REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION

HELD AT WINDHOEK

JUDGMENT

Case Title: Hendrik Christian v Esi Schimming-Chase & Another.	**Case No.:** HC-MD-CIV-MOT-GEN-2022/00003
	Division of Court: High Court (Main Division)
Heard before: Honourable Mr. Justice Munsu, AJ	**Order:** 19 January 2023
	Reasons: 27 January 2023.

Neutral citation: *Christian v Schimming-Chase* (HC-MD-CIV-MOT-GEN-2022/00003) [2023] NAHCMD 13 (27 January 2023).

Results on the merits:

Merits not considered.

The order:

1. The Applicant's point in *limine* that the legal practitioners for the Respondents lack the necessary authority to represent the Respondents is dismissed.
2. The Applicant is ordered to pay the costs occasioned by this point in *limine* which costs shall be limited in terms of the provision of rule 32(11).

Reasons for the order:

MUNSU AJ:

Introduction

[1] By way of notice of motion dated 21 January 2022, the applicant seeks relief in the following terms:

'1. Declaring the conduct of first respondent, to the extent that she acted as a trespasser of law and failed to uphold and promote the independence, integrity and impartiality of the court during judicial proceedings of case No: HC-MD-CIV-MOT-GEN-2021/00005.

2. Declaring all orders made by first respondent in case HC-MD-CIV-MOT-GEN-2021/00005;case No:HC-MD-CIV-MOT-GEN-2020/00446 null and void, and of no legal effect.

3. Compelling the 2nd Respondent forthwith to take all reasonable steps to monitor the norms and standards for the exercise of the judicial functions of the High court presided over by first respondent to avoid impropriety and the appearance of impropriety.

4. Ordering the respondent to pay wasted costs of twenty thousand N$ 20 000.00 Namibia Dollars to the applicant.

5. Further and/or alternative relief.'

[2] For convenience, I will refer to the parties as they are cited in the main application.

[3] The respondents filed their opposition out of time. As such, they seek condonation for the late filing of their notice of intention to oppose. The applicant opposes the application for condonation. In his answering affidavit, the applicant raised a point *in limine* that the legal practitioners for the respondents lack the necessary authority to represent the respondents. The applicant opted to have the point *in limine* determined first before the condonation

application.

[4] In a document titled 'Right of Audience', the applicant submitted that the Legal Practitioners Act 15 of 1995 (the Act) repealed both the Admissions of Advocates Act 74 of 1964 and the Attorneys Act 53 of 1979. The applicant states that in terms of the Act, all persons practicing law in Namibia must be enrolled as legal practitioners. According to the applicant, there is a fundamental distinction between a legal practitioner who has the right of audience in any court, and an 'advocate' who has no right of audience.

[5] The applicant made reference to section 33(1) of the Act which provides that:

> "(1) for the purposes of this Act, unprofessional or dishonourable or unworthy conduct on the part of a legal practitioner includes-
>
> (g) acting or purporting to act for any person in any matter without having been instructed by that person or a person authorised to give instruction on behalf of the person he or she represents or is to represent."

[6] Furthermore, the applicant submitted that Government Attorney is not authorized to instruct counsel on behalf of the respondents. In addition, the applicant contended that Government Attorney in any event lacks the necessary authorisation to appear and represent the respondents. He relies for this proposition on a document titled *'Handbook for the Office of the Government Attorney'*. Under clause 4, the said handbook provides that:

> '4.1 Like any other law firm, the Government Attorney acts on the instructions of a client. The client of the Government Attorney are all the OMAs of the Government as defined in Clause 1 of this Handbook.
>
> 4.2 A client may give written authorisation to divisions, bodies, boards and institutions that fall under them to give instructions to the Government Attorney on the express conditions that –
>
> (a) The client accepts responsibility for all consequences (including legal charges) arising from the instructions; and
>
> (b) The Government Attorney is given notice in writing of such authorization.
>
> 4.3 Once the Government Attorney has been instructed the matter should be wholly instructed to him/her and must not be entrusted to any other litigant."

[7] The applicant went further to state that under the heading *'instructing authority'* the Handbook provides that:

> 'The Government Attorney will accept an instruction only from a client's head office unless the head office concerned has authorized the Government Attorney in writing to accept instructions from a branch office division or body under the control of the client concerned.'

[8] It is the applicant's contention that:

8.1 The Government Attorney has not submitted evidence that they were in writing instructed by the head of judiciary to represent the respondents;

8.2 The Government Attorney lacks the necessary authorization to instruct the two counsels acting on behalf of the respondents. The applicant further states that the instructed counsels for the respondents have no right of audience in this court. He claims that 'the advocate' is a defunct profession which has no right of audience in any court in this country. His contention is that the instructed counsel for the respondents are still practicing as was provided for in the repealed legislations which is inconsistent with the law and he implored this court not to condone it.

[9] During oral submissions, the applicant went further and submitted that the Government Attorney is appointed by a Minister, who is a member of the Executive. According to him, an employee appointed by a member of the Executive cannot represent members of the Judiciary. He stressed that the Judiciary has its own budget enough to be able to take care of its own legal representation.

[10] Mr. Totemeyer for the respondents submitted that various documents filed of record in these proceedings state that both instructing and instructed counsel represent the respondents as legal practitioners. According to him, these all constitute allegations that they act on behalf of the respondents, which implies that they are "duly acting" on behalf of the respondents and have the necessary authority to do so.

[11] Relying on several authorities of this court, Mr Totemeyer submitted that a challenge regarding authority must be proper and supported by evidence. Counsel submitted that the applicant's challenge is unsubstantiated and must be ignored as it is a weak challenge.

[12] Mr Totemeyer further states that persons previously admitted under the (now repealed) Admissions of Advocates Act, 1964, continued to be legal practitioners in terms of section 6(1) of the Legal Practitioners Act, 15 of 1995 ("the Act"). According to him, after the Act came into operation, certain legal practitioners continued (or commenced) to practice in a manner akin to that of an advocate's practice (as it is generally and universally known) and did so by conducting a referral practice as is also contemplated by section 67 of the Legal Practitioners Act.

[13] Regarding the issue of separation of powers, Mr Totemeyer submitted that the concept 'government' is not defined, and that it is loosely referred to in various provisions of the constitution. Mr Totemeyer referred to Article 5 of the constitution which states that:'

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

And Article 36 which provides that:

'The Prime Minister shall be the leader of Government business in Parliament, shall coordinate the work of the Cabinet and shall advise and assist the President in the execution of the functions of Government.'

[14] Mr Totemeyer submitted that the above provisions suggest that 'government' is an umbrella concept that embodies all or any of the organs of State. He argued that it is unfounded to assume that the Government Attorney is precluded from representing the respondents simply because of its administrative functions that fall under the Ministry of

Justice and the fact that it receives instructions from other ministries.

Discussion

[15] It seems to me that the applicant's point *in limine* is threefold. The first is the authority of Government Attorney to represent the respondents, the second is the authority of Government Attorney to instruct counsel, and the third relates to the right of audience of the respondents' instructed counsel.

[16] The first issue that arises is whether the applicant laid a basis for his challenge regarding authority. He appears to have placed much store on the '*handbook for the office of the Government Attorney*'. Firstly, he did not attach the relevant parts of the handbook to his papers. Secondly, he did not provide the court with the said handbook or relevant parts thereof during oral submissions. I brought to his attention during oral submissions that it would be helpful if the said handbook were to be availed to the court. Despite his undertaking, he did not.

[17] In *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie BPK*[1] the court made a distinction between a case where the litigant is a natural person who institutes 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.[2]

[18] In her founding affidavit in support of the condonation application, Ms. Makemba, the legal practitioner for the respondents states as follows:

[1] *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie* 1957 (2) SA 347 ©.

[2] See *Baobab Capital (Pty) Ltd v Shaziza Auto 1 (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/02613) [2020] NAHCMD 290 (10 July 2020).

'1. I am a legal practitioner of this Honourable Court and practice as such at the Government Attorney's office where I am employed by the Government of the Republic of Namibia as a legal officer.

2. The Government Attorney is the Legal Practitioner of record of the respondents in this matter appointed to perform such functions as envisage in section 4 of the Government Attorney Proclamation R161 of 1982. I was assigned to handle the file on this matter and oppose the application on behalf of the respondents.

3. On account of what I state above, what I depose to herein is known to me personally and I am duly authorized by the respondents to depose to this affidavit in support of their application for this Honourable Court to condone of the late-filing of the respondents notice to oppose the application.'

[19] In *Oranjerivierwynkelders v Professional Support Service*[3] this court had the following to say:

'[24] It is now settled that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority (*Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228J-229A). This principle has been affirmed in several decisions of this court, and I am in agreement with it as far as it goes.'[4]

[20] Thus, the legal practitioner for the respondents did not need to do more than allege that she is authorised to oppose the relief sought by the applicant. This she did. She went further to state that she arranged a consultation with Mr Sebastian from the Chief Justice office regarding the second respondent's (Chief Justice) position on the matter. These allegations tend to show that the respondents' legal practitioner was duly authorised to represent the respondents. More so, when rule 6(3) of this court's rules exempts Government Attorney from filing a return containing the particulars of litigant. It was open to the applicant to challenge the averments regarding authorisation. The challenge must not be a weak one otherwise it falls to be ignored.

[3] *Oranjerivierwynkelders v Professional Support Service*
[4] See *Otjozondu Mining v Purity Manganese* 2011 (1) NR 298 at para 53-55.

[21] In the present matter, the applicant came to court and without laying a basis, denied the legal practitioner's authority to represent the respondents. The following appears in his answering affidavit:

'AD paragraphs 1 to 3

These paragraphs are noted, save to point out that deponent has nowhere provided evidence of authority to bring this application on behalf of the respondents.'

[22] The above is contrary to what the law informs us. Once the applicant has made the necessary averments in the founding papers, it is for the respondent to present evidence that there is lack of authority. The respondent is not entitled to come to court and deny necessary averments and demand proof thereof without laying a basis.

[23] In *National Union of Namibian Workers v Naholo,*[5] the court held that if the respondent offers no evidence at all to suggest that an applicant was not properly before court, a minimum of evidence would be required from the applicant to establish authority. The court stated further that this principle should also apply if the respondent availed himself of a mere non-admission or a tactical denial of authority without placing any evidence before court to suggest that the applicant was not properly authorised.

[24] In the *Naholo* matter[6] the deponent to the applicant's founding affidavit relied on a resolution by the Central Executive Committee of the applicant (National Union of Namibian Workers (NUNW)) to institute proceedings. In his answering papers the respondent raised the following issue *in limine:*

24.1 That the application had not been duly authorised by the applicant;
24.2 That the deponent who made the founding affidavit in the application, had not been properly authorised by the applicant to bring the application.

[25] The respondent's challenge went further to set out the following:

[5] *National Union of Namibian Workers v Naholo* 2006 (2) NR 659.
[6] Ibid.

25.1 The applicant body had unions affiliated to it. Those unions were spread across Namibia. It was unlikely that all the requisite members of the Central Executive Committee (CEC) could have been present at the meeting to pass the resolution;
25.2 The respondent knew at least three people, namely the President of applicant, the Secretary General of NANTU (affiliated union) as well as the President of NANTU (all three persons being voting members of the CEC), who did not even know of a meeting whereat the aforesaid resolution was allegedly passed;
25.3 In support of above-mentioned, the respondent filed supporting affidavits of the aforesaid three persons. The essence of the allegations made by them in their affidavits was that they confirm the abovementioned allegations;
25.4 The CEC normally met twice-yearly and a quorum was a simple majority. The applicant was challenged to prove that a properly constituted meeting took place with a quorum to pass the resolution;
25.5 In support of the respondent's aforesaid contentions, the respondent attached a copy of the applicant's constitution to its papers;
25.6 With further reference to the constitution, the respondent contended that the said resolution had to be passed at a special meeting in terms of the constitution. The constitution required the applicant's executive committee or a third of the affiliated unions to request a special meeting. Moreover, seven days' notice' of such a meeting was necessary. The respondent contested that any of the aforesaid had been complied with;
25.7 The respondent further contended that a resolution, not passed at a properly constituted meeting, was required in terms of the constitution to be signed by not less than two-thirds of the affiliated unions in order to have force.

[26] At para [26.1] the court opined as follows:

'In circumstances where a respondent substantially challenges the authority of the applicant – supported by sufficient evidence so as to create a genuine dispute of fact as to whether or not the applicant was properly authorised – the duty is cast on the applicant to refute that evidence. In this case the validity of the particular resolution or extract purporting to confer authority ('AVM1') was challenged on specific grounds. It went well beyond a mere non-admission. This challenge was supported by sufficient evidence. The applicant was called upon to properly respond thereto and to

refute those allegations. In those circumstances the applicant could not merely be content by simply relying on the text of the resolution (and a bare allegation in the founding affidavit that the deponent of the applicant is duly authorised), without meeting these challenges. The duty was cast on the applicant to show that the relevant resolution has a valid underlying basis.'

[27] In the present matter, the applicant's challenge is a mere non-admission of the averments made by the legal practitioner for the respondents. The applicant did not substantiate his challenge by presenting evidence. Nor did the applicant, for instance, state that he is aware of the internal requirements of Government Attorney and that those requirements were not complied with for the reasons he would provide. This would have called upon the respondents' legal practitioner to prove its authority in reply.

[28] Counsel for the respondents correctly argued, in my view, that the applicant did not state any statutory pedigree of the handbook sought to be relied upon. This is quite important considering the fact that the said handbook is not a statute. The binding effect of the said handbook was not established.

[29] The applicant's contention that an employee appointed by a member of the Executive cannot represent a member of the Judiciary appears to have been premised on the doctrine of separation of powers. However, this assertion was made in the broadest possible terms without any reference to any provision of either the constitution or statute. At best, it sounded like a proposal for reform. Over and above, this issue was not canvassed in the applicant's papers; instead, it was only mentioned during oral submissions. As such, the applicant's argument was not substantiated and no proper foundation was made.

[30] As regards the issue of audience of the two instructed counsel, it seems to me that the applicant is of the view that the repeal of the Advocates Act of 1964 did away with the right of audience of the two counsel. For one to appear in this court, they ought to be admitted as legal practitioner. The respondents' counsel submitted that they are duly admitted legal practitioners of this court.

[31] Because of its importance, the applicant implored the court to refer the issue of audience in respect of the two instructed counsel to a full bench of this court. However, I did

not hear the applicant allege that the two instructed counsel are not admitted legal practitioners of this court. In the absence of that, there is no real challenge to the issue.

Constitution

[32] I am of the view that the applicant's challenge of authority of the respondents' legal practitioner is a weak one and stands to be rejected.

Order

[33] In the result, it is ordered as follows:

1. The Applicant's point *in limine* that the legal practitioners for the Respondents lack the necessary authority to represent the Respondents is dismissed.
2. The Applicant is ordered to pay the costs occasioned by this point in *limine* which costs shall be limited in terms of the provision of rule 32(11).

Judge	**Comments:**
MUNSU, AJ	NONE
Applicant: In person.	**Respondents:** R Totemeyer, SC, With him G Narib Instructed by Government Attorney.