

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

Practice Directive 61

Case Title: Samuel Mulemwa Amukena v Nampower Corporation (Pty) Ltd; Ministry Of Labour and Social Welfare And Employment Creation; Bester Maiba Sinvula	Case No: HC-MD-CIV-MOT-REV -2021/00092
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: TOMMASI, J	Date of hearing: 28 March 2023
	Date of order: 07 June 2023 Reasons delivered on: 07 June 2023
Neutral citation: <i>Amukena v Nampower Corporation (Pty) Ltd and Others</i> (HC-MD-CIV-MOT-REV-2021/00092 [2023] NAHCMD 25 (7 June 2023)	
Results on merits: No decision on the merits.	
The Order: <ol style="list-style-type: none">1. The applicant is granted leave to amend the notice of motion by inserting Prayer 1 – 9 and 11 – 13 of his final proposed amendments with the qualification that prayer 9 is to read as an alternative prayer to prayer 11.2. The application for leave to amend, by inserting prayer 10, is dismissed.	

3. The applicant must file an amended notice of motion within 15 days from date of this order omitting prayer 10 and reflecting prayer 9 as an alternative prayer to prayer 11.
4. The court makes no order as to costs.

Further conduct

5. The parties must file a joint status report before or on 23 June 2023.
6. The matter is postponed to 28 June 2023 at 08H30 for a status hearing.

Reasons for orders:

[1] The applicant applied for leave to amend his notice of motion. This application comes shortly before the matter must be heard. The applicant, in a Final Amendment Notice, proposed an Amended Notice of Motion containing 13 prayers.

[2] In the main application the applicant filed an application to review and to set aside the arbitration proceedings presided over by the arbitrator (third respondent). He submits that these prayers are not new but they merely clarify the initial notice of motion which was not properly drawn up due to his ignorance of legal proceedings at the time. The applicant acts in person.

[3] The first respondent's position is that these amendments come very late in the process and they come at great cost and prejudice to the first respondent. Mr Ulrich, counsel for the first respondent argues that some of the amendments are new applications and would necessitate supplementary answering affidavits which would re-open the pleadings. He submits that the first respondent would be entitled to costs in terms of s 118 of the Labour Act, 11 of 2007.

[4] It is now generally accepted that an amendment may be sought or granted at any stage, even before judgment, as long as it is *bona fide*.¹

[5] The applicant explained that the amendments he is seeking are in fact reflected on his initial application but are not placed as prayers. He referred the court to page 7 of his application for review. He explains that the amendment he seeks is not to re-open the matter but merely to clarify the initial application for review. This to my mind, would make

¹ *Marmorwerke Karibib (Pty) Ltd v Transnamib Holdings Ltd* 2022 (3) NR 629 (SC).

the amendments sought *bona fide* if indeed it only seeks to clarify the initial application. There is however one amendment proposed which is not only for clarification but is a complete new application to this court, seeking an order for compensation. To accede to this amendment would be highly prejudicial to the respondents in that it would necessitate the filing of supplementary affidavits and re-opening of the pleadings. Not only would this be detrimental to the respondent but also to the applicant who is seeking finality in this matter. These amendments ought to be distinguished from those amendments which are proposed to clarify the initial application.

[6] The applicant in prayer 1 of the proposed amendment is seeking an order to nullify internal disciplinary proceedings which occurred on 22 and 30 August 2019. The applicant referred to this hearing in his founding affidavit and findings made by the Arbitrator in this regard. After hearing the applicant the court understood that this was not a new application but rather part of his prayer for the reviewing, correcting and/or setting aside of the arbitration proceedings. This amendment is thus seen not as a new application before court but merely a prayer for a particular remedy stemming from arbitration proceedings. To this extent the amendment ought to be allowed.

[7] Prayers 2-6 of the final proposed amendments are prayers which were initially included in the notice of application for review which the applicant amended to provide more clarity. These issues are furthermore raised in the founding affidavit of the applicant and given the *bona fides* of the applicant the court is inclined to the grant leave for these proposed amendments.

[8] Prayer 7 and 8 refers to the first respondent's procedure for High Voltage regulations, the Training Section's authority to conduct assessments and its failure to disclose the assessment marks to employees. These two proposed amendments stem from prayer 4 of the applicant's final proposed amendment. The applicant proposes in prayer 4 that the court correct, set aside and/ or review the decision of the arbitrator under Case No Neru 38-20, to read that the assessment of the applicant on 8 May 2018, was both procedural and substantively unfair and constituted an unfair labour practice. In light of its relationship to this prayer it would not constitute a new application but would resort under prayer 4 for the corrections, reviewing and setting aside of a decision by the Arbitrator.

[9] The proposed amendment in prayer 9 ought to be a prayer in the alternative to prayer 11 and should read as such.

[10] The prayer proposed in prayer 10 is a completely new application and no case has been made out in the founding papers of the applicant. In light hereof this amendment ought not to be entertained.

[11] The court having considered the application for leave for amendment exercised its discretion in favour of the applicant and grants leave to amend as per the order below.

[12] I am not persuaded that the applicant herein has been frivolous or vexatious, and in terms of s 118 of the Labour Act no order as to costs may be made.

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

1. The applicant is granted leave to amend the notice of motion by inserting Prayer 1 – 9 and 11 – 13 of his final proposed amendments with the qualification that prayer 9 is to read as an alternative prayer to prayer 11.
2. The application for leave to amend, by inserting prayer 10, is dismissed.
3. The applicant must file an amended notice of motion within 15 days from date of this order omitting prayer 10 and reflecting prayer 9 as an alternative prayer to prayer 11.
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Further conduct

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Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Applicant	Respondent

<p>Mr Amukena Erf 3173 Ongandu Street Windhoek</p>	<p>Mr Benjamin Ulrich Angula Co Inc Windhoek</p>
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