In the High Court of Swaziland

Civ. Case 1848/93

In the matter between:

P.R. Dunseith	1st Applicant
Nhlanhla W. Nxumalo	2nd Applicant

and

President of the Industrial Court	Respondent

CORAM:	Hull, C.J.
FOR THE APPLICANTS	Mr. Dunseith
FOR ATTORNEY GENERAL	Mr. Wilamaratne

Judgment
(4/2/94)

This is an application for a declaration that the second applicant has a right of audience before the Industrial Court.

The first applicant, Mr. Dunseith, is an attorney who is duly admitted to practise in this court. The second applicant, Mr. Nxumalo, is his articled clerk.

On 29th September 1993, Mr. Nxumalo was instructed by Mr. Dunseith to appear on his behalf in the Industrial Court in order to receive a reply and for the setting of a trial date in Industrial Court Case No. 121/93. The learned President declined to hear him on the ground that, as an articled clerk, he had no right of audience.

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Section 15 of the Industrial Relations Act (No. 4 of 1980) provides that, subject to any rules made by the Chief Justice in consultation with the Attorney General under section 12, any party in proceedings under the Act may be represented before the Industrial Court by a legal practitioner or by any other person authorised by the party. The Industrial Court Rules, 1984, which have been made under section 12, do not affect the classes of persons who may appear before the Court.

The Industrial Relations Act does not contain a definition of the expression "legal practitioner", and the Interpretation Act 1970 (No. 21 of 1970) does not do so either. In ordinary language it means, simply, a person who practises law, but in my view in section 15 it is being used in a particular context, namely in respect of a right of audience before a tribunal which, whether or not it is strictly a court, certainly has many of the attributes of such a body. In those circumstances, I consider that the correct approach to the meaning of the expression is that explained by Lord Esher in Unwin V. Hanson (1871) 2 QB 115 at 119, in the following way:

"If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with referred to a particular trade business, or transaction, and words are used which everyone conversant with that trade, business or transaction knows and understands to have a particular meaning in it then the words are to be construed as having that particular meaning, thought it may differ from the common or ordinary meaning of the words."

In Swaziland the practice of law, and in particular practice as an advocate, are regulated by the Legal Practitioners Act 1964 (No. 15 of 1964). Under section 26 (1), it is an offence for a person to practise or to hold himself out

as a legal practitioner (and more particularly to hold himself out as an advocate), unless he is a legal practitioner within the meaning of that Act. The expression "legal practitioner" is defined for the purposes of that Act, in section 2. It means a person who is duly admitted under the Act (or under the previous law) to practise as an advocate or attorney (or as a notary or conveyancer).

The significant difference between that definition and the ordinary meaning of " legal practitioner", of course, is one of status. To comply with section 26 of the Legal Practitioners Act, a person must be admitted under the Act as a practitioner.

In the context of section 15 of the Industrial Relations Act, the expression "legal practitioner" is in my view to be taken (on the principle to which I have just adverted) to refer to a legal practitioner as defined in section 2 the Legal Practitioners Act.

There is an exception in that last Act to the restriction imposed by section 26 on the right to practise law. Section 19(3) provides that an articled clerk who fulfills the requirements of any of paragraphs (a) to (d) of that subsection "shall be entitled to appear in any magistrate's court in Swaziland and before any board, tribunal or similar body in or before which his principal is entitled to appear instead of and on behalf of that principal .....".

The expression "courts" is defined, in section 2 of the Legal Practitioners Act for the purposes of that Act, in the following way:

"'courts' means the Swaziland Court of Appeal, the High Court of Swaziland, the Swaziland Water Court, the Judicial Commissioner's Court, the magistrate's Courts established under the Subordinate Courts Proclamation, Coroner's Inquests held in terms of the Inquests Proclamation, liquor

licensing boards constituted under a law relating to liquor licensing and all other tribunals in which practitioners have the right of audience but, subject to the provisions of any other law, does not include any Swazi Court or Swazi Court of Appeal established under any law relating to such courts". (I have added the emphasis for convenience of later reference.)

Mr. Nxumalo is Mr. Dunseith's articled clerk within the meaning of section 19 (3). He has fulfilled the requirements of the subsection.

Mr. Dunseith submits that he is accordingly entitled in terms of the subsection to appear in the Industrial Court on behalf of his principal - i.e. on behalf of Mr. Dunseith himself.

He contends that section 19(3) is not intended to confer, on a qualifying articled clerk, any right of audience in superior courts. But, he says, the Industrial Court is not a superior court: Citing two South African decisions relating to the industrial court in that country, (i.e. South African Technical Officers Association v. President of the Industrial Court and Others 1985 (1) SA 597 and National Union of Mineworkers v. East Rand Gold and Uranium Company Limited 1992 (1) SA 700 - both Appellate Division decisions) he goes a step further, arguing that for the same or similar reasons as there, the Industrial Court in Swaziland is not a court either, but rather a tribunal of the kind referred to in section 19(3), so that Mr. Nxumalo has under the subsection a right of audience before it on his behalf.

Mr. Wilamaratne, appearing on behalf of the Attorney General, to whom notice of the proceedings was given, agrees with Mr. Dunseith's view.

The Industrial Relations Act was enacted some years after the Legal Practitioners Act. It deals with a particular subject, namely industrial relations. It did not amend consequently at all the earlier Act.

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On a first reading of section 15, I think that it is easy to understand why the learned President concluded that an articled clerk has no right of audience in the Industrial Court. It is a short section which says, simply, that subject to rules, a party may be represented by "a legal practitioner or any other person authorised by (the) party." At first sight that seems straight-forward.

For myself, though not after some initial hesitation, I think however that Mr. Dunseith's conclusion is right. I should perhaps add that my reservations arose from the simplicity of the section and from the fact that to accept Mr. Dunseith's submission does involve a process of reasoning that cannot in my view be said to be immediately obvious. However, on an overall consideration of both statutes I do not have any real doubts that his conclusion is correct.

The Legal Practitioners Act was intended clearly to regulate generally the right to practise law, including the right to practise generally as an advocate. Section 26 was itself a widely drawn provision. In section 2, the word "courts" was given a very wide meaning. Section 19(3) was made applicable not only to Magistrate's Courts, but to any other board, tribunal or similar body in or before which his principal (i.e. a legal practitioner) was entitled to appear.

I agree with Mr. Dunseith that by expressly mentioning the Magistrate's Courts, but not the High Court or the Court of Appeal, the legislature is to be taken to have intended that articled clerks should not have a right of audience under section 19(3) before either of those two superior courts. Parliament, having specifically referred to the Magistrate's Courts, is not to be taken to have subsumed the superior courts of justice in the general wording that then follows, i.e. "any board, tribunal or similar body."

I agree too with Mr. Dunseith that the Industrial Court is not a superior court. That does not necessarily mean that it is not a higher body, in the legal hierachy, than a Magistrate's Court. The expression "superior court" is a legal term of art. The President of the Industrial Court must be a person who is qualified to be a judge of the High Court. The qualifications for the High Court are higher than those for magistrates. Moreover right of appeal from the Industrial Court lies directly to the High Court.

Section 15 of the Industrial Relations Act is expressed permissively. It says that a party "may" be represented by a legal practitioner "or" by a person authorised by the party.

On a proper view I do not think it is intended to mean "may" be represented by the one "or" the other, at the choice of the party, "and not otherwise".

I can understand that there may be important reasons of policy why a party before the Industrial Court, in the context of industrial relations, ought to be free to authorise anyone of his choice to speak for him, whether or not he has any kind of training in advocacy.

Articled clerks who fulfill the requirements of section 19(3), are however persons of some training and experience in law. There is a view of course, the expression of which can be seen in the procedures governing some tribunals - such as for example, small claims courts, and also some domestic tribunals - to the effect not merely that parties ought to have the choice of representatives other than legal practitioners but that right of audience by lawyers should be excluded. That view is perhaps not quite as fashionable now as it was for a time earlier and I am not persuaded that, in cases in which it is accepted that a person should be allowed to represented by another, it stands up to close scrutiny.

In the present case, section 15 does not exclude representation by a lawyer. The governing principle of section 15 is not that a party can be represented by a person of his choice. It is wider than that, namely that he can be represented by a person of his choice or by a legal practitioner.

On one view, the reference to right of representation by a legal practitioner is, at least in practical terms, superfluous. A lawyer cannot represent anyone unless that person, or someone on his behalf, instructs him.

But Parliament has seen fit to mention legal practitioners specifically in the section, and to mention them as the only category, other than other persons authorised by parties, who have right of audience before the Industrial Court.

I consider that the better view is that the real purpose of section 15 is to extend, in the case of the Industrial Court, the categories of person who may appear on behalf of others, but that the section is not intended to curtail those other categories of persons who, under the general scheme of the Legal Practitioners Act, are permitted to represent parties. More particularly, and section 15 having referred expressly to legal practitioners as persons having a right of audience, I do not think that the legislature intended by it, i.e. by that section itself, to restrict the circumstances in which by way of a dispensation and under the general provisions of the Legal Practitioners Act, a qualifying articled clerk may appear on behalf of his principal before courts, boards and other tribunals in which the principal has a right of audience.

Mr. Dunseith may very well be correct in saying also that the Industrial Court is not, at common law, a court of law. In making that submission, I think that he is concerned to sustain an argument that although by implication, section 19(3) does not apply to the Court of Appeal or to the High Court, it does not follow that it is also inapplicable to the Industrial Court.

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Accordingly, I make a declaration that by virtue of being an articled clerk who fulfills the requirements of section 19(3) of the Legal Practitioners Act 1964, the second applicant Mr. Nxumalo has a right of audience in the Industrial Court of Swaziland.

A person who is in fact authorised by a party to represent him before the Industrial Court also of course has a right of audience before it by virtue of the explicit terms of section 15 of the Industrial Relations Act 1980.

The Industrial Court is of course entitled to require that an articled clerk or a person who claims to be authorised by a party is in fact so qualified or otherwise to be granted audience under section 19(3) of the Act of 1964 or under section 15 of the Act of 1980. The modalities of the first of these things should be provided for under section 12 of the later Act. At present they are not. I will deal with this by way of amending rules, in consultation with the Attorney General.

Pending the making of such rules, an articled clerk who claims such a right of audience should apply by notice of motion to the High Court, with supporting affidavits, for an order declaring that he is so entitled, if the need to do so arises.

The rules made under the Act already deal with the other matter.

D. Hull

DAVID HULL
CHIEF JUSTICE

Accordingly, I make a declaration that by virtue of being an articled clerk who fulfills the requirements of section 19(3) of the Legal Practitioners Act 1964, the second applicant Mr. Nxumalo has a right of audience in the Industrial Court of Swaziland.

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