REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 290/2015

In the matter between:

NAMIBIA FARM WORKERS UNION (NAFWU) **APPLICANT**

And

ALFRED ANGULA **FIRST RESPONDENT**
ASSER HENDRIKS **SECOND RESPONDENT**
ENGLING, STRITTER AND PARTNERS **THIRD RESPONDENT**
ZUREUKA ZIONEZZA MAJIEDT **FOURTH RESPONDENT**

Neutral citation: *Namibia Farm Workers Union (NAFWU) v Angula* (A 290-2015) [2016] NAHCMD 252 (8 September 2016)

Coram: PARKER AJ
Heard: **21 June 2016**
Delivered: **8 September 2016**

Flynote: Practice – Applications and motions – Locus standi – Minimum requirement for deponent of founding affidavit to establish authority to institute motion proceedings – In challenging the authority so established respondent must adduce cogent and convincing evidence that deponent has no authority – In instant case deponent clearly establishing his authority supported by resolution by applicant trade union – Court held that deponent satisfied the minimum evidence requirement

and requirement that deponent must establish his or her authority in founding affidavit – Court found respondents' challenge to authority unconvincing and weak – Consequently, challenge to deponent's authority to institute the motion proceedings rejected. Principles in *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 (HC); and *Pinkster Gemeente van Namibia v Navolgers van Christus Kerk van SA and Another* 1998 NR 50 (HC) applied.

Summary: Practice – Applications and motions – Locus standi – Minimum requirement for deponent of founding affidavit to establish authority to institute motion proceedings – In challenging the authority so established respondent must adduce cogent and convincing evidence that deponent has no authority – Deponent established his authority to institute the motion proceedings on behalf of applicant trade union in the founding affidavit – Deponent stating who he was, being General Secretary of applicant union, and exhibiting a resolution of applicant, granting him such authority – Court found that respondents have not placed convincing and cogent evidence before the court challenging deponent's averments on his authority – Accordingly, court found respondents' challenge weak – Consequently, court rejected the challenge of lack of standing of deponent to founding affidavit.

Flynote: Practice – Applications and motions – Rescission – Judgments and orders – Application in terms of rule 103(1)*(a)* of the rules of court – Order sought and obtained in motion court – But motion court is for the hearing of unopposed matters – Matter moved in motion court as if it was instituted ex parte – But applicant was cited as defendant but was not served with papers or heard – Court held that it is an essential principle of our law that the court should not make an order that may prejudice the rights of a person who has not been cited as a party to the proceedings, or who has been cited as a party but has not been served with process and has not been heard – In such a case the order will be *brutum fulmen* – Accordingly court held that the 24 July 2015 order sought and granted in the motion court in the absence of applicant is *brutum fulmen* and so erroneously sought and

erroneously granted – Consequently, application for rescission of the 24 July 2015 order granted with costs.

Summary: Applications and motions – Rescission – Judgments and orders – Application in terms of rule 103(1)*(a)* of the rules of court – Order sought and obtained in motion court – But motion court is for the hearing of unopposed matters – Application moved in motion court as if it was instituted ex parte – And applicant was cited as defendant but was not served with papers or heard – Counsel for first respondent brought application to make a settlement agreement an order of court in the motion court – Application was granted in the absence of applicant trade union – Applicant is a registered trade union and first respondent was its General Secretary until the latter part of 2012 – The settlement agreement was allegedly entered into to settle certain dispute between first respondent and applicant – Court found that the applicant who is to cooperate in carrying out the order was cited but not served with papers and not heard – Court found that on the facts of the case, particularly the long-standing bitter rivalries among office bearers within the first applicant and numerous instances of accusations and counter accusations of improper conduct on the part of certain office bearers, that ought to have prompted counsel not to bring the application to make the settlement agreement order of court in the motion court – Counsel ought to have known there are substantial and material dispute of fact in the case – Accordingly, court concluded the 24 July 2015 order was erroneously sought and erroneously granted in the absence of applicant – Consequently, rescission application granted.

ORDER

(a) The order of the court, dated 24 July 2015, under Case No. A 178/2015 is rescinded and set aside.

(b) The application for declaratory order in para 2 of the amended notice of motion is dismissed.

(c) The parties are to pay their own costs.

JUDGMENT

PARKER AJ:

[1] This is an application instituted by the applicant, a trade union, whereby the applicant applies for the rescission of an order granted by the court in an application brought ex parte in the motion court. The applicant contends that the order was 'erroneously sought or erroneously granted' on 24 July 2015 in the absence of the applicant under Case No. A 178/2015, within the meaning of rule 103(1)*(a)* of the rules of court. The applicant has also applied for a declaratory order that the agreement between applicant and first respondent, dated 14 June 2015, is invalid. The respondents have moved to reject the application, and have raised points *in limine*. The third and fourth respondents, too, have moved to reject the application inasmuch as the applicant seeks costs against third and fourth respondents, together with first and second respondents. I proceed to consider the points *in limine* first.

First Point *in limine*: Locus standi

[2] This point *in limine* challenges the locus standi of Rocco Nguvauva, who describes himself as the General Secretary of the applicant. Annexed to the founding affidavit deposed to by Nguvauva is a Resolution signed on 13 August 2015 by the President, Vice-President, Treasurer, Deputy Treasurer, National Secretary, Deputy

National Secretary, General Secretary and Deputy General Secretary of the applicant. The first and second respondents contend that the resolution is invalid on the ground that 'the signatories thereto lack the necessary legal competence to do so'.

[3] As I see it, the resolution is on the headed paper of the first applicant and is signed by eight office-bearers of the applicant, as mentioned previously. I have no good reason to reject the resolution as being properly settled and signed. The applicant has made out a case for his authority to institute the proceedings in the founding affidavit as required by the rules of practice. See *Pinkster Gemeente van Namibia (Previously SWA) v Novolgers van Christus Kerk van SA and Another* 1998 NR 50 (HC). Regarding the question of *locus standi*, it was said in *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 (HC), paras 52 - 54 –

> '[52] It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger-challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1190E-G:
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> > "In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant. This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts." [Own emphasis added and footnotes omitted.]

'[53] It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority: *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J-229A.

'[54] The *Ganes* case Mr Bava relied on states clearly (at 624F-H, para 19):

> "In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit." '

[4] As I have said, in the instant proceedings Nguvauva has alleged that authorisation has been duly granted by a resolution of applicant; and has attached the resolution to his founding affidavit. The resolution is signed by eight office-bearers of the applicant. And I find that the challenge to the averments regarding authorisation is an extremely weak one. For instance, the first and second respondents do not challenge that those who signed the resolution are not such office-bearers of the applicant.

[5] Upon the authorities, I am satisfied that the averments of Nguvauva meet the minimum-evidence requirement (see *Otjozondu*) they also meet the requirement that a case for *locus standi* should be made out in the founding affidavit. (See *Pinkster Gemeente van Namibia (Previously SWA)*. The point *in limine* is accordingly rejected. It has no merit whatsoever. I proceed to consider the second point *in limine*.

Second Point *in limine*: Doctrine of dirty hands

[6] The point is based on the contention that Nguvauva 'is in contempt of court order 4 February 2015, and is thus barred from approaching this Honourable Court under the "doctrine of dirty hands".' The court has not found Nguvauva in contempt of court in respect of the said order upon an application under rule 74 of the rules. Consequently, the second point *in limine*, too, is rejected. I proceed to consider the last point *in limine*.

Third Point *in limine*: Recusal of applicants' attorneys

[7] I do not see any cogent and convincing ground set out in respondents' papers to support this point *in limine*. That being the case, that point *in limine*, too, is rejected. I now pass to consider the relief sought in para 1 of the notice of motion.

Rescission of and setting aside of the court order, dated 24 July 2015 (under Case No. A 178/2015)

[8] I have mentioned previously that the application to make 'the settlement agreement filed on (of) record' an order of court was bought without service of process on the applicant in the motion court. Motion court is for matters that are unopposed; that is when the other party has had notice of the matter but exercises his or her right not to oppose it. See rule 1 of the rules of court.

[9] In the instant case, the applicant (defendant in the motion court) is cited as a party but was not served with process, and yet applicant is expected to obey and implement the order. The short point is that the 24 July 2015 order is *brutum fulmen*. It must be remembered that it is an essential principle of our law that the court should not make an order that may prejudice the rights of a person who has not been cited as a party in the proceedings in question, or who has been cited as a

party but has not been served with process and has not been heard. (*Ruch v Van As* 1996 NR 345)

[10] Based on these reasons, I conclude that the 24 July 2016 order was clearly erroneously sought and erroneously granted in the absence of the applicant. I, therefore, find that the applicant has made out a case for the grant of the relief sought in para 1 of the amended notice of motion. Accordingly, the 24 July 2015 order (under Case No. A 178/2015) stands to be rescinded and set aside. I proceed to consider the declaratory order sought in para 2 of the amended notice of motion.

Declaring the agreement submitted under Case No. A 178/2015 invalid

[11] On the papers, I decline to exercise my discretion in favour of granting the declaratory order sought in para 2 of the amended notice of motion for these reasons. The matter is replete with substantial material dispute of fact. For example, there is dispute as to whether the persons who signed the settlement agreement were authorised by applicant to sign the agreement on its behalf. There is dispute as to whether Nguvauva is an employee of the applicant or an office-bearer; and in that regard, whether or not the elections during which Nguvauva says he elected as Secretary General were a nullity on the disputed basis that the Congress at which the elections were held was illegal.

[12] In the face of the material genuine dispute of fact, I come to the conclusion that the application for declaratory order cannot properly be decided on the affidavits in the instant proceeding, which, as I have said previously, is under Case No. A 290/2015. Certain facts are gleaned from Case No. A 409/2013 and Case No. A 178/2015, making the dispute of fact in the instant proceeding deeply genuine and material (see rule 67 of the rules of court). What is more; I find that the applicant knew in advance that there will be material dispute of fact, and yet proceeded by way of motion. In such a situation, Levy J in *Mineworkers Union of Namibia v Rössing Uranium Limited* 1991 NR 299, at 302D stated:

'A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs. *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A).'

[13] Based on these reasons, as I say, I decline to grant the relief sought in para 2 of the amended notice of motion. The application there is accordingly dismissed with costs.

[14] It remains to consider costs. The applicant has asked for costs on the scale as between attorney (legal practitioner) and own client. There are only two orders sought, apart from a costs order. The applicant has been successful as respects para 1 of the amended notice of motion and unsuccessful with regard to para 2 of the notice of motion. This is, therefore, a good case where it is fair and just that the parties pay their own costs.

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

(a) The order of the court, dated 24 July 2015, under Case No. A 178/2015 is rescinded and set aside.

(b) The application for declaratory order in para 2 of the amended notice of motion is dismissed.

(c) The parties are to pay their own costs.

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C Parker

Acting Judge

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APPEARANCES

APPLICANT: E M Angula
Of AngulaCo. Inc., Windhoek

FIRST AND SECOND
RESPONDENTS: F Bangamwabo
Of Clement Daniels Attorneys, Windhoek

THIRD AND FOURTH
RESPONDENTS: E M Schimming-Chase
Instructed by Theunissen, Louw & Partners, Windhoek