KALENGA M'POYOU AND KANE MOUNOUROU (1979) Z.R. 211 (H.C.)

HIGH COURT
MOODLEY, J.
6TH APRIL, 1979
1979/HN/14

Flynote
Civil procedure - Notice of motion - Habeas corpus ad subjiciendum - Supporting Affidavits - No Application - Joint notice of motion - Whether possible - Swearing of Affidavit for client - When possible.

Headnote
The advocates for the two applicants had filed a notice of motion for writs of habeas corpus *ad subjiciendum*, together with two supporting affidavits. The first applicant had sworn an affidavit, whereas the affidavit of the second applicant was sworn by an advocate on his behalf. No application for the writ, however, was made.

Held:
(i) Before a notice of motion for a writ of habeas corpus *ad subjiciendum* could issue, there must be an application for such a writ.
(ii) An application for such a writ may not be joint.
(iii) An affidavit can be sworn on behalf of an applicant only where it is quite impossible for him to do it himself.
(iv) It is the duty of counsel to ensure that all documents drafted for purposes of court proceedings are in meticulous order.

Legislation referred to:
R.S.C., O. 54, rr. 1, 2.
High Court Rules, Cap. 50, O. 5, rr. 11 to 18.

Judgment
MOODLEY, J.: The advocates for the two applicants had filed a notice of motion for writs of habeas corpus *ad subjiciendum* together with two supporting affidavits. The first applicant Kalenga M'poyou had sworn an affidavit, whereas the affidavit on behalf of the second applicant Kane Mounourou was sworn by an advocate on behalf of this applicant.

I have perused the papers in connection with this application on the file and I regret to say that I have been left greatly disturbed both by the contents of the documents and the manner in which the advocate concerned had instituted these proceedings. Before a notice of motion for a writ of habeas corpus *ad subjiciendum* could issue, there must be an application for such a writ. No such application had been made in this case.

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R.S.C. O. 54, R. 1, provides, *inter alia*, that an application for a that of habeas corpus *ad*

subjiciendum should be made to a single judge in court, except that in vacation or at any time when no judge is sitting in court it may be made to a judge otherwise than in open court. RSC O. 54, r. 1, further provides in para. 2 for an application for the writ to be made *ex parte* and, subject to para. 3, must be supported by an affidavit by the person restrained showing that it was made at his instance and setting out the nature of the restraint. Paragraph 3 of this rule provides that where a person restrained is unable for any reason to make the affidavit required by para. 2 the affidavit may be made by some other person on his behalf and the affidavit must state that the person restrained was unable to make the affidavit himself and the reasons for his inability to do so should also be set out in the affidavit. In terms of RSC Order 54/1/2 the procedure employed is for the application to be made *ex parte* to a judge in the first instance and if upon hearing the application the court gives leave, the application s usually adjourned for the notice to be served on such persons as the court directs; and upon the adjourned hearing, if the application succeeds writ is ordered to issue.

R S C Order 54, r. 2, of the Supreme Court provides as follows:

> "2 (1) The Court or Judge to whom an application under rule 1 is made ex parte may make an order forthwith for the writ to issue, or may:
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> (a) Where the application is made to a judge otherwise than in Court, direct that an originating summons for the writ be issued, or that an application therefore be made by originating motion to a Divisional Court or to a Judge in Court;
> (b) Where the application is made to a Judge in Court, adjourn the application so that notice thereof may be given, or direct that an application be made by originating motion to a Divisional Court;
> (c) Where the application is made to a Divisional Court, adjourn the application so that notice thereof may be given.
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> (2) The summons or notice of the motion must be served on the person against whom the issue of the writ is sought and on such other persons as the Court or Judge may direct, and, unless the Court or Judge otherwise directs, there must be at least 8 clear days between the service of the summons or notice and the day named therein for the hear of the application."

The next point which emerges from the documents is that the notice of motion for the writs is in respect of a joint application on behalf of two applicants. In my view joinder of applications for a writ of habeas corpus *ad subjiciendum* is inappropriate since the application for a writ on behalf of each applicant is a separate and distinct cause of action, even if there are factors which are common to both applications. The word "corpus" means "a body" and not "bodies". Quite clearly therefore the application as filed on behalf of these two applicants is misconceived.

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I now come to the affidavits filed in support of this application. As I have said the applicant Kalenga M'poyou had sworn an affidavit in support of his application. On the other hand the advocate for the applicant Kane Mounourou has sworn an affidavit on behalf of the second applicant. It would appear that the advocate concerned was unable to obtain an affidavit personally from Kane Mounourou because this applicant had been removed to Lusaka Remand Prison.

Paragraph 3 of R.S.C. Order 54, r. 1, provides that an affidavit on behalf of an applicant could only be made where the restrained party is unable to make the affidavit himself. In my view the reason provided by the advocate for his failure to take an affidavit from the second applicant, namely, that the second applicant had been removed to Lusaka Remand Prison, is not a sufficient and good reason to justify the advocate making an affidavit on behalf of the applicant. It was open for the advocate to travel to Lusaka to obtain an affidavit personally from this applicant. Alternatively, the advocates could have engaged the services of an agent in Lusaka who could have obtained an affidavit from the second applicant. The only occasion where an affidavit can be made on behalf of an applicant is where the person restrained is unable to make the affidavit himself. In this case the applicant who was in Lusaka Remand Prison was able to make the affidavit. There is no indication that he was suffering from any physical disability or was being held incommunicado, so that it was impossible for the advocate to obtain an affidavit in those circumstances.

I should state further that it is most inadvisable for an advocate to swear an affidavit deposing as to facts on behalf of a client in contentious matters, especially where there is a risk that the facts deposed to by the advocate could be disputed by the other side. In such circumstances the advocate concerned would be placed in a most embarrassing situation. The attention of the advocate is particularly drawn to the contents of rr. 11 to 18 of O. 5 of the High Court Rules, Cap.50.

Finally I come to the affidavits themselves. I find that there are numerous spelling errors, some omissions and alterations in the two supporting affidavits. The omissions and errors have not been corrected and the alterations have not been initialled by the persons swearing the affidavits. Both these affidavits in their present state are disgraceful and appear to indicate a considerable degree of carelessness on the part of the advocate who drew up these affidavits. Judges have neither the time or the disposition to act as schoolmasters to correct each and every word in documents drafted by counsel. It is the duty of counsel to ensure that their paperwork is in meticulous order before filing and that all documents drafted for purposes of court proceedings conform with the legal requirements.

For the reasons given above I am not prepared to entertain the notice of motion for writs of habeas corpus a*d subjiciendum* in its present form and accordingly the notice and the supporting documents are struck out of the file.

Notice of motion struck out

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