

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2017/00336

In the matter between:

JOHANNA NDEMUWEDA

APPLICANT

and

**THE GOVERNMENT OF THE REPUBLIC
OF NAMIBIA (MINISTER OF HEALTH & SOCIAL SERVICES)**

RESPONDENT

Neutral citation: *Ndemuweda v The Government of the Republic of Namibia (Minister of Health and Social Services)* (HC-MD-CIV-MOT-GEN-2017/00336)
[2018] NAHCMD 67 (23 March 2018)

Coram: UEITELE J

Heard: 17 November 2017

Delivered: 23 March 2018

Flynote: Constitution of the Republic of Namibia – Organs of State – Such not to interfere with the operational functions of the other – Expectations on other branches of State to comply with orders made by a court of law – Non-compliances therewith to put the constitutional mandate of the courts into disrepute.

Summary: The plaintiff instituted action against the Government of the Republic of Namibia represented by the Ministry of Health and Social Service as defendant. The ministry as the defendant, opposed the action instituted by the plaintiff. The matter was referred to Court connected mediation in which a settlement agreement was reached. Pursuant to the settlement agreement, this court on 3 October 2016 issued an order making the settlement agreement between the plaintiff and the Ministry as defendant an order of Court.

In terms of that order the Ministry was ordered to pay to the plaintiff an amount of N\$400 000 plus interest calculated at the rate of 20% per annum. The money had to be paid within a period of one hundred and twenty days from the date that the settlement agreement was signed. The settlement agreement between the parties was signed on 28 September 2016, meaning that payment to the plaintiff had to be effected by the latest on 31 January 2017.

At the end of March 2017, the plaintiff enquired with the Government Attorney's office as to payment that had to be made to it by the defendant, to which the Government Attorney's office responded that a letter was sent to the defendant awaiting instructions. The plaintiff then again enquired with the Government Attorney's office via letter regarding payment that was due as per the court order on 15 May 2017, to which, up until 18 September 2017 when this application was launched, no response was made by.

On 15 May 2017, the plaintiff's legal practitioners addressed a follow up letter to the Government Attorney enquiring about the payment that was due in terms of the court order. The letter written on behalf of the plaintiff on 15 May 2017 has, up until 18 September 2017 when the plaintiff brought this application, not been responded to.

During court proceedings, the Permanent Secretary as the accounting officer in the Ministry, came to Court to explain why the payment due as per court order was delayed for more than eleven months after the due date. The Permanent Secretary testified that the Ministry of Finance informed him that it did not have the funds to make that payment and instructed the Ministry to identify a budget vote from its Ministry's budget from which

the payment would be effected. The Permanent Secretary further testified that because of the precarious financial position of Government, the Ministry of Finance jettisoned the traditional approach of transferring the entire amount of money budgeted in respect of a financial year to a Government Ministry and was now only releasing money on a monthly basis and the moneys so being released was also not the entire funds requested by a Ministry but it depended on the cash flow situation of the Ministry of Finance. The money that would be released by the Ministry of Finance to the Ministry would barely be adequate to fund the operational activities of the Ministry and the Ministry would, despite the will to pay the plaintiff always be left short of funds to meet its financial commitments.

As a result, the Permanent Secretary undertook to divert funds from the funds that he will receive in respect of the month of November 2017 so that he can comply with the Court order of 3 October 2016. He made an undertaking that the Ministry will pay the amount of N\$ 400 000 by the end of November 2017.

Held that The Constitution explicitly enjoins organs of State to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

Held further that in order to ensure that the courts' authority is effective, an order of court binding on 'all persons to whom and organs of State' to which it applies must be fulfilled.

Held further that a person who unlawfully and intentionally disobeys a court order that person commits the offence of contempt of court and that the essence of the offence of contempt of court lies in the violation of the dignity, repute or authority of the court.

Held further that the explanation of the Permanent Secretary clearly indicates that 'deliberate and *mala fide*' are absent in the disobedience of the Court order of 3 October 2016 and that he has shown good cause, however, due to the constitutional functions carried by State organs, a constitutional crises will develop if court orders are not heeded and honoured.

Held further held it is recommend to the Minister of Finance that he investigate means on how the State's obligation to pay monetary awards emanating from Court orders can be funded from sources other than the operational budgets of the Ministries.

ORDER

1 The Permanent Secretary's undertaking to pay the amount of N\$ 400 000 to MS Johanna Ndemuweda by not later than 30 November 2017 is noted and he must so pay the amount.

2 The Permanent Secretary's undertaking to pay the interest at the rate of 20% per annum on the amount of N\$ 400 000 which interest must be calculated from 28 January 2017 to the date of final (both days included) to MS Johanna Ndemuweda by not later than 31 December 2017 is noted and he must so pay the interest.

3 The registrar must bring this judgment to the attention of the attention of the Minister of Finance and the Attorney General.

4 No order as to costs.

5 The matter is finalized and is removed from the roll.

JUDGMENT

Ueitele J:

Introduction and Background

[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon the respect for the dignity and authority of the courts. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, act as guardians of the Constitution, asserting their authority in the public interest. This case deals with one of the foundational principles of this Nation.

[3] The applicant in this matter is a certain Ms Johanna Ndemuweda who, on 3 February 2016, as plaintiff (I will, in this judgment, refer to her as the plaintiff), instituted action against the Government of the Republic of Namibia represented by the Ministry of Health and Social Service as defendant (I will, in this judgment, refer to the defendant as the Ministry). The Ministry defended the action instituted by the plaintiff. The matter was referred to Court connected mediation and was settled at the mediation proceedings. Pursuant to the settlement agreement this Court, on 3 October 2016, issued an order making the settlement agreement between the plaintiff and the Ministry an order of Court.

[4] In terms of that order the Ministry was ordered to pay to the plaintiff an amount of N\$400 000 plus interest calculated at the rate of 20% per annum. The money had to be paid within a period of one hundred and twenty days from the date that the settlement agreement was signed. The settlement agreement between the parties was signed on 28

September 2016, this means that the payment to the plaintiff had to be effected by the latest on 31 January 2017.

[5] When, by the end of March 2017, the plaintiff had not yet received the payment due to her, her legal practitioner addressed, on 10 April 2017, a letter to the Ministry's legal practitioners (the Government Attorney's office) enquiring as to when the plaintiff can expect payment. The Government Attorney responded by an electronic mail stating that they have forwarded the letter written on behalf of the plaintiff to the Ministry and that they are awaiting instructions from the Ministry. By the end of April 2017 the Government Attorney had still not responded to the plaintiff's legal practitioners. The plaintiff's legal practitioner, on 15 May 2017, addressed a follow-up letter to the Government Attorney enquiring about the payment that was due in terms of the court order. The letter written on behalf of the plaintiff on 15 May 2017 has, up until 18 September 2017 when the plaintiff brought this application, not been responded to.

[6] Frustrated by the silence and inaction of the Ministry the plaintiff on 18 September 2017 launched this application in terms of which she sought an order in the following terms:

- '1. The defendants pay the plaintiff the sum of N\$400 000-00 plus interest at the rate of 20% per annum from 28 September 2016 to date of final payment within seven (7) days of this order of court;
2. Should the defendants fail to pay as contemplated in subparagraph (1) that this court orders the deputy-sheriff of the district of Windhoek to execute this court order and raise enough funds to satisfy the plaintiff's debt and all other costs incurred as a result of the execution;
3. Further and or alternative relief as deemed fit by the court.'

[7] The Ministry did not oppose the application and the matter was placed before me on the First Residual Court Roll (that is, the first unopposed motion court roll) of 27 October 2017. When the matter was called I raised the question whether it was competent

for the Court to grant the orders sought, because there is already a court order (the order of 3 October 2016) directing the Ministry to pay to the plaintiff the amount of N\$400 000 plus interest. Secondly the Crown Liability Ordinance, 1910 in clear terms provides that assets of the State may not be attached for purposes of execution. Ms Zenda who appeared on behalf of the plaintiff in the unopposed motion court conceded that the court could not make the orders sought in the notice of motion.

[8] I have indicated above that courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. I furthermore indicated that by doing so, courts are not only giving effect to the rights of the successful litigant but are more importantly, acting as guardians of the Constitution, asserting their authority in the public interest. For this reason I, of my own accord, issued an order in the following terms:

'1 The Permanent Secretary of the Ministry of Health and Social Services must, not later than 10 November 2017, pay out the amount owed to the Applicant.

2 Failure to which, they must come to court on the 17 November 2017 at 10:00, to show cause why they are not adhering to an order of court.'

[9] The Permanent Secretary as the accounting officer in the Ministry did not pay to the plaintiff the amount due to her, but came to Court to explain why he had not paid the money.

The explanation by the Permanent Secretary

[10] At the hearing on 17 November 2017 the Permanent Secretary in the Ministry of Health and Social Services testified that, on 10 October 2016 he received an urgent memorandum from the Government Attorney, in which he was advised of the settlement agreement between the plaintiff and the Ministry and also that the Government had to pay an amount of N\$ 400 000 to the plaintiff. He testified that upon receipt of that memorandum he immediately and in writing instructed the legal department, specifically a certain Mr Siseho, of the Ministry to prepare a submission to the Ministry of Finance in

which submission the legal department had to requests funds from the Ministry of Finance to pay the plaintiff as per the Court Order. He further testified that after giving the instructions he never followed to establish whether the instructions were executed.

[11] Somewhere during the course of October 2017 it was brought to his attention that the instructions which he gave on 10 October 2016 were only executed on 19 September 2017, that is, approximately eleven months after they were given, and a day after this application was launched.

[12] The Permanent Secretary testified further that the Ministry of Finance responded to the request to pay the plaintiff by stating that it did not have the funds to make that payment and instructed the Ministry to identify a budget vote from its Ministry's operational budget from which the payment would be effected. The Permanent Secretary continued to testify that since they had not made any budgetary provisions in the financial estimates for the 2017/2018 budget for payment of damages, the Ministry had no budgetary vote from which to allocate or source the money.

[13] The Permanent Secretary further testified that because of the precarious financial position of Government, the Ministry of Finance jettisoned the traditional approach of transferring the entire amount of money budgeted in respect of a financial year to a Government Ministry and was now only releasing money on a monthly basis and the moneys so being released was also not the entire funds requested by a Ministry but it depended on the cash flow situation of the Ministry of Finance. The money that would be released by the Ministry of Finance to the Ministry would barely be adequate to fund the operational activities of the Ministry and the Ministry would, despite the will to pay the plaintiff always be left short of funds to meet its financial commitments.

[14] Despite the financial gloomy picture of the Ministry painted by the Permanent Secretary, he (the Permanent Secretary) undertook to divert funds from the funds that he will receive in respect of the month of November 2017 so that he can comply with the Court order of 3 October 2016. He made an undertaking that the Ministry will pay the amount of N\$400 000 by the end of November 2017. It is against this backdrop that I must

now determine whether the Permanent Secretary has, in his explanation shown good cause to avoid this Court's sanctions.

Has the Permanent Secretary shown good cause?

[15] I wish to start off my evaluation with the following brief comments. The Constitution declares its own supremacy and this supremacy pervades all law.¹ Article 78 of the Constitution vouchsafes judicial authority. It provides that the judicial power of Namibia is vested in the Courts of Namibia and that no person or organ of State may interfere with the functioning of the courts. The Constitution explicitly enjoins organs of State to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.² In order to ensure that the courts' authority is effective, an order of court is binding on 'all persons to whom and organs of State' to which it applies and must be fulfilled.

[16] Where the orders of a court are disregarded with impunity such a situation will undermine and erode the foundational basis of our Republic and will inevitably, lead to a situation of constitutional crisis. It thus follows that any action or inaction that displays disregard for judicial orders must be swiftly dealt with.

[17] When a person unlawfully and intentionally disobeys a court order that person commits the offence of contempt of court.³ The essence of the offence of contempt of court lies in the violation of the dignity, repute or authority of the court.⁴ In the matter of *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*⁵ Justice Sachs remarked that the institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with

¹ Article 1(1) & (5) of the Constitution provides that:

'(1) The Republic of Namibia is hereby established as a, sovereign, secular democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all .

(2) ...

(5) This Constitution shall be the Supreme Law of Namibia.'

² Article 78(3).

³ *S v Beyers* 1968 (3) SA 70 (A).

⁴ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

⁵ 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382) in para [61],

contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.

[18] In the *Fakkie NO*⁶ Justice Cameron stated that the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. He said:

'...A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).'

[19] In the present matter the Permanent Secretary in the Ministry has come to Court and explained the financial difficulties which the Ministry faces. From the explanation of the Permanent Secretary it is quite clear that the charge of 'deliberate and *mala fide*' are absent in the disobedience of the Court order of 3 October 2016. Accordingly I am satisfied that the Permanent Secretary in the Ministry of Health has shown good cause.

[20] This is however not the end of the matter. This case is good example of the Constitutional crises we may find ourselves in if Court orders are not heeded and honoured by State organs. It is for that reason that I find it appropriate to strongly urge the Minister of Finance to investigate means on how the State's obligation to pay monetary awards emanating from Court orders can be funded from sources other than operational budgets of the Ministries. I further direct that the Registrar of this Court brings this judgment to the attention of the Honourable Minister of Finance and the Honourable Attorney General.

[21] In the result I make the following order:

⁶ Supra footnote 4.

- 1 The Permanent Secretary's undertaking to pay the amount of N\$ 400 000 to MS Johanna Ndemuweda by not later than 30 November 2017 is noted and he must so pay the amount.
- 2 The Permanent Secretary's undertaking to pay the interest at the rate of 20% per annum on the amount of N\$ 400 000 which interest must be calculated from 28 January 2017 to the date of final (both days included) to MS Johanna Ndemuweda by not later than 31 December 2017 is noted and he must so pay the interest.
- 3 The registrar must bring this judgment to the attention of the Honourable Minister of Finance and the Honourable Attorney General.
- 4 No order as to costs.
- 5 The matter is finalized and is removed from the roll.

SFI Ueitele
Judge

APPEARANCES:

APPLICANTS

C Van Wyk

Of Legal Assistance Centre, Windhoek

RESPONDENTS

N Khupe

Of Government Attorney, Windhoek