

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

PRACTICE DIRECTIVE 61

Case Title: Petronella Boois v Isak Matroos	Case No: HC-MD-CIV-MOT-GEN - 2022/00016
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: Honourable Lady Justice Tommasi, Judge	Date of hearing: 9 August 2022
	Date of order: 25 August 2022 Reasons delivered on: 25 August 2022
Neutral citation: <i>Boois v Matroos</i> (HC-MD-CIV-MOT-GEN -2022/00016) [2022] NAHCMD 436 (25 August 2022)	
Results on merits:	
IT IS HEREBY ORDERED THAT: 1. The respondent's points <i>in limine</i> are dismissed. 2. The application for leave to appeal is refused. 3. The court makes no order as to costs. 4. The matter is removed from the roll and considered as finalised.	
Reasons for orders:	

Introduction and Background:

[1] This court initially issued an order which *inter alia* interdicted and restrained the first respondent from interfering with, and/or withholding his consent to authorize payments due and required to be paid out of the second applicant, a Close Corporation, conducting business in terms of the fulfilment of its obligations as a subcontractor in a project under tender.

[2] The first respondent approached this court for an order to stay the execution of the initial order. This court granted an order to stay the execution of this court's order dated 11 January 2022, made under Case Number: HC-MD-CIV-MOT-GEN-2022/00002 pending the adjudication and determination of the application for rescission of this court's initial order granted to the applicant.

[3] The applicant, in response to the court's order to stay execution of the first order, filed a notice for leave to appeal. This application is opposed.

[4] The first respondent raised two points *in limine*, namely that there has been non-compliance with rule 115 (2) read with rule 65 of the High Court Rules and that the order to stay execution is not an appealable order.

First point *in limine*

[5] The applicant herein filed a notice which incorporates her ground of appeal. In *Hollard Insurance Company of Namibia v Minister of Finance* (HC-MD-CIV-MOT-REV-2018/00127[2020] NACMD 247 (24 June 2020), Geier J, at para 8 stated the following:

'In this regard it is also clear that not all applications have to be brought 'on notice of motion supported by an affidavit and that an applicant can also be brought 'on notice', in an appropriate case, for as long as it is accompanied by the grounds on which the application is based.'

I agree with this view and I am not persuaded to uphold this point *in limine*.

[6] The second point *in limine* raised is that the order is not appealable on the ground

that it is not definitive of the rights of the parties i.e. that it does not grant definite and distinct relief; and in terms of section 18(3) of the High Court Act 16 of 1990. Section 18(3) reads as follows:

'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

[7] The applicant's sole ground of appeal is that the court order is null and void i.e. invalid. In *Minister of Finance and Another v Hollard Insurance Company of Namibia Limited and Others* 2019 (3) NR 605 (SC), the court held that if an order of a court was incompetent it was *fortiori* appealable even if it was only interim and did not finally determine the rights of the parties, that allowing an incompetent order to stand, offended the rule of law and legality and that the real debate about appealability concerned competent orders granted by the High Court.

In light of this decision the second point *in limine* is also dismissed.

The appeal on merits

[8] The applicant herein (respondent in the application for a stay) raised the following issues in her notice of application for leave to appeal:

(a) At the hearing she raised a point *in limine* that Advocate Muhongo lacks the necessary authority to file the note of submissions of the respondent herein (applicant in the application to stay) and to appear on behalf of the respondent at the hearing.

(b) The court enquired whether same was filed on e-justice. She explained that she came from Keetmanshoop where she does not have access to e-justice and she arrived late on 31 January 2022. She only became aware of the fact that Advocate Muhongo will be appearing from the draft order filed on 1 February 2022.

(c) The presiding judge refused to entertain the point *in limine* when she raised it on 1

February 2022 at the hearing despite her explaining her failure.

[9] She maintained that the court erred in the following respects:

- (a) Failing to hear applicant's point *in limine* that Advocate Muhongo lacks the necessary authority to prepare applicant's note on submissions and to appear on behalf of the applicant at the hearing;
- (b) On 7 September 1995 the Legal Practitioner's Act 15 of 1995 came into operation and put to rest the fact that the two professions were fused and the Admission of Advocate Act 74 of 1964 was repealed (Citing *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC)).
- (c) The respondent herein instructed and/or authorized Jenny Vermeulen of Law Firm Ellis Shilungudwa Inc as his legal practitioner in this matter.
- (d) There is no documentary evidence that the applicant instructed or authorized Jenny Vermeulen to instruct or authorize Advocate Muhongo to represent, file note on submissions and to appear on behalf of the applicant (respondent herein).
- (e) The lack of authority thus renders the ruling null and void, of no legal effect.

[10] The applicant submits that it is crystal clear that the profession of Advocate is not recognized and he is unauthorized. She submits that there are reasonable prospects of another court coming to a different conclusion and that the court under the circumstances is bound as a matter of duty, to grant leave to appeal.

[11] The respondent's counsel, Mr Liebenberg submitted that the respondent gave instructions for Advocate Muhongo to be appointed and the High Court Rules do not require the respondent to file a power of attorney or any proof of any authority to act on behalf of a client.

[12] The question to consider is, whether there is a reasonable prospect that the

Judges of Appeal will take a different view.

[13] The first ground raised is the failure by the court to hear the point *in limine* raised by the respondent herein. The respondent herein filed submissions on 31 January 2022 and it was clear from this document that Advocate Muhongo was instructed counsel for the respondent. The applicant herein or someone on her behalf, filed her notes of argument minutes before this on 31 January 2022. The applicant, however, chose not to give notice of the point *in limine*, but waited for the morning of 2 February 2022 to spring the surprise on the respondent. Her explanation in this regard is less than candid and the court cannot permit litigation by ambush, even if the applicant appears in person. The applicant furthermore had not been able to state the facts on which she averred that Advocate Muhongo was not authorised and had no right of appearance before the court.

[14] There is no legal requirement for an applicant to file a power of attorney and it cannot be said that the legal practitioner who appeared on behalf of the applicant (respondent herein) was unauthorised.

[15] It is indeed so that the Legal Practitioner's Act 15 of 1995 fused the professions of advocates and attorneys. Section 6 of the Act makes provision that both advocates and attorneys enrolled before the commencement of the Act must now be enrolled as legal practitioners and section 4 and 5 makes provision for the enrolment of legal practitioners after the commencement of the Act. It is not contended that Advocate Muhongo has not been properly enrolled as a legal practitioner. As such, he has audience to appear before the court. In *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC), paragraph 14, Maritz JA succinctly states the de facto position as follows:

'Exemption from holding a fidelity fund certificate may be granted to practitioners who practise for gain on their own account but who do not, in the conduct thereof, accept, receive or hold moneys for or on account of any other person - much as advocates have practised prior to the promulgation of the Act. Hence, although the legal professions have been fused into one, many legal practitioners voluntarily opted to structure the mode of their practices, within the permissible ambit of the Act, more or less along the same lines as advocates and attorneys have done before.'

There are no facts which would support a finding that Advocate Muhongo had no right of

audience before the court and it is unlikely that an appeal court would come to a different view.

Costs

[16] The applicant partially staved off the points *in limine*. In light hereof the court is not inclined to order the applicant to pay the defendant's costs herein.

[17] In the result the following order is made:

1. The respondent's points *in limine* are dismissed.
2. The application for leave to appeal is refused.
3. The court makes no order as to costs.
4. The matter is removed from the roll and considered as finalised.

Judge's signature	Note to the parties:
Tommasi Judge	Not applicable.
Counsel:	
Applicant	Respondent
. Ms Boois Applicant in person	Mr Liebenberg of Ellis Shilengudwa, Windhoek