in vain for a reason why he made provision, 'in the alternative' for a legal practitioner to sign the document, or, for that matter, the heads of argument, well knowing that no legal practitioner would ever be signing them. This being so, I agree with counsel for the applicant that, in the particular circumstances of this case, the use of the plaintiff's name in conjunction with the words 'legal practitioner for plaintiff' do not appear to have an innocent purpose and could be calculated to convey the impression, or tends to induce the mistaken belief, that the person named August Maletzky is a legal practitioner acting for the plaintiff or that the plaintiff is a legal practitioner.

[22] As I have said before, the plaintiff has brought no application for condonation in regard to the signing of the combined summons. He offered no explanation and no apology. He persists in attempts to justify his conduct with spurious arguments while disparaging the first defendant his counsel and the legal profession in general. He scoffs at the thought that he conveyed the impression that he is a legal practitioner or that a person by the name of August Maletzky is a legal practitioner. I do not think this is mere false bravado or a tactical smokescreen in an attempt to prevent the application from succeeding, followed by an adverse cost order. The plaintiff has done nothing to imbue me with any sense of confidence that he will desist from using the title of legal practitioner as he has done in this case. This Court cannot let him continue to use its process and other documents required to be filed before it under the rules in the course of judicial proceedings to perpetrate what appear to be shenanigans. I therefore intend making a specific order regulating his future conduct. Furthermore, in the absence of an innocent explanation it would appear, as

Mr *Stolze* submitted in somewhat stronger terms than I use here, that the plaintiff may have contravened section 21 of Act 15 of 1995 or have committed fraud.

[23] In the result the flowing order is made:

1. The plaintiff's point *in limine* is dismissed.
2. The first defendant's rule 30 application is upheld.
3. The combined summons is set aside.
4. The plaintiff shall pay the first defendant's costs.
5. Unless and until the plaintiff is ever lawfully admitted as a legal practitioner, he shall in future refrain from using the words 'legal practitioner for', or any similar words, in conjunction with his name, whether or not accompanied by the solidus punctuation mark (i.e. the " / " mark), on any process issued under authority of the Registrar of this Court or in any document filed in this Court.
6. A copy of this judgment and the contents of the court file must be provided to the Prosecutor-General who is requested to consider whether any prosecution should be instituted.
7. A copy of this judgment must be provided to the Director of the Law Society of Namibia.

_____

K van Niekerk

Judge

APPEARANCE:

For the first defendant/applicant: Mr H de V Stolze

of Chris Brandt Attorneys

For the plaintiff/respondent: In person