

REPORTABLE

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 41/2015

In the matter between:

KAYLA TRADING ENTERPRISES CC

APPLICANT

and

OKAVU RENAISSANCE INVESTMENTS CC

RESPONDENT

Neutral citation: *Kayla Trading Enterprises CC v Okavu Renaissance Investments CC* (I 41/2015) [2016] NAHCNLD 101 (05 December 2016).

Coram: CHEDA J

Heard: 25/07; 16/09; 17/10/2016

Delivered: 05 December 2016

Flynote: Locus Standi - A legal practitioner who acts for and on behalf of a party must clearly establish authority for so acting – *locus standi* – a without prejudice document must not be brought to the attention of the court as it is privileged communication. Legal arguments must not be included in an affidavit.

Summary:

Applicant applied for a second chance to be heard by filing a further affidavit after the previous application was dismissed. The legal practitioner who filed a founding affidavit did not establish *locus standi* for so acting. Legal practitioner included a without prejudice document in the application. The affidavit contained legal arguments which was not proper. Respondent raised points *in limine*. Points *in limine* upheld and application was dismissed.

ORDER

1. The points *in limine* are upheld.
2. Application is dismissed with costs.

JUDGMENT

CHEDA J:

[1] In this matter respondent issued out summons out of this court to which applicant failed to enter an appearance to defend. Respondent applied for and obtained a default judgment on the 23 March 2015.

[2] On the 29 October 2015 applicant applied for a default judgement. Respondent filed a notice of opposition and the matter was set down for hearing on the 29 February 2016.

[3] On the 22 February 2016 applicant filed an interlocutory application in order to file a further affidavit and this application was opposed. This application was set down and heard on the 30 June 2016 and was dismissed.

[4] On the 25 July 2016 applicant indicated that he wished to re-file the application and matter was set down for hearing on the 16 September 2016 for arguments.

[5] Respondent has raised the following *points in limine*:

- a) Lack of *locus standi* by applicant's legal practitioner;
- b) Attachment of inadmissible evidence by the legal practitioner;
- c) Affidavit containing legal arguments

[6] At the onset both parties applied for condonation of their failures to comply with the rules of court, this related to the filing of affidavits and heads of arguments out of time. Both gave reasonable explanations which persuaded me to grant the said condonations. In addition to the explanations, I was persuaded by the fact that this matter keeps on coming up, this being the second time and applicant insists whether correctly or wrongly that it should be awarded a further opportunity to present its case. It is in light of that, that I granted the applications.

- a) Lack of *locus standi*

[7] Mr. Greyling has argued that applicant's legal practitioner has no authority to represent applicant because the said authority was not stated in her affidavit. In her affidavit she stated "I am duly authorised to depose to this affidavit for the reason that I am the legal representative of record for applicant." It is his argument that applicant's legal practitioner should have gone further and stated that "she is duly authorised to launch the application" and this should have been followed by a confirmatory affidavit.

[8] Ms. Samuel is, however, of the view that her averment is correct, nothing more should be stated and challenged respondent to prove the non-existence of authority and referred to *Scott and Others v Hanekom and Others 1980 (3) SA 1182 (c) at 1190 E-G* where it was stated "it is now trite that the applicant need do no more in the founding papers than allege that the authorisation has been duly granted"

[9] It is further her argument that the mere fact that a deponent is duly authorised to depose to a founding affidavit instituting proceedings is an indication that she has authority to bring the application on behalf of the applicant.

[10] Ms. Samuel's affidavit speaks of authority to depose to the affidavit which is the foundation of legal representation. However, such legal representation may or may not include authority to launch an application. Launching an application ushers in a new dimension in the proceedings as it has costs implications in the event of a loss of the case by applicant.

[11] It is for that reason that applicant must also weigh-in by deposing to a confirmatory affidavit thereby adding credence to his legal practitioner's action for and on his behalf. It is for that reason that it is not enough that a legal practitioner should rely on the words "duly authorised" as such words are too general and lack specifics.

[12] This application is further compounded by the fact that Phillip Auala's confirmatory affidavit does not aver that he has been duly authorised by applicant to depose to his affidavit. That also brings in the question of *locus standi in judio*.

[13] I draw solace from the matter of *Kandjii v Tjingaete Tjinga's Gold Farming v Tjinjeke* (I 1024/2009; I 45/2009) NAHCMD 35 (06/02/2014), where Damaseb JP remarked:

"A legal practitioner is an agent of a client and an agent cannot institute legal proceedings on behalf of the client without authorisation."

[14] Authorisation must be clear, and cannot be ordinarily implied or concluded by conjecture or speculation. It is an expression by the principal to his agent which clothes agent with power to conclude juristic acts on behalf of the principal. The need for clear authorisation therefore results in the creation of a legal machinery through which a legal relationship is brought into existence. It is, therefore, an announcement to third parties that the principal will be bound by the acts of his/her agent.

[15] Authorisation is essential in motion proceedings, see Herbstein Van Winsen, *The Civil Practice of the High Court of South Africa* 5th ed. Vol I – p 437 where the learned authors state:

“Where an application is made by an agent on behalf of a principal, an averment of the agent’s authority is essential, unless it appears from affidavits filed in the application that the principal is aware and ratifies the proceedings, see *Millman v Goosen* 1975 (3) SA 141 (0).”

[16] In the case of an artificial person, unlike an individual, it can only function through its agents, and can take decisions only by the passing of resolutions in the manner prescribed by its constitution. It cannot be assumed, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised.

[17] It, therefore, stands to reason that where the legal practitioner has not made the necessary averments the required legal authorisation will be lacking, thereby rendering the affidavit ineffective.

b) Attachment of inadmissible evidence

[18] Respondent attacked applicant’s attachment of a “without prejudice” correspondence. In response to applicant’s letter of the 08 December 2015, respondent had intimated that it was going to oppose applicant’s proposed application for condonation. The response was marked “without prejudice”. It is trite law that privileged communication between legal practitioners which occur from time to time and whose objective is to reach a settlement and is clearly marked “without prejudice” should not reach the eyes of the court, see, *The Town Council of Helao Nafidi v Northland Development Project Limited (I2725/2014 [2015] NAHCMD 73 (27/03/2015)* where, it was held that legal practitioners should ensure that privileged information should not be brought to the attention of the court as it might affect the court’s ability to objectively determine the dispute at hand in the long run.

[19] This is in line with the need for the court to maintain its impartiality throughout the proceedings. There is authority that negotiations between parties, whether oral or written which are undertaken with a view to a settlement of their differences, are privileged from disclosure eventhough there is no express stipulation that they shall be without prejudice. It was therefore improper for applicant to have included it, see also *Millward v Glasser 1950 (3) SA 547 (w)*.

c) Affidavit containing legal argument

[20] It is respondent's argument that applicant's legal practitioner has referred to legal arguments in her affidavit and this is inadmissible. An affidavit must contain essential elements which are fact based. It must not contain legal arguments. This is trite law.

[21] An affidavit must not contain scandalous, vexatious or irrelevant matters. A party who does so stands the risk of having the matter struck out and will be levied with appropriate costs.

[22] The points raised *in limine* are the catalyst in these proceedings as applicant can only proceed if it passes these hurdles. From the above it is clear that applicant has a huge legal battle to overcome those hurdles. Applicant failed to jump the said hurdles and cannot succeed.

[23] In conclusion, this is the order of court

1. The points *in limine* are upheld.
2. Application is dismissed with costs.

M Cheda
Judge

