

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING**

CASE NO.: HC-MD-CIV-MOT-REV-2022/00148

In the matter between:

SAMUEL MULEMWA AMUKENA

APPLICANT

and

NORED ELECTRICITY (PTY) LTD

RESPONDENT

Neutral Citation: *Amukena v Nored Electricity (Pty) Ltd* (HC-MD-CIV-MOT-REV-2022/00148) [2022] NAHCMD 539 (7 October 2022)

Coram: OOSTHUIZEN J

Heard: 16 September 2022

Delivered: 7 October 2022

ORDER

1. The application is dismissed
2. Costs in the cause are awarded.
3. The matter is finalized and removed from the roll.

RULING

OOSTHUIZEN J:

Introduction

[1] This application was brought by the applicant, Samuel Mulemwa Amukena, on behalf of his son in the following terms:

- '1 Reviewing, Correcting or setting aside the entire decision of the 15th of March 2022, in which it was decided that for the Respondent to grant job attachment to the biological son of the applicant namely Amukena Steven Nyambe must be on condition that he must a registered student at the University, when the respondent is fully aware that Amuken a Steven Nyambe has already completed the 4 years Electrical Engineering Degree, such a decision is unreasonable and should be reviewed and set aside;
- 2 The Court to order the Respondent to unconditionally grant Amukena Steven Nyambe job attachment offer at its Ondangwa Head Office;

- 3 Should the Court on evidence come to the reasonable conclusion that the exclusion for Amukena Steven Nyambe to do job attachment at NORED was based on prohibited and/ or arbitrary grounds such as ethnicity (Tribalism) and/or victimization because of carrying surname Amukena, the Court should order the Respondent to remedy the injustice by absorbing Mr. Amukena Steven Nyambe in its structure on the basis of permanent employment;
- 4 Alternatively, compensation from the date of exclusion of Amukena Steven Nyambe to the date of last retirement date;
- 5 Compensation for the delay that would prevent Mr. Amukena Steven Nyambe graduating in April 2022 as a result of the unfair discrimination based on arbitrary grounds;'

[2] The respondent, NORED Electricity (Pty) Ltd, opposed the application and raised points *in limine* as follows:

'a. Applicant lacks the necessary standing to bring the application on behalf of Amukena Steven Nyambe.

b. The decision Applicant seeks to set aside is not an administrative act and is accordingly not subject to judicial review.'

Background

[3] What has been brought before me is that, the applicant is the biological father of Amukena Steven Nyambe (Nyambe), who has been studying for an Electrical Engineering (Honours) Degree at the University of Namibia. Nyambe completed his studies in December 2021, however, his graduation ceremony was delayed due to him not completing three required industrial attachments for graduation purposes. Nyambe has allegedly been applying to the respondent for job attachment since 2019 to 2021, but has not been successful. Nyambe, then went to report to the applicant that he has been treated unfairly by the respondent, in relation to the job attachment offers.

[4] The applicant further alleged that he conducted an investigation into the matter and came to the conclusion that the people that applied after Nyambe were offered attachment by the respondent, which in the opinion of the applicant is 'unreasonable and unfair'.

[5] The applicant addressed a letter of complaint to the respondent on 21 February 2022, with regards to the alleged exclusion or discrimination that Nyambe suffered. In a letter dated 15 March 2022, the respondent responded to the applicant explaining the process involved in relation to attachment. The applicant is of the view that the respondent is an administrative body established by Act of Parliament and that its conduct was unreasonable and inconsistent with Art 18 of the Namibian Constitution.

Issues

[6] This court is tasked to determine two issues. Firstly, whether the applicant has *locus standi* to bring the application before this court. Secondly, whether the decision by the respondent is reviewable.

Locus standi

[7] The first issue that I will deal with is that of *locus standi*. In terms of common law, a person that brings a matter before court must have a direct and substantial legal interest in the outcome of the matter.¹ In *Namrights Inc v Government of Namibia*,² the court reiterated the requirements of locus standi as stated in *Wood v Ondangwa Tribal Authority*³ as follows:

'(a) the nature of the relationship he or she bears with the persons who are unable to approach the court themselves for relief; and

¹ *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) para 16.

² *Namrights Inc v Government of Namibia* (HC-MD-CIV-MOT-GEN-2019/00243) NAHCMD 538 (6 December 2016) para 13.

³ *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

(b) why such persons are unable to approach the court themselves.’

[8] In instituting the matter, the applicant filed a power of attorney in order for him to act on behalf of Nyambe as his agent. The applicants reasoning for bringing the application on behalf of Nyambe, is because he is the father and the ‘lawful guardian’, whose rights and interest he is protecting. He argues that Nyambe still resides in the parental home, depends on them (parents) financially, that he is an ‘adult major dependent’, a layperson and fears victimization in case he still has to apply to the respondent in the future. The applicant relied on the *Namrights* case where the court stated that ‘applicant has not placed one iota of evidence before the court to explain the nature of the relationship applicant has with the parents or guardians of the girl children and why those parents or guardians are unable to approach the court themselves for relief.’⁴ Based on the above excerpt, he argued that he has satisfied the court that he has the requisite *locus standi* to bring the application as the biological father and legal guardian.

[9] The respondent argued that the applicant has failed to provide any explanation as to why Nyambe could not institute the proceedings on behalf of himself, as it is common cause that Nyambe is a major male who was born during September 1996. That there is no confirmatory affidavit filed on behalf of the Nyambe to confirm and support the allegations made by the applicant.

[10] If I am to apply the *Wood v Ondangwa Traditional Authority* requirements as cited in *Namrights* to the present matter, then it is not disputed that a father and son relationship exists between the applicant and Nyambe. However, in respect of the second requirement the applicant has not provided sufficient reasons as to why Nyambe cannot litigate the matter. Nyambe, as stated above, is a major male and both the applicant and Nyambe are laypersons. It is further not enough for the applicant to allege that Nyambe fears victimization.

⁴ *Namrights Inc v Government of Namibia* (HC-MD-CIV-MOT-GEN-2019/00243) NAHCMD 538 (6 December 2016) para 17.

[11] The applicant has not provided me with a satisfactory reason as to why Nyambe could not institute the application in his own name. I am alive to the fact that the applicant instituted proceedings in his own name under the auspices of a power of attorney, whilst he has not suffered any violation of his rights or his legal entitlements⁵. It follows, therefore, that the applicant has no *locus standi* to approach this court.

Whether the decision amounts to an administrative act which is subject to judicial review

[12] In terms of the second question before me as to whether the reply in the respondent's letter dated 15 March 2022 was an administrative act as provided for in Article 18 of the Namibian Constitution that is subject to judicial review.

[13] Article 18 of the Namibia Constitution provides that:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[14] As mentioned above, the applicant seeks an order from this court to review the alleged decision of the respondent in which the respondent made the following remarks in a letter dated 15 Mach 2022:

'Lastly, should the student still be in need of placement, please do not hesitate to send through his latest job attachment application for possible consideration in our next intake for the period July to December 2022 provided that he is still studying.'

[15] In the answering affidavit deposed to by Fillemon Nakashole, the Chief Executive Officer of the respondent, the respondents indicated that the decision does not amount to an administrative act as provided for in terms of Article 18 of the Namibian

⁵ *Namrights Inc v Government of Namibia* (HC-MD-CIV-MOT-GEN-2019/00243) NAHCMD 538 (6 December 2016) para 16.

Constitution. The respondent's contention is that it is a private company with limited liability, with shareholders and managed by a board of directors. Further, that the respondent supplies electricity to various Northern Regions, but it is not a state-owned enterprise nor a parastatal of the Government of Namibia. The respondent's decision in its letter to refuse or not grant Nyambe attachment is therefore a commercial one and not an administrative decision.

[16] In order to determine what constitutes an administrative action I will make reference to *Skorpion Mining Company (Pty) Ltd v Road Fund Administration*⁶ in which Masuku J stated as follows:

[48] In *Transworld Cargo (Pty) Ltd v Air Namibia and Others*¹⁴ Ziyambi AJA, stated that the test for determining whether conduct under enquiry constitutes 'administrative action' is not whether the action in question is performed by a member of the executive organ of State. In this regard, the question is whether the task itself is administrative or not and this depends on the nature of the power exercised. The court proceeded to say that a number of considerations may influence the decision whether the act complained of is administrative or not, and these include the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters and on the other, to the implementation of legislation.

[49] Regarding whether the defendant performs a public function, the following array of factors may be decisive, namely, the identity and the legal nature of the entity; the source of the power in question i.e. whether it flows from legislation, the constitution or a contractual instrument. Another factor may be what is called the financial test, namely, what the financial source for the entity is, i.e. is it funded by public taxes or it is entirely privately funded? A further test may be its institutional make-up i.e. whether it is an institution of government. The last is what is referred to as the 'functions test', which considers the actual nature of the function under review.'

[17] I am of the considered view that in light of the abovementioned test, the respondent's conduct was not administrative as it was not exercising a public duty. As stated above, the respondent is a private company and operates as such. There is

⁶ *Skorpion Mining Company (Pty) Ltd v Road Fund Administration* (I 2063-2014) [2016] NAHCMD 201 (12 July 2016) para 48 and 49.

nothing placed before me that indicates that the respondent's decision arises from any statutory provision, nor that it relates to the exercise of any statutory power.

[18] I am therefore of the considered view that such decision is not susceptible to review in terms of Article 18 of the Namibian Constitution or the common law.

Conclusion

[19] In light of the above-mentioned, the points *in limine* are upheld which results in the finalization of the entire application.

[20] The court will impose the general rule regarding costs, costs are granted in favour of the respondent.

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

1. The application is dismissed.
2. Costs in the cause are awarded.
3. The matter is finalized and removed from the roll.

GH OOSTHUIZEN

Judge

APPEARANCES:

APPLICANT: S M Amukena
Applicant in person

RESPONDENT: J Greyling
Of Greyling and Associates, Oshakati