

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-REV-2023/00178

EVA MARIA DORKAS PANDULO PHILLEMON

APPLICANT

and

MINISTER OF JUSTICE

FIRST RESPONDENT

DIRECTOR: LEGAL AID

SECOND RESPONDENT

Neutral citation: *Phillemon v Minister of Justice* (HC-MD-CIV-MOT-REV-2023/00178) [2024] NAHCMD 100 (8 March 2024)

Coram: SIBEYA J

Heard: 7 November 2023

Delivered: 8 March 2024

Flynote: Review – Whether or not the minister should have afforded the applicant *audi* before her decision to withdraw the appointment of the applicant as legal aid counsel – Articles 12 and 18 of the Constitution and common law – *Audi alteram partem* rule – The effect of not affording *audi* to a person who is likely to be affected by an administrative decision.

Summary: The applicant, a legal aid counsel at the Directorate of Legal Aid is alleged to have sent a tweet on social media, Twitter, on 2 April 2023. The tweet is alleged to have caused public outcry. The minister, thereafter, and on 4 April 2023 withdrew the appointment of the applicant as legal counsel. Dissatisfied with the withdrawal of the appointment, the applicant instituted review proceedings seeking to set aside the decision of the minister of 4 April 2023. The application is opposed by the respondents.

The respondents raised a point *in limine* that the review application became moot as the applicant absented herself from office or official duties for more than 30 days as provided in the Public Service Act 13 of 1995. The Public Service Act, contended the respondents, meant that the applicant was deemed to be have been discharged on account of misconduct. The applicant contended otherwise. The responded raised another point *in limine* that the applicant was only transferred to the Directorate of Legal Aid for a period of 12 months which had since lapsed, therefore making the withdrawal of the appointment of as legal aid counsel superfluous. The applicant disagreed.

Held: The applicant cannot be said to have absented herself for more than 30 days from office or official duties as she was booked off sick and she submitted leave forms to her supervisor and she had sufficient leave days available, demonstrating that she had a valid cause to be absent from office or official duties as provided for in s 25(1)(o) of the Public Service Act.

Held that: The applicant's appointment as legal aid counsel did not lapse after 12 months as she was appointed permanently and her appointment letter made no mention of the duration of the appointment by the minister.

Held further that: the *audi alteram partem* principle is one of the pillars of justice and it requires that no one must be judged unheard.

Held: that the minister took the decision of 4 April 2023, to withdraw the appointment of the applicant as legal aid counsel despite such decision having severe adverse effect on the applicant without affording the applicant *audi*. On this basis, the

minister's decision is reviewed and set aside. The application, therefore, succeeds with costs.

ORDER

1. The first respondent's decision made on 4 April 2023, to withdraw the appointment of the applicant as legal aid counsel in terms of section 3(3) of the Legal Aid Act, 1990 (Act No. 29 of 1990) pending processes in terms of the Public Service Act, 1995 (Act No. 13 of 1995) and Public Service Staff Rules, is reviewed and set aside.
2. The first and second respondents, must jointly and severally, the one paying the other to be absolved, pay the costs of the applicant limited to the costs of one legal practitioner.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

SIBEYA J:

Introduction

[1] Suspension from practising one's trade is a grave invasion in someone's career, so much that great care and thought should precede such a decision as it may constitute a life altering or threatening event.

[2] Before court, the applicant seeks relief to have the decision of the first respondent to withdraw her appointment as legal aid counsel pending further processes in terms of the Public Service Act 13 of 1991 (the Public Service Act) and Public Service Staff Rules. The first respondent based her decision on the alleged

events that occurred in the applicant's private capacity and which found their way into the public sphere. The application is opposed by the respondents

The parties and representation

[3] The applicant is Ms Eva Maria Dorkas Pandulo Phillemon, a major female employed by the Ministry of Justice in Windhoek. The applicant shall be referred to as such.

[4] The first respondent is the Minister of Justice, duly appointed as such in terms of Article 32(i)(*dd*) of the Namibian Constitution and has the powers and duties regarding supervision and administration of justice and the administration of the Legal Aid Act 29 of 1990 (the Legal Aid Act), with her address of service being care of the Office of the Government Attorney in Windhoek. For ease of reference, the first respondent shall be referred to as 'the minister'.

[5] The second respondent is the Director: Legal Aid, under whose office and supervision the applicant served as legal aid counsel, with her address of service being care of the Office of the Government Attorney in Windhoek. The second respondent shall be referred to as 'the Director'.

[6] As stated, the respondents oppose the application.

[7] Where reference is made to the first and second respondents jointly, they shall be referred to as 'the respondents' while where it becomes necessary to refer to the applicant and the respondents jointly, they shall be referred to as 'the parties'.

[8] The applicant is represented by Mr Namandje while the respondents are represented by Mr Kauta.

Relief sought

[9] The applicant seeks the following relief:

'1 An order calling upon the Respondents to show cause as to why the following orders should not be made:

2 An order reviewing, correcting and setting aside the decision made by the First Respondent on 4 April 2023.

3 An order declaring the First Respondent's decision as ultra vires section 3(3) read with section 4(2)(a) of the Legal Aid Act and invalid and that it must be set aside.

4 Cost of suit against any of the Respondents who is opposing the application.

5 Further and/or alternative relief.'

Background

[10] The applicant was employed as a personal assistant to the former Executive Director (ED) of the Ministry of Justice, a grade six position, until 1 September 2020. On 27 August 2020, the ED addressed a request to the director that approval was granted for the applicant to be transferred to the Directorate of Legal Aid as a senior legal officer grade five, for a period of 12 months or until she is suitably accommodated, whichever occurs first from 1 September 2020.

[11] On 30 August 2020, the director recommended the appointment of the applicant as legal aid counsel to report to Ms Vetjavi Tjivikua. The minister, thereafter, acting in terms of s 3(1)(b) of the Legal Aid Act, appointed the applicant as legal aid counsel on 2 September 2020.

[12] On Sunday, 2 April 2023, the applicant is alleged to have authored a tweet in the following words:

'For once, the Damara people are doing something beautiful, cultural identity.

I love this!

This overshadow that violence image of breaking bottles, knife stabbing, insults, no culture identity that I only know of them.'

[13] It is the above tweet that led to the impugned decision of the minister of Tuesday, 4 April 2023. The decision of the minister is crafted as follows:

'SUBJECT: WITHDRAWAL OF APPOINTMENT AS LEGAL AID COUNSEL IN TERMS OF SECTION 3(3) OF THE LEGAL AID ACT,1990 (ACT NO. 29 OF 1990)

1. I refer to the above.
2. In light of the recent events which have taken place in your personal capacity, and which have made their way into the public sphere, I herewith inform you of the withdrawal of your appointment as legal aid counsel in terms of section 3(3) of the Legal Aid Act, 1990 (Act No. 29 of 1990), pending further processes in terms of the Public Service Act, (Act No. 13 of 1995) and Public Service Staff Rules.
3. This decision is made mainly as a direct result of your conduct, which in our view will negatively impact your ability to perform your duties as legal aid counsel.
4. Kindly take note that withdrawal of your appointment as legal aid counsel does not amount to dismissal and further communication on the way forward will be provided by the office of the Executive Director...'

Point in limine

Mootness

[14] The respondents contend that the applicant's application to set aside the decision of the minister of 4 April 2023, and for an order to declare such decision as *ultra vires* and invalid, is moot.

[15] The respondents contend that as the tweet was made on Sunday 2 April 2023, the applicant did not report to work on Monday, 3 April 2023. Thereafter, the applicant absented herself from work for a period exceeding 30 days without the permission of the director or the ED, and she is, therefore deemed to have been discharged from the public service on account of misconduct from 2 April 2023, being her last day at work.

[16] The respondents contend further that during the period of 3 April and 21 June 2023, the applicant was absent from work without leave. It is contended further that the applicant belatedly applied for sick leave, which leave applications do not interrupt the peremptory application of s 24(5)(a)(i) of the Public Service Act. Mr Kauta argued that the applicant did not make herself available for the procedure stipulated in subsection (b), and therefore, she was, as a matter of law, no longer employed in the Directorate of Legal Aid. He argued further that it follows that no employment relationship exists between the applicant and the Ministry of Justice and the Directorate of Legal Aid and, therefore, the relief sought has become academic.

[17] The applicant, on her part, states that she did not absent herself without leave, as she provided leave certificates to Ms Tjivikua, her direct supervisor. She contends that she had sufficient leave days she could take when booked off by a medical practitioner, totaling 132 sick leave days. She also contends that she was in communication with the ED and, therefore, her absence was known and authorised. The applicant contends that she continues to execute her functions as a public servant for which she is remunerated.

[18] Section 24(5) of the Public Service Act provides that:

‘Any staff member who, without permission of the permanent secretary of the office, ministry or agency in which he or she is employed-

- (i) Absents himself or herself from his or her office or official duties for any period exceeding 30 days’ or
- (ii) Absents himself or herself from his or her office or official duties and assumes duty in any other employment,

Shall be deemed to have been discharged from Public Service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment.’

[19] An application is moot if the relief sought is academic, and does not present a live dispute between the parties for determination by the court. Several decisions of this court have pronounced that the court should not entertain matters that are moot,

where there is no live dispute between the parties or where the relief sought is incompetent. One such matter is the *Mwoombola v Simataa*,¹ a decision of this court.

[20] I hold the view that in order to meaningfully address this subject regard must be had to s 25(1) of the Public Service Act. Section 25 provides for misconduct. Section 25(1)(a) and (o) reads that:

‘25. (1) Any staff member shall be guilty of misconduct if he or she –

(a) contravenes or fails to comply with any provision of this Act;

...

(o) absents himself or herself from his or her office or official duties without leave or valid cause.’

[21] The above-mentioned s 25(1) remains in the statute of the Public Service Act and is, therefore, valid until set aside. It is not challenged in these proceedings, thus it commands application in the form that it stands. The reading of s 25(1)(o) reveals that a public servant would be permitted to be absent from office or official duties provided that he or she has been granted leave or has a valid cause.

[22] The applicant, *in casu*, provided sick leave certificates to the employer. She had sufficient leave days to her disposal which she could utilise when booked off sick and that is what she did. In my view, she cannot be faulted for utilising leave days that she is entitled to according to law. On this basis alone, the point *in limine* raised ought to fail.

[23] There is, however, another basis which renders the point *in limine* meritless. It is that if the applicant can show that she had a valid cause for her absence from her office or official duties, then she cannot be said to have committed misconduct. Conversely put, if the applicant can demonstrate that she had a valid cause for her absence from office or official duties, she cannot be deemed to have been discharged on account of misconduct.

¹ *Mwoombola v Simataa* 2020 (1) NR 113 (LC).

[24] Against the backdrop of the above conclusions, I find that the point *in limine* raised by the respondents that the applicant's review application is moot lacks merit and falls to be rejected as I hereby do.

The alleged lapse of the applicant's appointment as legal aid counsel

[25] The respondents raised another 'technical jab' at the applicant's application. I purposely termed it a 'technical jab' for the reasons apparent below. The minister, who deposed to the answering affidavit on behalf of the respondents, stated *inter alia*, that the ED approved the transfer of the applicant to the Directorate of Legal Aid effective 1 September 2020 for a period of 12 months or until she is suitably accommodated, whichever occurs first. The minister contends that the applicant was appointed for a period of 12 months, and thus her appointment lapsed on 31 August 2021.

[26] The minister proceeded to state the following:

'61. My decision to withdraw the applicant's appointment was made on the basis that the applicant was still employed as a legal aid counsel – this was however not the case because at the time of the decision, 4 April 2023, the applicant's appointment in the Directorate of Legal Aid had lapsed and concomitantly so too did her certificate, issued, under my hand, on 2 September 2020.'

[27] The applicant contends contrariwise, as she states that, in her view, the 12 months period related to her transition into the legal aid position and not her appointment.

[28] The respondents' contention, in my considered view, can be disposed of without breaking a sweat. The appointment letter dated 2 September 2020, signed by the minister provides that as follows:

'SUBJECT: APPOINTMENT IN TERMS OF SECTION (3)(1)(b) OF THE LEGAL AID ACT , ACT 29 OF 1990

By virtue of the powers vested in me by section (3)(1)(b) of the Legal Aid Ac, 1990 (Act 29 of 1990), I hereby appoint

MS. EVA MARIA PHILLEMOM

As Legal Aid Counsel to assist the Director of Legal Aid in the administration of the Legal Aid Act, 1990 (Act 29 of 1990) and to perform all the functions and duties entrusted to her in terms of the said Act.

Given under my hand at Windhoek this 02 day of 09/2020.'

[29] It is apparent from the appointment that no mention is made of the appointment of the applicant as legal aid counsel for a period of 12 months or until such time as she is suitably accommodated. The appointment of the applicant as legal aid counsel is plain and clear as day light. She was appointed as legal aid counsel on the terms that she assists the director to perform the functions and duties entrusted to the director by the Legal Aid Act. The said appointment letter is as silent as a church mouse on the duration of the appointment of the applicant as legal aid counsel. I find that the above conclusions lay bare the fact that the applicant was appointed permanently as legal aid counsel.

[30] In any event, even if it is to be assumed that the appointment of the applicant was for a period of 12 months from 1 September 2020 or until suitably accommodated, the applicant's appointment was only withdrawn on 4 April 2023. That was after a period of one year and seven months had passed from the twelve months reckoned from August 2021. In my view, it is reasonable to take it that the employer of the applicant tacitly agreed on the employment and appointment of the applicant as legal aid counsel.

[31] I referred to the point raised about the expiry of the appointment as a technical jab due to the fact that the point finds no trace in the decision to withdraw the appointment of 4 April 2023. Notwithstanding the above, the respondents could still rely on the expiry of the appointment of the applicant and even succeed to ward

off the application if found to have merit. In *casu*, however, the point is meritless, and is dismissed accordingly. .

The merits

[32] The main contention raised by the applicant against the minister's decision of 4 April 2023, is that she was not heard before the decision of 4 April 2023, was made. She contends that the minister violated the rule of natural justice of *audi alteram partem*. Her denial of *audi*, the applicant contends, tainted the decision of the minister and violated her rights warranting that such decision be set aside by a competent court.

[33] The applicant further alleged that the minister's decision was made out of public pressure and with ulterior motive.

[34] Mr Namandje argued that the minister as an administrative official is obliged by common law and Article 18 of the Namibian Constitution to act fairly and reasonably when making decisions, especially those that adversely affect individual rights. He argued that the minister failed to afford *audi* to the applicant before withdrawing the appointment as legal aid counsel thus negatively prejudicing the applicant. Mr Namandje argued that *audi* is entrenched in our law that on its violation the applicant's review ought to succeed.

[35] The minister, for her part, contends that what is required is for the decision maker to afford the party who may be adversely affected by the decision to make representations. The minister states further that the applicant was afforded an opportunity to make representations as the director contacted the applicant and invited her on Monday, 3 April 2023, to make representations and the applicant opted not to make use of that opportunity. The minister states further that, she as a result, exercised her discretion based on the evidence before her, and decided to withdraw the applicant's appointment as legal aid counsel.

[36] Mr Kauta argued that the applicant was afforded an opportunity to be heard as she was requested to explain her conduct to her supervisors, but she refused the

invitation. He argued that an opportunity was availed to her to explain her conduct but she declined to use that opportunity and can, therefore, not be heard to cry foul that she was not afforded *audi*.

[37] Mr Kauta submitted that *audi* cannot be separated from the context of the matter. It has to be considered in light of the prevailing facts and circumstances of a particular case.

[38] The Supreme Court in *Standard Bank Namibia Ltd v Atlantic Meat Market*² remarked as follows regarding the principle that *audi* should not be separated from the facts of the matter:

[8] Ms Vivier, on the other hand, argued with reference to *Nortje en 'n Ander v Minister van Korrektiewe Dienste and Andere*³ that the *audi alteram partem* rule cannot be separated from the context in which it is applied. The headnote to the judgment captured the essence of the court's reasoning on that point as follows:

“There is no universally applicable set of requirements for compliance with the *audi* rule. On the contrary, because of the innumerable situations in which it may be applied, the *audi* rule is so flexible and adaptable that the requirements for compliance therewith cannot be separated from the context in which it is applied. The touchstone which must be utilised in determining whether the *audi* rule was complied with in a specific case is intimately connected with the fundamental principle of the rule. The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances the public official or body concerned must act fairly.”

[39] It is apparent from the above authority that *audi* cannot be divorced from the context of the concerned matter. *Audi* must be considered in light of the facts and circumstances of the matter.

² *Standard Bank Namibia Ltd v Atlantic Meat Market* (SA 8 of 2005) [2014] NASC 14 (17 October 2014) para 8.

³ *Nortje en 'n Ander v Minister van Korrektiewe Dienste and Andere* 2001 (3) SA 472 (SCA) at 479I/J to 480C. Compare also *Van Huyssteen's* case at 305C-D where the Court held that what is of importance is that 'the principle and procedures which, in the particular situation or set of circumstances, are right and just and fair' are applied.

[40] The minister, in her answering affidavit, lays bare the fact that she did not communicate with the applicant but she relied on the statements made by the director, who is said to have afforded the applicant the opportunity to make representations. In my view, it becomes critical to analyse the version of the director in order to determine whether or not the applicant was afforded *audi*. A suggestion is also made that before she took the impugned decision, the minister also consulted the ED. There are no established facts that the ED consulted the applicant before the said decision was taken. The one who appears to have engaged the applicant in some form is the director. I proceed to address the role played by the director below.

[41] The director deposed to a confirmatory affidavit where she confirmed the allegations that related to her made by the minister contained in the answering affidavit. The director did not set out the factual basis of her discussion with the applicant or her attempts to reach the applicant in order to afford her *audi*.

[42] The only communication from the director regarding the said context within which *audi* is said to have been afforded to the applicant is a letter dated 6 April 2023, addressed to the applicant by the director. Given the importance of this letter, I have opted to cite its contents in full as I do so below. The said letter provides as follows:

'6 April 2023

Ms. Eva Maria Nangolo
Legal Officer
Directorate: Legal Aid

Via Email

RE: INVESTIGATION INTO COMPLAINTS MADE AGAINST YOU FOLLOWING SOCIAL MEDIA STATEMENTS

I refer to the above and the telephone request made to you by the private secretary on 4 April 2023 to come and see me. I further refer to your telephone call to me on 5 April 2023, wherein you informed me that you are not well and have been booked off sick for ten days.

You also informed me that you have the sick leave certificate and will send it to your immediate supervisor, Ms Tjivikua.

Kindly be informed that apart from the issue of your relocation of office which I mentioned in the telephone conversation, there was another matter I wished to discuss with you.

I was at the time, and as I do now, instructed to engage you urgently and inquire if the Tweet account under your username *@ngongonakolondo* is your and if it was you who posted the message on the social media platform Twitter. As you are aware, under the aforesaid twitter account, inflammatory tweets of a tribal nature were made, which have caused widespread, public outcry.

The Minister, using her discretion as set out in the enabling statute, under which you were appointed, and in an effort to protect the integrity of the Legal Aid system and overall public perception of administration of justice, withdrew your certificate pending further inquiry and investigation.

Please be informed that the investigation is for purposes of determining whether or not your certificate to practice can be re-instated to enable you to perform to functions under the Legal Aid Act, 1990 (Act No. 29 of 1990), as amended.

It is against this background, that you are requested to give reasons why disciplinary proceedings should not be taken against you in terms of section 25(h) of the Public Service Act, 1995 read with clause 10(b) of the Regulations of the Public Service Act, 1995.

I further emphasise that you remain employed in the Ministry of Justice but will now report to the Executive Director Ministry of Justice, because the withdrawal of your certificate is restricted to functions you were performing in terms of the Legal Aid Act.

For record purposes, I would ask that you respond in writing to this communication, to confirm you have received it. May I please have your response on or before 28th April 2023.

Yours sincerely,

P. Daringo'

[43] The applicant states that the above letter was the first communication that she received from the director. The applicant denies that she was ever invited to make representations nor was any notice provided to her to attend to the office of the director for purposes of making representations.

[44] Considering that the minister relied on the director to have afforded the applicant *audi*, and the director did not personally speak to the applicant in these proceedings save for confirming the averments alleged by the minister, it becomes critical to consider the above written communication that she made. As alluded to earlier, the above letter is the only written communication from the director that forms part of the review record relevant to the issue, whether or not the applicant was afforded an opportunity to make representations regarding the minister's decision to withdraw her appointment.

[45] A closer look at the concerned letter reveals that it refers to a telephone conversation made to the applicant by a private secretary on 4 April 2023 to come and see the director. The director also then proceeds to refer to a telephone call made by the applicant to her on 5 April 2023 where the applicant states that she was booked off sick. The letter does not state that on 4 April 2023, the director communicated with the applicant. To the contrary, it appears that the private secretary is the one who contacted the applicant in order to inform her to go and see the director. The private secretary deposed to an affidavit confirming the allegation stipulated in the answering affidavit of the minister.

[46] The minister does not say that the private secretary afforded *audi* to the applicant, but she says that it was the director who afforded such *audi* to the applicant. In any event, the private secretary does not say that she afforded *audi* to the applicant prior to the minister's decision of 4 April 2023 or any at other time.

[47] The above cited letter suggests that the main communication between the private secretary and the applicant was to inform the applicant to go and see the director. The letter does not reveal the purpose why the applicant must go and see the director. In my view, the conveying of a message to go and see the director cannot be catapulted to affording the applicant the opportunity to make

representations regarding the withdrawal of her appointment as legal aid counsel. The applicant was probably not aware of the nature, form and texture of the reasons why the director sought to see her.

[48] I opine that notice to make representations regarding an envisaged decision which is likely to have an adverse effect on a person should be clear enough to be understood by the receiver of such notice what it is or what it purports to be and its purpose. The receiver of the notice or invitation to make representations should not be left second guessing as to what such notice or invitation is all about.

[49] In *casu*, the message delivered by the private secretary is, in my view, wanting in all respects when it is suggested that the said message may have constituted an invitation for the applicant to make representations regarding the minister's decision of 4 April 2023.

[50] The director's aforesaid letter of 6 April 2023, provides further that the director received a telephone call from the applicant where she was informed that the applicant was booked off sick. The conversation of 5 April 2023, makes no reference to any opportunity afforded to the applicant to make representations. Crucial as it is and considering that *audi* is central in administrative decisions, I hold a firm view that had the director discussed affording an opportunity to the applicant to make representations regarding the withdrawal of her appointment, she would have included same in her letter. Similarly, considering that *audi* is at the centre stage of this matter, where it is specifically raised as one of the grounds of review, had the applicant been afforded *audi*, the director would have deposed to same accordingly.

[51] In the same letter, the director states that she received an instruction to engage the applicant in order to inquire about the confirmation of the source of the concerned tweet. The person who instructed the director is not mentioned. This appears to be the time that the director attempted to engage the applicant meaningfully on the subject of the tweet. The difficulty that I have, however, is that no mention is made regarding the minister's decision to withdraw the appointment of the applicant. What comes out of the letter is that the minister withdrew the

applicant's appointment allegedly in order to protect the integrity of the legal aid system and the public perception of justice given the alleged public outcry.

[52] The director, in the above letter, makes it clear that the investigation referred to in the letter is to determine whether or not the withdrawn appointment of the applicant could be re-instated. This, in my view, has nothing to do with the decision to withdraw the appointment and can, therefore, not be referred to as *audi* for the decision of 4 April 2023.

[53] It was suggested by Mr Kauta, if I understood him well, that the applicant will be subjected to investigation and possibly a disciplinary hearing where she will also have an opportunity to make her presentations. This, I find, misses the point. The issue at hand is whether or not the applicant was afforded *audi* before the minister took the decision of 4 April 2023. The minister was required to afford the applicant *audi* before taking the said decision. Whether the applicant could be subjected to a disciplinary hearing at a later stage is of no moment in this matter, as the decision of 4 April 2023, has severe consequences to the applicant and the applicant ought to have been afforded *audi* before such decision was taken.

[54] As stated that the minister relies on the director to have afforded the applicant *audi*. The director, at the very least therefore, should have informed the applicant that the minister considers to withdraw her appointment as legal aid counsel, as a result she was should give reasons why the minister should not do so. This, in my considered view, would have constituted *audi*. As it is apparent by now, this did not happen. The context within which *audi* was afforded to the applicant in this matter, as claimed by the respondents, is simply non-existent. In my view, the facts of the matter lay bare that in the context of this matter, the applicant was not afforded an opportunity to make representations before the 4 April 2023 decision was taken.

[55] From the record, I find that the minister, as stated before, did not afford the applicant *audi*. This much she states in her affidavit, but she deposed that it is the director who afforded the applicant *audi*. In view of my findings and conclusions set out hereinabove, I find that neither the director nor the private secretary afforded the applicant *audi* before the minister took the decision of 4 April 2023.

[56] As stated, the *audi alteram partem* principle is one of the pillars of justice and it emphasises that no one must be judged unheard.⁴

[57] In *casu*, I find that the applicant's appointment as legal aid counsel was withdrawn by the minister without affording her *audi*. This constitutes a violation of the applicant's common law and constitutional right to be heard before an adverse decision is taken against one.

[58] It cannot be downplayed that the decision of the minister of 4 April 2023, prejudiced the applicant. The decision of the minister has all the attributes of a suspension from work. Suspension from practising one's trade is a grave invasion in someone's career, and can be life threatening. It is protected by Art 21(1)(j) of the Constitution.

[59] The applicant's career of choice was abruptly paused on 4 April 2023. If one considers the speed at which the decision of the minister was made, the effect of the decision on the applicant becomes imaginable. I find that the decision of the minister had severe adverse effects on the applicant and, therefore, the applicant was entitled, as a matter of law, to be afforded an opportunity to make representations to the minister before the impugned decision could be taken.

[60] The applicant raised another ground of review that the minister's decision is *ultra vires* s 3(3), read with s 4(2)(a) of the Legal Aid Act. She states that this is attributed to the fact that the withdrawal of an appointment can only be effected in certain circumstances prescribed by law only, and the applicant's case falls outside such provisions. The respondents are of a different view. In light of the findings that I have made hereinabove, I am of the opinion that this matter can be disposed of without venturing in this later ground of review.

Conclusion

[61] In view of the conclusions reached above, I find that the applicant managed to prove that she is entitled to the relief sought, namely: to and set aside the decision of

⁴ *Mouse Properties Ninety Eight CC v Minister of Urban and Rural Development and Others* 2022 (2) NR 426 (SC).

the minister of 4 April 2023), withdrawing her appointment as legal aid counsel. Similarly, I find that the respondents failed to ward off the applicant's review application. The review relief sought by the applicant will, therefore, be granted as prayed.

[62] Considering that I have decided to uphold the review relief sought by the applicant, I hold the view that the third relief sought in the applicant's amended notice of motion to declare the minister's decision *ultra vires* s 3(3) read with s 4(2) (a) of the Legal Aid Act has become unnecessary and academic to say the least. I, therefore, refrain from entertaining or pronouncing myself on the said relief.

Costs

[63] It is well settled in our law that costs follow the result. I found no reasons to depart from this established principle, neither did the parties argue otherwise. Considering that the applicant succeeded in her application, she shall be awarded costs.

Order

[64] In the result, it is ordered that:

1. The first respondent's decision made on 4 April 2023, to withdraw the appointment of the applicant as legal aid counsel in terms of section 3(3) of the Legal Aid Act, 1990 (Act No. 29 of 1990) pending processes in terms of the Public Service Act, 1995 (Act No. 13 of 1995) and Public Service Staff Rules, is reviewed and set aside.
2. The first and second respondents, must jointly and severally, the one paying the other to be absolved, pay the costs of the applicant limited to the costs of one legal practitioner.

3. The matter is removed from the roll and regarded and as finalised.

O S SIBEYA
JUDGE

APPEARANCES:

APPLICANT:

S Namandje
Of Sisa Namandje & Co Inc,
Windhoek

RESPONDENTS:

P Kauta
Instructed by the Government Attorney
Windhoek