

## TRANSLATION

Republic of Lebanon  
Court of Cassation  
General Panel

Decision No. 8/2004  
Case No. 214/2004  
Date of Decision: 26/3/2004

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In the Name of the Lebanese People

The General Panel of the Court of Cassation, constituted of First President Tanios el Khouri and the cassation presidents Ghassan Abou Alwan, Labib Zwein, Muhib Maamari, Mohamad Said Adra, Shbeeb Mkalled, Mohamad Ali Ouwaida, Ralf Riashi and Nemeh Lahoud,

After reviewing the report prepared by President Ralf Riashi,

And upon deliberation:

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1. plaintiff Muhamad Mugarby represents the other plaintiffs in the direct action brought against them before the first investigating judge at Nabatieh, o. 272/2003. As the attorney does not have his office within the perimeters of the seat of the investigating judge, he chose on 12/6/2003 to have an elected domicile for the purposes of the action at Hamed Building, Al Saray Quarter, Third Floor, which is owned by Khairat el Zein and her children as the heirs of the late Habib Hamed.
2. On 23/6/2003, the investigating judge at Nabatieh issued a decision to dismiss the exceptions in form made by the defendants, who are plaintiffs in the action at hand. Their attorney Muhamad Mugarby appealed the decision before the Indictment chamber at Nabatieh; appeal o. 212/2003, of 9/7/2003.
3. On 12/7/2003, and after the appeal was filed, it was noted in the minutes of the file before the indictment chamber that the investigating judge's decision was not notified because attorney Muhamad Mugarby had no office in Nabatieh.
4. On 28/8/2003 the indictment chamber issued a decision directing the clerk of court to verify the truth about the elected domicile of the defendants' attorney, plaintiffs in the action at hand, and to send a letter to the president of the bar

association for information as to when Muhamad Mugarby was struck off the general roll of lawyers.

5. On 9/9/2003 the clerk reported that he went to the address of the elected domicile and was unable to find thereat an office for attorney Muhamad Mugarby.

6. On 11/9/2003 the president of the indictment chamber issued a decision directing the defendants, plaintiffs in the action at hand, to pay LL 30,000 on account of the allowance to the court clerk for investigating the elected domicile, and added to the file the letter by the president of the bar association addressed to the first president of the court of cassation.

7. On 18/9/2003 the indictment chamber issued its second decision dismissing the appeal in form for having been signed by an attorney who was struck off the general register at the bar association and who does not have an office in Nabatieh.

Therefore,

### I. In Form

The action at hand satisfies all formalities. But before considering its substance we must first determine how serious its grounds are in accordance with Article 750 CCP in order to make a finding as to whether it is admissible or not.

### II. The Extent to Which the Submitted Grounds Are Serious

#### 1. As to Ground One, Violation of the rule of adversarial proceedings (contradictoire) and the rule that the action is governed by the adversaries.

The plaintiffs accuse the court that issued the two decisions being complained about that it committed a grave error in asserting as a fact that attorney Muhamad Mugarby was struck off the roll of the bar association, when none of the parties made such an allegation in the action, based on a letter issued by the president of the bar association addressed to the first cassation president which was entered into the file without their knowledge and without notifying them a copy thereof to enable them to discuss its contents and present their defenses with respect thereto, all in violation of the rule of adversarial proceedings (contradictoire) and Articles 363, 365, 366, 368, and 373 CPP.

Whereas the proceedings before the indictment chamber are confidential and are not subject to the rule of adversarial proceedings applied by judges on the merit unless otherwise stipulated by law.

Hence, the indictment chamber is not obliged to notify the parties of the action what it has on file regardless of its source. Consequently it was not required to notify the defendants the letter by the bar association advising that attorney Muhamad Mugarby's name was struck off the general roll of the association. It verified the contents of this letter after it received it on 11/9/2003 from the bar association at Beirut ("BAB") as indicated in its decision of 18/9/2003 and was entitled to rely on this letter without inviting arguments with respect thereto.

Whereas, and contrary to the submission of the plaintiffs, the admission by the court of the letter by BAB does not violate the rule that the parties govern the action, because a penal action is related to public policy and hence the court may raise on its own all issues relating to public policy including the procedural exception that an attorney has no power to represent his clients in the action.

Thus the contents of this ground are rejected.

## 2. As to Ground Two, Violation of Articles 7, 40, and 372 CCP

Plaintiffs pleaded that a grave error was committed because the two decisions violated Articles 7, 40, and 372 CCP for implementing the decision by BAB to prohibit attorney Muhamad Mugarby from practicing the profession without joining him or BAB in the action.

Whereas there is no provision of law permitting joining new parties before the indictment chamber.

Whereas the lack of an attorney's capacity to represent parties in an action is an issue related to public policy which a court may raise on its own and to reach the appropriate conclusions with respect thereto as to the parties to the action without joining the attorney or BAB as parties to the action.

Hence the contents of this ground are rejected.

## 3. As to Ground Three relative to Jurisdiction

Plaintiffs pleaded that there is grave error in that the court exceeded its jurisdiction by accepting the letter by the president of BAB addressed to the first cassation president asserting that attorney Muhamad Mugarby's name was struck off the roll of lawyers because the conflicts with BAB in matters of professional practice fall under the jurisdiction of the twelfth panel of the Beirut court of appeal.

Whereas the court hearing an action has the right to consider the defenses and exceptions raised with respect thereto based on the rule that the judge of the original is the judge of the branch.

Whereas the indictment chamber of Nabatieh, and while considering the action against the defendants, has the competence to determine the extent of the attorney's power to represent the parties to the action. By admitting the letter by BAB advising that the name of attorney Muhamad Mugarby has been deleted from the general roll of the association to find that he no longer has any power to represent the parties, the court has not exceeded its jurisdiction.

Hence the contents of this ground are rejected.

#### 4. As to Ground Four Relative to Admitting a Letter that Has no Binding Authority on Courts

The Plaintiffs complain that the court committed a grave error by basing its second decision on the copy of a letter addressed by the president of BAB to the first cassation president advising that attorney Muhamad Mugarby had been struck off the general roll while such a letter and its content with regard to the striking off has no power binding on the courts.

Whereas the striking of an attorney off the association's roll and his prohibition from practicing law is a legal fact that may be evidenced by what the president of BAB may attest with respect thereto.

Whereas the indictment chamber, by relying on the letter of the BAB president as evidence that Attorney Muhamad Mugarby had no standing to represent the parties to the action it was looking into, did not commit any error.

Hence the contents of this ground are rejected.

#### 5. As to Ground Five Relative to Giving the Disciplinary Decision Immediate Enforceability

Plaintiff pleaded that the indictment chamber at Nabatieh made a grave error by attributing to the disciplinary decision of the BAB against attorney Muhamad Mugarby immediate force, while it is not so by law.

Whereas the decision of 18/9/2003 did not attribute to the decision by BAB to strike Muhamad Mugarby off the association's roll the standing of immediate enforceability. It only found that this decision was in force so that the said attorney may not, after it was issued, the right to practice the legal profession or adopt the standing of an attorney.

Whereas the standing of "immediately enforceable" does not apply to a disciplinary decision of the disciplinary council of the bar association because such a standing applies only to judicial judgments and decisions, i. e. those issued by courts and are of a judicial nature. For the disciplinary council of the bar association is not a court and does not issue judicial decisions. Hence its

decision to discipline an attorney by striking him off is considered to be in force from the day of its issuance unless it is suspended by the court of appeal in which the law vested the authority to scrutinize the disciplinary decisions of the disciplinary council of the bar association. Subjecting the disciplinary decision to such a judicial scrutiny does not provide it with the standing of a judicial decision issued by courts because such a standing does not exist in the first place for the above reasons.

The above is not contradicted by what was stipulated in Article 111 COLP which makes it a condition to convict an attorney of the crime stipulated thereunder for practicing the profession after being prohibited therefrom that the disciplinary decision shall have become irrevocable. For the irrevocability condition is required for the elements of the crime to be fulfilled, but has no effect on the standing force of the disciplinary decision which it has from the date it was made. The two standings are different as to content and to effects, and there is no contradiction there. The reconciliation of the two standings is based on the submission that the standing force of the disciplinary decision prohibits the object of this decision from using his professional capacity or practicing his profession as an attorney from the date it is issued. But his continuing to practice the business of his profession despite the disciplinary decision does not constitute the crime provided under Article 111 except after an irrevocable decision is issued confirming the disciplinary decision, which makes the violations of the decision committed before it became irrevocable, but from the date of its becoming irrevocable, constituting the crime provided by Article 111 COLP.

Whereas the indictment chamber at Nabatieh, in the light of the foregoing, correctly recognized the standing force of the disciplinary decision by finding that attorney Muhamad Mugraby is not entitled to practice law or adopt the standing of an attorney, and may not be faulted.

Hence the contents of this ground are rejected.

#### 6. As the Sixth Ground Relative to Violating the Rules of Execution

Plaintiffs accuse the indictment chamber at Nabatieh of committing a grave error by finding that the disciplinary decision to strike attorney Muhamad Mugraby off the roll of BAB is good for execution and for having executed the same despite the fact that it is not one of the executory deeds provided for by Article 835 CCP and no one petitioned for its execution before a competent execution department.

Plaintiffs confuse an executory deed with evidence.

The indictment chamber at Nabatieh upheld the letter of BAB, advising of the striking off of attorney Muhamad Mugraby from the association's roll, as

evidence proving that attorney Muhamad Mugraby had no longer the right to practice the legal profession, and not as an executory deed. Hence there was no reason to justify executing the decision striking off attorney Muhamad Mugraby through an execution department before relying on it.

Hence the contents of this ground are rejected.

#### 7. As to the Ground Relative to the Elected Domicile

Plaintiffs blame the indictment chamber for committing a grave error in finding that the elected domicile of their attorney in the action is fictitious based on the investigation by its clerk who concluded that there is no office for attorney Muhamad Mugraby at the address he gave.

Whereas it appears from the decision of 18/9/2003 that the indictment chamber actually directed its clerk to investigate whether attorney Muhamad Mugraby has an office at the address of the elected domicile that he indicated but the result was negative in that no one was found at the said address who may be notified on behalf of the said attorney. Hence it found that the said address is fictitious and that the defendants, his clients, did not have an actual residence within the location of the investigating judge's seat, and, consequently, drew the appropriate legal conclusions.

Whereas the findings of the indictment chamber in this respect are not erroneous.

Hence the contents of this ground are rejected.

#### 8. As to Ground Eighth Relative to the Running of the Delay

Plaintiffs take issue with the indictment chamber as to its grave error in finding that, where there is no elected domicile, the delay for appealing the decisions of the investigating judge commence from the date they are issued, although Article 135 CPP does not so provide.

Whereas Article 135 provides a delay of twenty four hours for appealing the decisions of the investigating judge which commence for the defendant from the date of his notification of the decision in his elected domicile within the city in which the investigating judge's office is located unless he has an actual domicile there.

Whereas it must be understood from this article that notification of the decision of the investigating judge to the defendant is not necessary unless he shall have elected a domicile within the city in which the office of the investigating judge is located or if has an actual domicile therein. Based on this fact it is to be constructed that in the event there is no elected or actual domicile for the

defendant as indicated in the said Article 135, there is no longer an obligation to notify him the decision of the investigating judge so that the delay for appeal runs from the date of its issuance.

Finding differently would obstruct the provisions of Article 135 in this respect and makes it useless, which violates the rules of interpretation that require the interpretation of a legal text in a way that gives it effect and not otherwise.

In the light of the foregoing it is not possible to accuse the investigating chamber of gross error in what it found.

Hence the contents of this ground are rejected.

In Conclusion,

And in the light of the foregoing, the action does not stand on serious grounds justifying going through therewith which makes it unacceptable as provided under Article 750 CCP.

Whereas bringing this action without serious grounds requires, further to Article 750 CCP, ordering the plaintiffs to pay damages to the Lebanese State in the amount of one million Lebanese Pounds and fining them five hundred thousand Lebanese Pounds for abuse of litigation based on Article 738 cross-referenced to Articles 628 and 11 CCP.

For these Reasons

The General Panel unanimously decides:

Firstly: To admit the action in form.

Secondly: Not to go forward with it for the lack of seriousness in its grounds.

Thirdly: To order plaintiffs to pay the Lebanese State the amount of one million Lebanese Pounds and to fine them, additionally, five hundred thousand Lebanese Pounds.

Fourthly: To confiscate the provision and to order plaintiffs to pay costs together.

Decision issued on 26/3/2004.

(Signatures of the judges)

(Signature of the clerk Majida Hammoud)

Our Comments on the reasons of the general panel (Following the same order).

### General

A) The action in question is not a public action, i.e. one initiated by a public prosecutor, but a direct one, i. e. initiated by a private party, going directly before an investigating judge. The law requires that this action, unlike one started by a prosecutor, observe certain rules of *contradictoire*. Copies of the action and attached documents should first be served on the defendant/s, that have the right to file exceptions that are specified as to nature and number in CPP. CPP also requires the choice of an elected domicile in the town where the judge has his office, unless the defendants or their lawyer have actual domicile there. Many lawyers choose an elected domicile at the BAB office in the court house building. As the appeal delay is only 24 hours, the BAB office which has one employee who does not work in the afternoon, may not be a good location to alert us if the investigating judge issues and serves thereon an adverse decision which we may wish to appeal. Hence we made a different choice within the town of Nabatieh.

After we filed the appeal, and after I was jailed and released, the chief judge of the indictment chamber, a panel of the court of appeal, sent his clerk to check on whether I have an office in Nabatieh, which I do not and did not claim to have. The clerk went to an address different from the one I gave and reported back that he could not find an office for me.

B) We filed the action before the general panel on the basis of the grave errors made by the indictment chamber. The law requires two stages in such proceedings. Step one is to make a ruling as to whether the action is acceptable in form and based on serious grounds. If it so rules, then it addresses the merits in adversarial procedure, with hearings and exchange of memos. When it rules that the grounds are not serious, the merits are not addressed because the issues should involve grave errors and not simple legal errors that would allow an appeal in cassation. In this case, the general panel did not follow the said procedure and dived into the merits to exonerate the investigating chamber and, consequently, to rule that the grounds of the action were not serious.

C) CCP requires that all judgments be pronounced publicly as soon as they are signed by the judges, and that the clerk should countersign the judgment immediately thereafter, under the sanction of nullity. On Friday afternoon, Mr. Khouri called Mr. Osta at BAB, told him he had a decision favorable to BAB, and supplied him with a copy. Later in the afternoon, the National News Agency issued a bulletin with a short story about the decision and the conclusions of the general panel that were deemed unfavorable to me. Many morning papers, on Saturday, carried the news. Mr. Fakih went to the office of the cassation court's clerk at 8:00AM Saturday morning, but was the clerks told him that they did not hear of such decision. At 9:15 AM, a signed copy

suddenly appeared. At 9:20 AM, the clerk signed the decision under Mr. Fakhri's eyes. It was not publicly pronounced and the record did not make such an assertion.

D) Many of the judges who signed the decision should have excused themselves. Mr. Khouri did not excuse himself although he had circulated the letter of BAB to which we took exceptions in writing addressed to him and filed an action to declare his circular null and void. Mr. Mamari is the brother of the prosecutor in Beirut who had me arrested, and is a former chief of one of the SOLIDERE appraisal commissions which I criticized. The issue of substantial monies paid to him and other SOLIDERE judges by the Council on Development and Reconstruction (CDR) is still pending in an action before the tribunal of first instance at Beirut. He had signed the decision of the high judiciary council in April 2000 referring my file to Mr. Addoum which resulted in a number of prosecution attempts that remain pending. Zwain is the judge that ordered MTV closed down without any action brought and without notifying the owners of MTV or inviting them to appear and state their defenses. The station was shut down as soon as the decision was made without notification or allowing any delay for appeal. Mkalled is the highest paid judge from extra commissions and positions and is protected by Speaker Berri, who supports the eviction of my peasant clients in the Nabatieh region from their property. Lahoud once called his appellate court panel to convene on a Saturday to issue a decision against my brother in law on orders of Berri, but we won the case before the general panel. Mr. Riashi should have excused himself rather than authoring a contradictory opinion 16 days after his earlier opinion. So on and so forth.

E) The decision exceeded what was necessary to reach the conclusions it reached and embodied a clear threat to have me prosecuted after an adverse decision is reached against me by the court of Bou Nacif which will be based on my practice of law before that decision is made.

#### Discussion of the reasons of the general panel:

1. Wrong. The contradictoire rule clearly applies, and there is no penal action yet in the case. A direct action by a private party is not a penal action but a civil action before a penal judge and aims at money damages. Public policy is nowhere there, but even if it existed it does not negate rights of defense.
2. Wrong. There is no provision in CPP precluding the joining of other parties especially that we have here a civil action brought by a private party. The general rule under CPP applies which permits joining on several grounds, one of which is to find the truth.
3. The general panel is saying that the indictment chamber had concurrent jurisdiction with the court of Bou Nacif. If so, how could it later say that Bou

Nacif's court will rule in the case? I like this conclusion and I might use it against them later.

4. Wrong. If the BAB is a legal fact as the judges found then the parties should have been made aware thereof and invited to make arguments with respect thereto pursuant to Article 373 CPP and the contradictoire rule.

5. Wrong all the way. This is the most sinister paragraph where the judges of the general panel, while carefully avoiding the issue of the internal bylaws of BAB because they could not use them as a solid basis, reverted to the opposite argument that a disciplinary decision is not a judgment, hence it is stronger than a judgment! By giving such a non-judgment force and effect from the date it was issued, they avoided the issue of notification thereof, though issued in absentia, and took away my rights of defense and the right to take and make any exceptions, including those based on the invalidity of the purported decision. This is worse than the Dreyfus case.

6. Wrong! The judges said that the BAB letter was not being recognized as immediately enforceable but only recognized as evidence. But if it is evidence, it should have been notified and the parties should have been invited to produce any other evidence and to make arguments with respect to this purported evidence in recognition of the contradictoire rule.

7. Wrong on plain facts and confuses the actual office with the elected domicile.

8. Wrong. They give a construction to Article 135 CPP that denies the rights of defense and appeal while there is nothing in the language thereof that could remotely support such a conclusion.

### Conclusions

This case is one of eight similar cases I brought which are pending before the general panel. Its rank was number five, but the judges selected it to make from it a first ruling that threatens and scares me. The number of such actions still pending is eight cases because I filed another action before the general panel on Saturday morning March 27<sup>th</sup> challenging those parts of the decision of March 10<sup>th</sup> in the court of cassation headed by Mr. Riashi that were not in my favor. Translations will be made.

One possible rational reason for the choice made by the judges is that they thought they could invoke the doctrines of secretive proceedings and public policy in what they labeled as penal proceedings to deny me the benefit of the adversarial rules (contradictoire) and of the rules of evidence. Then they made a shortcut around the internal bylaws and avoided the application of the rules of civil procedure to the purported disciplinary decisions by characterizing them

as non-judgments. Since they could not defend the internal bylaws as the basis of giving disciplinary decisions immediate enforceability despite not being irrevocable, they simply deemed them in force from the date they have without providing any legal basis at all to such a bizarre finding.

I believe the high judges, who found comfort in thinking that their plainly irregular decision may not be challenged in any other form of appeal, are so wrong that they have committed the crime of abuse of power for which they may be prosecuted in the event of a change in regime or perhaps they may be sued in another country for damages.