

## REPUBLIC OF NAMIBIA



## HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

## RULING

CASE NO: HC-MD-CIV-ACT-CON-2019/00375

In the matter between:

UNIVERSITY OF NAMIBIA

PLAINTIFF

and

ERWIN NAMWIRA MPASI KATEWA

DEFENDANT

**Neutral Citation:** *University of Namibia v Katewa* (HC-MD-CIV-ACT-CON-2019/00375) [2022] NAHCMD 563 (18 October 2022)

**Coram:** CHRISTIAAN, AJ

**Heard:** 27 September 2022

**Delivered:** 18 October 2022

**Flynote:** Rules of practice - Rule 59 (9) - Amendment of pleadings discussed – Authority to institute proceedings rehearsed - Deponent failed to state that he was duly authorised to institute the proceedings – Proceedings not properly authorised.

**Summary:** This is an interlocutory application brought by the plaintiff, seeking leave to amend its particulars of claim. The amendment was opposed by the defendant.

During arguments, the defendant raised three preliminary points, to be dealt with by this court. This court considered the authority of deponent to lodge application to amend on behalf of the plaintiff to be the first point of departure.

In *casu*, the deponent to the application to amend failed to state that he was duly authorised to institute the proceedings on behalf of the plaintiff, the University of Namibia. The issue of authority was not addressed at all in the founding affidavit and he could not, in reply, place proof of the authority as no authority whatsoever, was alleged.

*Held that:* in motion proceedings, the applicant has the onus of proofing that he or she is authorised to institute proceedings. The institution of the particular proceedings must be authorised.

*Held further that:* a distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party and those matters where absolutely no averments are made regarding authority.

*Held further that:* where absolutely no averments are made regarding authority, the only conclusion that may be reached is that the proceedings are not properly authorised.

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## ORDER

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1. The point *in limine* that the deponent to the founding affidavit lacks the authority to institute the application is upheld and therefor the application for leave to amend is struck from the roll.
2. Cost of this application is awarded to the defendant, of which costs are limited in terms of the provisions of Rule 32(11).
3. The parties are ordered to file a joint status report on the further conduct of the matter by no later than 27 October 2022.

4. The case is postponed to 02 November 2022 for a Status Hearing.

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## JUDGMENT

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CHRISTIAAN, AJ

### Introduction

[1] This is an interlocutory application brought by the plaintiff, seeking leave to amend its particulars of claim.

[2] This application is opposed by the defendant.

### Background

#### *The claim*

[3] The plaintiff instituted civil action against the defendant. In its particulars of claim, the plaintiff alleges, inter alia, that:

‘8.1. On or about 19 March 2012, Unam, represented by Osmund Mwandemele, the PVC: Academic Affairs, as Acting Chairperson: Staff Development Committee and Mr. Katewa, acting in his personal capacity, entered into a written agreement, which was signed by Arendt Joubert on behalf of the PVC: Academic Affairs and Research.

8.2. The material terms of the agreement are that:

8.2.1. The defendant would pursue further studies to obtain a higher qualification of PHD at the University of Stellenbosch for a period of 4 years as from 19 March 2012 to 31 December 2015, on a full-time basis.

8.2.2. Plaintiff would retain the employment position of the defendant as a Lecturer until the defendant completes his studies.

8.2.3. Plaintiff would remunerate 100% salary to the defendant during the first year (2012), 75% during the second year (2013) and 50% salary for the third year (2014) and onwards until the completion of the defendant's study programme.

8.2.4. Plaintiff undertook not to alter other fringe benefits of the defendant during the study period.

8.2.5. In return, and upon successful completion of the defendant's studies, the defendant would work for the Plaintiff for a period equivalent to the duration of study leave granted to him.

8.2.6. In case of failure to return and work for the Plaintiff after successful completion of his fellowship, the defendant would be liable to repay all the financial support, inclusive of salary with benefits received from Plaintiff during the of fellowship. Alternatively, a status holder who resigns before serving the employer for a period equal to that of his or her fellowship shall also be liable for repayment to Plaintiff under the agreement.

8.3. Plaintiff complied with all terms of the aforesaid agreement by:

8.3.1. Authorizing study Staff Development leave for the defendant.

8.3.2. Retaining the employment position of the defendant for the duration of his studies.

8.3.3. Making available funds for study related expenses required for the study of the defendant.

8.3.4. Remunerating the defendant, a monthly salary while on Staff Development leave in accordance with paragraph 23.3 above, as well as maintaining all other benefits of the defendant during the study period to the value of N\$2 338 430.89, inclusive of tuition fees.

8.4. On or about 31 March 2016, and before the successful completion of his PhD qualification, the defendant resigned from the plaintiff's employment thereby repudiating the agreement between the parties. In furtherance of his contractual breach, the defendant further failed and/or neglected to repay the plaintiff the financial assistance provided to him during his period of studies at Stellenbosch University.

8.5. As a result of the defendant refusal to comply with his aforesaid contractual obligations, the plaintiff suffered a total loss in the amount of N\$2 338 430.89, calculated as follows:

8.5.1. N\$270 603.80 paid in respect of tuition fees;

8.5.2. N\$2 067 827.09 paid in respect of defendant's salaries from March 2012 to December 2015.<sup>1</sup>

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<sup>1</sup> Paragraph 4-10 of the Particulars of claim

[4] The defendant admitted in his plea that the plaintiff complied with the terms of the aforesaid agreement by authorizing study leave for the defendant, retaining the employment position of the defendant for the duration of his studies and making available all funds for tuition fees required for the study of the defendant.

[5] The defendant avers that the plaintiff remunerated the defendant a monthly salary while on study leave, and maintained some of the benefits inclusive of tuition fees.

[6] The defendant further avers that he was entitled to the remuneration provided to him during the period of 19 March 2012 to 31 March 2015 by virtue of his employment contract.

[7] The defendant further avers that he did not fail or neglect to repay the financial assistance but raised questions on how the amount claimed was arrived at.

#### The amendment

[8] The particulars of claim did not allege that the defendant pursued further studies to obtain a higher qualification of PHD for a period of 4 years as from 19 March 2012 to 31 December 2015, on a full-time basis, at the University of Stellenbosch and North West University.

[9] It is however clear from the plaintiff's particulars of claim that the plaintiff is claiming damages (arising from breach of contract signed on or about 19 March 2012) for the loss suffered in the total amount of N\$2 338 430.89 in respect the financial assistance provided to the defendant during his period of studies for a period from March 2012 to December 2015.

[10] The plaintiff therefore concedes that there is an omission which needs to be rectified, in order to ensure that the real issues between the parties are ventilated before the trial court.

[11] The plaintiff therefore seeks to delete paragraph 9 of the particulars of claim and to substitute the whole paragraph 9 with the following paragraph:

'9. On or about 31 March 2016, and before successful completion of his PHD qualification, the defendant resigned from the plaintiff's employment thereby repudiating the agreement between the parties. In furtherance of his contractual breach, the defendant further failed and/ or neglected to repay the Plaintiff the financial assistance provided to him during period of his studies at Stellenbosch and North- West University'.<sup>2</sup>

[12] The plaintiff states that the amendment is aimed at: (a) correcting an obvious omission and does not change the cause of action; and would further ensure that the real issues between the parties are ventilated; and (c) that the defendant would not suffer any prejudice if the proposed amendments are allowed.

#### The objection to the proposed amendment

[13] The defendant has given notice of objection to the proposed amendments, together with three points *in limine*. In the Notice of Objection defendant has outlined the grounds of objection and they are summarised as follows:

- a) The amendment is sought to be made at an extremely late stage in the matter with the effect of rendering most of the judicial case management steps already taken in the matter useless as the parties will have to redo most of the case management steps already taken.
- b) The plaintiff's intended amendment seeks to introduce a new cause of action insofar as it wants to supplement its case to include North-West University and that if allowed, the plaintiff's intended amendment will introduce a claim that has prescribed.
- c) If allowed therefore, the intended amendment will be massively prejudicial to the Defendant, which prejudice cannot be compensated by an order as to costs.<sup>3</sup>

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<sup>2</sup> Paragraph of the Notice of amendment.

<sup>3</sup> Paragraph 1-4 of the defendant's notice of amendment.

[14] The defendant further highlighted three preliminary points during arguments, to be dealt with by the court. These preliminary points are listed hereunder and will be discussed before the merits of the case before court:

- a) Authority of deponent to lodge application
- b) Failure by the plaintiff to apply for leave to amend within 10 days of the objection being received by the defendant
- c) The plaintiff has not complied with Rule 32(9) and (10)<sup>4</sup>

[15] I will now proceed to deal with the preliminary issues.

#### Preliminary issues

##### *Lack of authority to lodge the application*

[16] Firstly, the defendant challenges the authority of the deponent to the founding affidavit, Mr Matengu, to institute/ lodge the application on behalf of the plaintiff. Mr Matengu is employed by the plaintiff as the Vice-Chancellor.

[17] The deponent to the affidavit in support of the plaintiff's application for leave to amend contains the following allegation:

'2. I am able and duly authorized to depose to this affidavit, the contents of which fall within my personal knowledge, and which are both true and correct unless the contrary is indicated otherwise.'<sup>5</sup>(My emphasis)

[18] No further allegation regarding authority is contained in the affidavit.

[19] The defendant is challenging Mr Matengu's authority to launch the application. Counsel for the defendant argued that no specific authority is required for any person

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<sup>4</sup> Pages 2-6 of the defendant's notes for submissions on the Plaintiff's application for leave to amend its particulars of claim.

<sup>5</sup> Paragraph 2 of the Founding affidavit

who can positively attest to the facts, as they are entitled to depose to an affidavit, whether it is a founding affidavit or any ancillary affidavit.

[20] The defendant further argues that the deponent to the plaintiff's founding affidavit has not made the allegation, nor has he provided any evidence under oath, as required in motion proceedings, to convince the court that he had the requisite authority to launch the application for leave to amend on behalf of the plaintiff.

[21] Counsel for the plaintiff highlighted the principles that is set out by the Judge President in his work entitled *Court Managed Civil Procedure of the High Court of Namibia*<sup>6</sup> and argued that in motion proceedings, the applicant has the onus of proofing that he or she is authorised to institute proceedings. He further argued that issue of lack of authority is raised in answering affidavits and not in heads of argument, in order to give the applicant an opportunity to prove it in reply. It is the institution of the particular proceedings that must be authorised.

[22] It is trite that an applicant must make out his case in the founding affidavit and explicitly state the source of his authority to bring an application on behalf of another person, be it an artificial or a natural person. The deponent must state that he or she had been authorised to bring the application in that representative capacity and if possible produce his source or proof of such authority. Alternatively, the principal must file a confirmatory affidavit confirming such authorisation.<sup>7</sup>

[23] In the case of *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk*,<sup>8</sup> the question as to the proof required of authority to institute legal proceedings on behalf of an artificial person such as a company was fully considered by Watermeyer J, who stated the position as follows<sup>9</sup>:

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<sup>6</sup> (Petrus T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*, 1st ed (2020).

<sup>7</sup> *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020) referring to *Naholo v National Union of Namibia Workers* 2006 (2) NR (659) (HC); *South West Africa National Union v Tjonzongoro and Other* 1985 (1) SA 376 (SWA); *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799; *JB Cooling and Refrigeration CC v Dean Jacques Willems t/a Armature Winding and Other* (A 76/2015 [2016] HAHCMD 8 (20 January 2016); and *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

<sup>8</sup> *Mall (Cape) (Pty) Ltd vs Merino Ko-operasie Bpk*, 1957 (2) SA 347 (D) at 351 D to 352 B.

<sup>9</sup> At Page 351-352 *ibid* at 351-352.



'The court made a distinction between a case where the litigant is a natural person who institute proceedings and where he is doing so on behalf of a juristic person. The Court held that in the case of a natural person, where a notice of motion is complete and regular on the face of it and purports to be signed by an attorney, the court may presume, in the absence of anything that shows that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, that the attorney has been authorised. The court however stated that in the case of an artificial person evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.'(My emphasis)

[24] A distinction must be drawn between matters where authority to launch the application is averred in the founding affidavit and objected to by the opposing party and those matters where absolutely no averments are made regarding authority. In the former instance the principles as set out in *Otjonzondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka & Two Others*<sup>10</sup> applies. In the *Otjonzondjupa Regional Council* matter Muller J (as he then was) sets out the principles as follows:

'(a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorization has been placed before Court;(My emphasis)

- (b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;
- (c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;
- (d) Each case will in any event be considered in respect of its own circumstances; and
- (e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorised person on its behalf.'

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<sup>10</sup> (LC 7/2010) [2010] NAHC 29 (26 March 2010).

[25] I wish to highlight, what Masuku J stated in the *Standard Bank*<sup>11</sup> matter, as it finds application in the current circumstances:

[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.' (My underlining).

[26] And further

'18. 'Authorisation of proceedings is a serious matter, and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.'<sup>12</sup>

'19. Once this is not stated in the founding affidavit, the only conclusion that may be reached is that the proceedings are not properly authorised and that inevitably, is the applicant's fate in these proceedings. It is accordingly unnecessary to consider the other issues raised by the Plaintiff in his notice.'

[27] I fully associate myself with this court's judgment in the *Standard Bank* matter and must reach the same conclusions as my Brother and whereas there are no allegation that the current proceedings are authorised, the proceedings cannot be allowed to continue.

[28] In the current matter, the deponent to the founding affidavit failed to state that he was duly authorized to institute the proceedings on behalf of the plaintiff, the University of Namibia. The issue of authority was not addressed at all in the founding affidavit and he could not, in reply, place proof of the authority as no

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<sup>11</sup> *Standard Bank Namibia Ltd v Nekwaya* (HC-MD-CIV-MOT-GEN-2020/00089 [2020] NAHCMD 122 (26 March 2020).

<sup>12</sup> Paragraph 18.

authority whatsoever, was alleged. The only conclusion that may be reached is that the proceedings are not properly authorised.

[29] I therefore stand to disagree with the argument of the counsel for the plaintiff, when he says that the issue of lack of authority in motion proceedings is raised in answering affidavits and not in heads of arguments, in order to give the applicant an opportunity to prove it in reply. The counsel clearly loses sight of the above principle in law.

[30] The point *in limine* that the deponent to the founding affidavit lacks the authority to institute the application is upheld.

### Conclusion

[31] In the premises, the unavoidable conclusion is that the plaintiff must fall at the first hurdle because the current proceedings are not properly authorised. It appears to me that it is in the premises unnecessary to deal with the second and third points *in limine* and the merits of the application.

[32] The court deemed it a futile exercise to deal with any of the other points *in limine* which might also have an impact on the question whether the application for leave to amend is properly before court, as the point *in limine* raised regarding the failure to comply with Rule 32(9) and (10) and failure to apply for leave to amend within 10 days of the objection being received by the defendant went to the basis on which the application was brought.

[33] In the circumstances, the applicant has, by its own hands, paved way to the inevitable destination of this application, namely the striking of the application from the roll.

### Costs

[34] The court considered the application for a cost order as requested by the defendant but came to the conclusion that because this application for leave to amend the particulars of claim is struck from the roll for a technical reason, it would

be appropriate to award the defendant a normal cost order, capped in terms of rule 32(11).

Order

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

1. The point *in limine* that the deponent to the founding affidavit lacks the authority to institute the application is upheld and therefore the application for leave to amend is struck from the roll.
2. Cost of this application is awarded to the defendant, of which costs are limited in terms of the provisions of Rule 32(11).
3. The parties are ordered to file a joint status report on the further conduct of the matter by no later than 27 October 2022.
4. The case is postponed to 02 November 2022 for a Status Hearing.

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P CHRISTIAAN  
Judge, Acting

## APPEARANCES

PLAINTIFF: H Hamunyela  
Instructed by Samuel & Company Legal Practitioners,  
Windhoek

DEFENDANT: N Mhata  
of Nambili Mhata Legal Practitioners,  
Windhoek