REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 265/2014

In the matter between:

ANNA-ROSA KATJIVENA & OTHERS **APPLICANTS**

and

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA **FIRST RESPONDENT**
MINISTER OF SAFETY AND SECURITY **SECOND RESPONDENT**
COMMISSIONER GENERAL OF THE NAMIBIAN CORRECTIONAL SERVICE **THIRD RESPONDENT**
PERMANENT SECRETARY IN THE MINISTRY OF SAFETY AND SECURITY **FOURTH RESPONDENT**

Neutral citation: *Katjivena v Prime Minister of the Republic of Namibia* (A 265/2014) [2016] NAHCMD 146 (18 May 2016)

Coram: PARKER AJ
Heard: **20 April 2016**
Delivered: **18 May 2016**

Flynote: Practice – Parties – *Locus standi* – Of first applicant to bring application on her behalf and on behalf of the other applicants – Respondent challenging *locus standi* of first applicant – Court confirming Roman law *actio popularis* not part of Namibian law – In instant case, court finding that on the facts and in circumstances of the case present application does not constitute *actio popularis* – Consequently, court rejected respondents point *in limine* on applicant's *locus standi in judicio*.

Summary: Practice – Parties – *Locus standi* – Of first respondent to bring application on her own behalf of other applicants – Application for interdictory order and declaratory orders – First applicant stating in founding affidavit that she brought application on her own behalf and authorized to bring the application on behalf of others – The others confirming such of first applicant's authority by confirmatory affidavits – Court finding that all applicants having the same interest and application based on the same facts, the same statutory provisions and the same principles of law – Court finding that it is commonplace in the practice of the court for one applicant to bring application on his or her own behalf and on behalf of other applicants having the same interest, and where the same statutory provisions and principles of law are applicable and foundation of such applicant's authority laid in founding affidavit and such authority confirmed by the other applicants by confirmatory affidavits – In that event such application not constituting Roman law *actio popularis* – Consequently, court rejected respondents' preliminary objection to first applicant's *locus standi in judicio*.

Flynote: Applications and motions – Application for declaratory orders – Question to answer was whether lawful for respondents to make deductions from applicants' salaries for salaries respondents received retrospectively – Where payment of approved salaries was with effect from a particular date but pending the happening of an event the critical date on which one's right to the new salaries inured is the 'with effect from' date not date on which the pending event occurred – To contend otherwise is to wrongfully conflate the time at which the right inured with the time at which payment, for all manner of reasons, can be effected – In the instant case the critical date was 1 December 2009 and applicants' rights to the approved revised salaries was 1 December 2009 – Consequently, respondents had no power in law to make, and continue to make, deductions from applicants' salaries for alleged unlawful retrospective payment of the salaries – Respondents' action is ultra vires and unlawful – Consequently the right thing to do is to grant declaratory order and, *a priori*, interdictory relief and directions sought.

Summary: Applications and motions – Application for declaratory orders – Question to answer was whether lawful for respondents to make deductions from applicants' salaries for salaries respondents received retrospectively – Where payment of approved salaries was with effect from a particular date but pending the happening of an event the critical date on which one's right to the new salaries inured is the 'with effect from' date not date on which the pending event occurred – To contend otherwise is to wrongfully conflate the time at which the right inured with the time at which payment, for all manner of reasons, can be effected – By a letter dated 25 January 2010 the Prime Minister approved revised salaries for categories of staff in first respondent's Ministry with effect from 1 December 2009 – Payment of new salaries subject to promulgation of an amendment to Act 17 of 1996 and approval from Treasury – Court found that the critical date on which applicants' right to the new salaries inured is 1 December 2009 and not the date on which the amendment was effected or Treasury approval obtained – Consequently, applicants were entitled as of right to the new salaries retrospective to 1 December 2009 – Accordingly respondents acted ultra vires and unlawfully when they made deductions and continued to make deductions from applicants' salaries for alleged unlawful retrospective payment of salaries – Consequently the right thing to do was to grant declaratory orders and, *a priori*, the interdictory relief and directions sought.

ORDER

(a) The deductions made from the salaries of applicants are declared unlawful and null and void.

(b) Respondents are interdicted and restrained from making any or further deductions from the salaries of the applicants.

(c) The respondents must, on or before 17 June 2016, pay back to each applicant any monies unlawfully deducted from his or her salary.

(d) The respondents, one paying, the other to be absolved, shall pay the applicants' costs.

JUDGMENT

PARKER AJ:

[1] In April 2010 the Namibia Correctional Service (whose Commissioner General is the third respondent) would see a new organizational structure. This would necessitate an approved 'revised salary scales. Salary notches and increments attached to the grades of the new job category (:) Correctional Officer with effect from 1 December 2009'. The approval was the decision of the then Prime Minister contained in a letter dated 25 January 2010 (annexed to the founding affidavit) ('the Prime Minister's letter'). Pursuant to the approved revised remuneration, third respondent issued a notice whereby third respondent informed each applicant about each applicant's new rank and the remuneration such rank carried with effect from 1 December 2009. As a result, applicants received backdated salaries, with effect from 1 December 2009. The payments were made in April and May 2010.

[2] It was the respondents' view that the payments were made not in accordance with the decision of the Prime Minister found in the Prime Ministers letter. Consequently, the respondents decided to deduct various amounts of money from the salaries of applicants in their effort to recover the alleged unauthorized payments; and, according to the respondents, this was done in terms of the Public Service Act 13 of 1995. I use the adjective 'alleged' advisedly. It is for a good reason, as I shall demonstrate in due course.

[3] Aggrieved by the decision to make the deductions, which are continuing, applicants brought the instant application by notice of motion in which they seek the relief set out in the notice of motion. Applicants are represented by Mr Rukoro.

[4] The respondents have moved to reject the application; and are represented by Mr Kashindi. The respondents have raised a point *in limine*, in the pleadings, ie 'Respondents' Answering Affidavit' deposed to by Ndeutala Angolo (who describes herself as the 'Permanent Secretary' in the Ministry of second respondent). There is also filed of record 'Third Respondent Answering Affidavit', deposed to by Raphael Tuhafeni Hamunyela (the third respondent).

[5] In the respondents' answering affidavit, the respondents (all the respondents, including third respondent) raise a point *in limine* on 'prescription'. Then in the heads of argument, Mr Kashindi raises a point *in limine* of his own; and it is on 'locus standi'. Counsel's justification for raising the preliminary objection from the Bar is that, according to counsel, the respondents are not barred from raising any point *in limine* at any stage in application proceedings. And what is Mr Kashindi's authority for so intrepidly averring? It is, for him, *Mashozhera v The Chairperson of the Immigration Selection Board* (A 207/2015) [2016] NAHCMD 38 (25 February 2016), a case I presided over. Mr Kashindi, with respect, misreads the *ratio decidendi* of *Mashozhera*.

[6] In *Mashozhera* the application was heard on urgent basis. Second, the question of law which concerned the immigration status of the applicant, ie the applicant being a prohibited immigrant, was not raised as a point *in limine*. Third, the legal contention sought to be made on the prohibited immigrant status of applicant did 'arise from facts alleged on the papers'. And 'on the papers means in the pleadings. Keeping these facts respecting *Mashozhera* in any mental spectacle, I conclude that Mr Kashindi's argument falls flat on its face. The present application was not heard on the basis of urgency. Second, the respondents have not laid any factual foundation in their papers on the issue of *locus standi in judicio*. Third, the question of *locus standi in judicio* is not a question of law only: it is a question of

mixed fact and law. Fourth, and *a fortiori*, a decision on *locus standi in judicio* is crucial because if upheld, it stops the application in its tracks; the court would not be competent to consider and determine the application. Hence, it is always important that in motion proceedings a challenge to *locus standi in judicio* is raised in respondent's answering affidavit in order to give the applicant a fair opportunity – to which he or she is entitled – to place evidence before the court in the replying affidavit in order to meet the challenge. As matters stand, in the instant proceedings, the respondents have ambushed not only the respondents but the court – much to the prejudice of the respondents.

[7] As respects the attitude taken by Mr Kashindi for the respondents; I should say that it is trite that in our law no two cases are the same; and so, one wishing to rely on a principle of law in a case, must always also consider the particular facts and circumstances of the case he or she seeks to rely on in order to see if the principle there would be of assistance on the point under consideration in the instant proceedings. In the instant case Mr Kashindi did not follow this trite and reasonable counsel and has stumbled as a result.

[8] Based on all these reasons I find that *Mashozhera* is of no assistance on the point under consideration. I hold that in motion proceedings a point *in limine* challenging an applicant's *locus standi in judicio* should always be pleaded in the answering affidavit in order to afford the respondent a fair opportunity to meet it in the replying affidavit.

[9] On these grounds alone I find that the point *in limine* on *locus standi in judicio* is not properly before the court; and so, the point falls to be rejected. The point should be rejected on another basis, that is, on the basis of substance. It is not disputed that the Roman Law concept of *actio popularis* is not part of our law. In our law no private person can proceed by *actio popularis*. What this means is that the general principle of our law is that –

'A private individual can only sue on his own behalf not on behalf of the public. The right which he seeks to enforce, or the injury in respect of which he claims damages, or against which he desires protection, will depend upon the nature of the litigation. But the right must be available to him personally, and the injury must be sustained or apprehended by himself.'

(*Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A), per Rumpff CJ at 305F-G, approving Innes CJ in *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 at 621)

[10] As Mr Rukoro submitted – and correctly so, I should say – Anna-Rosa Katjivena (first applicant) has not brought the application on behalf of the public, that is, 'the community in general, or a section of the community having a particular interest'. (*Concise Oxford Dictionary of Current English*, 11th ed) The right which she seeks to enforce is available to her personally and to the rest of the applicants, and not an amorphous entity. Ms Katjivena is therefore not some busybody bystander who has decided on her own to bring the application on behalf of the public. She is not acting, as Mr Rukoro put it, 'on behalf of some passive others'. Ms Katjivena is not *populariter agere*.

[11] Based on these reasons. I do not find that Ms Katjivena has brought an *actio popularis*. The respondents' point *in limine* on *locus standi in judicio* is therefore rejected. It has no merit. I now proceed to consider and determine the point *in limine* on prescription.

[12] Mr Kashindi says that the prescription objection is based on s 33 of the Public Service Act and s 133(3) of the Correctional Service Act 9 of 2012. On the facts and in the circumstances of the instant case, in terms of both statutes the limitation period is 12 months. And Mr Kashindi submits that 'between May and November 2012' 'the applicants had knowledge or might reasonably have been expected to have knowledge that they were overpaid and that deductions will be made from their salaries. This is evidenced by various memos and letters dated 21 May 2012, 29

May 2012, 16 November 2012, 7 November 2012, 6 November 2012, 16 October 2012, 31 October 2012, respectively, that were sent to the applicants'. And so; for Mr Kashindi, 'the cause of action arose during May and November 2012. Sadly, applicants only filed their application with the Registrar of the Honourable Court on the 30th of September 2014 and served same on the respondents' legal representatives on the 2nd of October 2014. That is more than twelve (12) calendar months after the date on which the cause of action arose (a delay of about seventeen months). There is no explanation on record for the delay'.

[13] Based on the aforegoing argument of his, Mr Kashindi submits in peroration that in the premises and circumstances of this case, the applicants' claim has prescribed in terms of Section 33 of the Public Service Act and section 133(3) of the Correctional Service Act.

[14] The argument on the other side by Mr Rukoro is that the applicants' claim has not prescribed for two reasons. First, the deductions complained of commenced on 30 September 2013, and that is when the debt the applicants are suing on arose. And second, upon the authority of *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) the wrongful act of the respondents (the deductions) constitutes continuous wrong rather than a single wrongful act in the past because it is 'still in the course of being committed and is not wholly in the past'. (*Barnett and Others*, para 21) Thus, for Mr Rukoro, on the authority of *Barnett and Others*, since the deductions are continuing, the claim has not prescribed.

[15] I accept Mr Rukoro's argument based on the two grounds. I find that the cause of action arose 'in the past' on 30 September 2013, and not between May and November 2012, and the wrongful act is continuing. With the greatest deference to Mr Kashindi; Mr Kashindi's argument is weak in the extreme for the following reasons. The applicants could not have been aggrieved by a wrong which may or may not be committed. Put simply, between May and November 2012 the respondents had not 'done or omitted' to do anything, within the meaning of s 33 of the Public Service Act or s 133(3) of the Correctional Service Act. One cannot

complain about 'anything' which has not been 'done' or 'omitted' to be done in relation to him or her. The applicants could not lay claim for payment of debt in May to November 2012 when no debt existed, that is, when no deductions from their salaries had taken place. That is common sense; apart from the law.

[16] According to the applicants – and I agree – the wrongful deductions constitute the debt and no deductions had taken place in May to November 2010, that is, at that time, as I have said more than once, the respondents had not 'done anything' or 'omitted' to do anything in May to November 2010, within the meaning of s 33 of the Public Service Act and s 133(3) of the Correctional Service Act, which provisions Mr Kashindi is so much enamoured with and which is the talisman on which Mr Kashindi hangs his contention.

[17] Mr Kashindi's argument that the applicants should have brought an application for interdictory relief to stop the deductions carries no weight – none at all. It cannot take the respondents' case any further. Probably, such approach would commend itself to Mr Kashindi; but it does not to the applicants. The applicants have chosen a route permitted by the law and the rules of court that answer to their claim that moneys have been taken from them unlawfully, that is, 'anything done' by the respondents (see s 33 of the Public Service Act and s 133(3) of the Correctional Service Act), by which they now seek redress.

[18] Thus, upon the interpretation and application of s 33 of the Public Service Act and s 133(3) of the Correctional Service Act and upon the authority of *Barnett and Others v Minister of Land Affairs and Others*, I accept Mr Rukoro's submission and reject Mr Kashindi's. It follows that the point *in limine* on prescription also fails; and, it is rejected.

[19] I now proceed to consider and determine the application on the merits, and I must at the outset underline the following important points. The issue at play on the merits is not whether the deductions were made in terms of an applicable legislation. The issue is also not whether the persons who made the deductions had statutory

power to act as such. And yet again, the issue is not whether the deductions had prescribed in terms of the applicable Act. The only relevant issue that cries for consideration is whether the respondents acted lawfully in making the deductions which, as I have said previously, is still continuing.

[20] Doubtless, the determination of the application turns primarily and squarely on the interpretation and application of the Prime Minister's decision contained in the aforementioned Prime Minister's letter. I set out, hereunder, the entire text of the Prime Minister's letter:

'**NEW JOB CATEGORY CORRECTIONAL OFFICER: AMENDMENT OF THE SALARY AND GRADING STRUCTURE OF THE FUNCTIONAL PERSONNEL OF THE NAMIBIAN PRISON SERVICE**

1. Your unreferenced letter dated 11 May 2009 has reference.

2. The Prime Minister, on recommendation of the Public Service Commission, approved the revised salary scales, salary notches and increments attached to the grades of the new job category Correctional Officer with effect from 1 December 2009, indicated on the attached schedule: Subject to the amendment of the First Schedule to the Prison Act, 1998 (Act 17 of 1998), reflecting the new ranks of Correctional Officer before the implementation of this approval.

3. Attention is drawn to the provisions of Section 5(4) of the Public Service Act, 1995 (Act 13 of 1995), which requires approval from Treasury if a recommendation involves expenditure from revenue before implementation.'

[21] The wording and words of the Prime Minister's letter are clear and unambiguous. The applicants became entitled *as of right* (underlined and italicized for emphasis) to the 'approved revised salary scales, salary notches and increments attached to the grades of the new job category (.) Correctional Officer with effect from 1 December 2009'. The 'subject to' provision in para 2 and the 'Attention is drawn to' provision in para 3 of the Prime Minister's letter cannot by any stretch of

legal imagination whittle away applicants' right to the approved revised salary structure with effect from 1 December 2009. That is the critical date on which their right inured.

[22] It does not lie in the mouth of a public servant or any other person to say that the Prime Minister acted ultra vires when he decided that the approved revised salary structure was with effect from 1 December 2009. Only a competent court in an application before it can review and set aside a decision of an administrative body or administrative official on any ground at common law or in terms of art 18 of the Namibian Constitution. As far as this court is concerned, the Prime Minister's decision stands, as Mr Rukoro submitted, and was given effect to. In this regard, I can see no reason to fault the third respondent issuing letters of appointments/promotions to the applicants in terms of which applicants were either promoted or appointed to various positions within the first respondent's Ministry 'with effect from 1 December 2009', and the applicants receiving salaries, calculated from the critical date of 1 December 2009. And if the Prime Minister did exercise his statutory power to consent to or approve the appointments/promotions made by third respondent in due course, it is sheer idle contention to argue that salaries attached to such appointments should not be with effect from the critical date of 1 December 2009 in terms of the Prime Minister's letter. Such argument seeks to set at naught the decision of the Prime Minister.

[23] Thus, the fact that the approved revised salary structure could be implemented only when an 'amendment to the First Schedule to the Prisons Act, 1998 (Act 17 of 1998) ('the amendment')' has been promulgated and only when 'approval from Treasury' ('Treasury approval') has been obtained cannot detract from the irrefragable fact that the applicants' entitlement *as of right* to the approved revised salary structure inured on 1 December 2009. To contend otherwise, as the respondents do – apparently upon advice, which I consider to be wrong advice – is to conflate time at which a right to a new salary inures and time at which payment – for all manner of reasons – can be effected. In this regard, such provisos, as are contained in the Prime Minister's letter, are commonplace in the payment of new

salaries in the Public Service and other Services of the State. It is because the two dates are different and in almost all cases they do not coincide; that is why usually when payment of new salaries is to be effected, they are calculated to take effect from a 'with effect from' date. It is not only reasonable but fair to do that so as not to set at nought the critical date such pubic servants' right to the new salaries inured. See, for example, PSM Circular No. 15 of 2001, dated 15 May 2001, which brought about far-reaching remuneration structure in the Public Service for Management Cadre staff and PSM Circular No. 16, also dated 15 May 2001, which ushered in motor vehicle allowance for professional staff members on Management Cadre salary notches. Para 1 of PSM Circular No. 15 (dated 15 May 2001) reads:

> 'The Prime Minister, on recommendation of the Public Service Commission, has approved the following annual remuneration package for staff members and members of the services in the Management Cadre *with effect from 1 April 2001*.'

(Italicized for emphasis)

A similar formulation is found in PSM Circular No. 16 of 2001.

[24] To return to the Prime Minister's letter; the letter does say that applicants' entitlement to the approved revised remuneration structure is with effect from 1 December 2009. In this regard, if, for example, it took one week, one month or one year or more from the date of the Prime Minister's letter for the amendment to the Prisons Act to be promulgated and the Treasury approval obtained, that cannot on any pan of scale and by any legal imagination amend the 'with effect from 1 December 2009' provision in the Prime Minister's letter.

[25] It is therefore important to signalize this crucial point: If the intention of the Prime Minister was to grant the right to the approved revised salaries with effect from the date on which the aforementioned amendment was promulgated and with effect from the date on which the aforementioned Treasury approval was obtained, the Prime Minister would have made such of his intention known by express words in the

Prime Minister's letter. And it must be remembered that the Prime Minister's intention can be gathered from the provisions of the Prime Minister's letter only; not from any views of the respondents and not from any advice the third and fourth respondents say they obtained. See *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014) [2016] NAHCMD 80 (17 March 2016).

[26] I have undertaken the foregoing analysis on the Prime Minister's letter to come to the following reasonable and inevitable conclusion: In the absence of express provisions to the contrary in the Prime Minister's letter, applicants' entitlement to the approved revised remuneration inured, as I have said more than once, on 1 December 2009. Thus, the fact that the aforementioned amendment was promulgated on 29 April 2010 (in Government Gazette No. 4471 of 29 April 2010 under Government Notice No. 79) is of no moment as respects the date on which the aforementioned right of applicants inured, being 1 December 2009, ie the critical date.

[27] Mr Kashindi argued that the applicants were not entitled to the approved revised salary structure with effect from 1 December 2009 because, according to counsel, the 'Government Notice of 29 April 2014 did not provide for a retrospective implementation date and/or retrospective payment of staff members from the 1 December 2014'. Counsel's argument, is with respect, as meaningless as it is meritless. The Government Notice could not have provided for any such thing. Why should the Government Notice do any such thing? As I have said *ad nauseam*, the Prime Minister's letter is as clear as day as to when the applicants' right to the approved revised salary structure inured, and the Prime Minister did not subject the inurement of the right to the date on which the amendment was promulgated or the date on which Treasury approval was obtained, as I have said more than once.

[28] Indeed, Mr Kashindi's argument can be a *reductio ad absurdum* in this way. If, for example, the amendment was promulgated 10 years from 25 January 2010, ie on 24 January 2020, applicants' right to the approved revised salary structure would, as far as Mr Kashindi is concerned, inure on 24 January 2020; forget about the 'with

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effect from 1 December 2009' provision in the Prime Minister's letter. Mr Kashindi's contention is not supported by the clear words and wording of the letter and the Prime Minister's intention expressed so clearly in that letter. I conclude therefore that Mr Kashindi's argument has no merit in law or logic and it flies in the teeth of accepted practice in the Public Service. Consequently, I reject it. It has no merit – none at all.

[29] Based on the aforegoing reasoning and conclusions on the examination of the Prime Minister's letter, I accept Mr Rukoro's submission that the Prime Minister acted lawfully in terms of the Public Service Act when he approved the revised salary package with retrospective effect; and what is more, as I have said previously, the Prime Minister did not act out of character in terms of accepted practice in the Public Service, as I have demonstrated.

[30] Consequently, I find that the respondents had no power in law to make, and continue to make, the deductions. Their action is *ultra vires* and unlawful. They took and continue to take away the applicants' right to the salaries paid to them. In making the deductions, the third and fourth respondents may have acted to the best of their judgment based on the wrong advice they say they received, but I think they have made a mistake: their action, as I say, is ultra vires and unlawful. Accordingly, the right thing to do is to grant the declaratory order sought. Thus, the applicants have established a right which the court should protect by declaratory order in terms of s 16 of the High Court Act 16 of 1990, and *a priori*, the interdict and direction sought. In sum, the application succeeds to the event set out in the order.

[31] In the result, I make the following order:

(a) The deductions made from the salaries of applicants are declared unlawful and null and void.

(b) Respondents are interdicted and restrained from making any or further deductions from the salaries of the applicants.

(c) The respondents must, on or before 17 June 2016, pay back to each applicant any monies unlawfully deducted from his or her salary.

(d) The respondents, one paying, the other to be absolved, shall pay the applicants' costs.

C Parker

Acting Judge

APPEARANCES

APPLICANTS:	S Rukoro Instructed by Tjituri Law Chambers, Windhoek
RESPONDENTS:	M S Kashindi Instructed by Government Attorney, Windhoek