

REPUBLIC OF NAMIBIA

LABOUR COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTION 61

Case Title: FANUEL KAPAPERO, N.O. & 2 OTHERS // BETTY MBILE SILUMBU	Case No: HC-MD-LAB-MOT-REV-2022/00209; INT-HC-OTH-2023/00031
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Date reserved: 15 June 2023
	Delivered on: 19 July 2023
Neutral citation: Kapapero N.O v Silumbu (HC-MD-LAB-MOT-REV-2022/00209) [2023] NALCMD 30 (19 July 2023)	
Order:	
<ol style="list-style-type: none">1. The condonation application is dismissed.2. The application to rescind the judgment and order of the court, dated 16 November 2022, is struck from the roll.3. There is no order as to costs.4. The matter is finalised and removed from the roll.	
Reasons for the above order:	
<u>Introduction</u>	

[1] The respondents instituted an application by notice of motion to rescind a judgment and an order of the court, dated 16 November 2022. In the notice of motion they also apply to the court to condone the late filing of the rescission application. Mr Ncube represents the respondents, and Mr Mayumbelo represents the applicant. I am grateful to both counsel for their heads of argument and the authorities they rely on. I have distilled from the authorities the propositions of law that are of assistance on the points under consideration.

[2] The applicant raised a point in limine. I shall deal with it now to get it out of the way at the threshold. I roundly reject the applicant's point *in limine* on the issue of authority to institute the instant rescission application. In our public administration system, who better than the Executive Director (ie the chief administrative officer) of a Ministry to institute and defend proceedings involving the Ministry. It follows inexorably that the filing of the Special Power of Attorney, done *ex cautela abuntandi*, is absolutely unnecessary. The point *in limine* is singularly lacking of substance and merit, and is accordingly dismissed.

[3] The law the Labour Court applies is contained in the first place in the Labour Act. Its procedure is also contained in the Labour Act, supplemented by its own rules, ie the Labour Court Rules ('the rules'), subject to rule 22 thereof.

[4] In virtue of rule 22 of the rules, an application to rescind a judgment or order of the Labour Court can be brought in terms of *only* rule 16 of the rules. (Italicised for emphasis) I have made this important point to reject any reliance by the applicant on rule 103 of the Rules of the High Court or the common law as appears in the chapeu of the 'Notice of Motion'. I shall return to this legal reality as to the appropriate procedure in due course.

[5] The rescission of a judgment or an order of the Labour Court is governed by rule 16 of the rules only, as aforesaid. In terms of subrule (1) of rule 16, only a judgment by default may be rescinded by the court upon application by any party referred to in the subrule. And what, for the purposes of rule 16, constitutes 'judgment by default'? It is a judgment given in terms of rule 7 of the rules. A judgment by default, where the applicant failed to appear at the hearing, is regulated by subrule (2) of rule 7; and where the respondent failed to appear is regulated by subrule (3) of rule 7.

[6] The time limit within which a rescission application must be made is 14 days. I use

'must' advisedly. In the instant matter, it took the respondents, who are represented by counsel, some 22 days, after the filing of the judgment and the order on the e-justice system on 16 November 2022, to institute the rescission application.

[7] For good reason, I shall deal with the condonation application now to determine whether there is an application to rescind properly before the court.

[8] It is well settled that an application for condonation is required to meet the two requisites of good cause before the applicant can succeed in such application. These entail firstly, establishing a reasonable and an acceptable explanation for the delay and secondly, satisfying the court that there are reasonable prospects of success on the main application.¹ And it should be remembered, the two requisites must be satisfied together. This principle was enunciated by the Supreme Court in *Balzer v Vries*.² That case concerned an application to condone the late filing of a notice of appeal. I see no good reason why the principle should not apply with equal force to applications to condone the late filing of rescission applications to rescind judgments and orders.

The requisite of acceptable explanation for the delay

[9] The period within which a rescission application must be made in terms of the rules is 14 days from the date of the judgment or order sought to be rescinded. On the respondent's version, the matter was assigned to their counsel on 6 October 2023. The judgment and order of 16 November 2023 was filed on the e-justice system the same day. Counsel does not tell the court why it took her five days to find the judgment and the order only on 21 November 2022, albeit counsel had been seized with the matter since 6 October 2022.

[10] A case management order calling a case management conference was made and filed on the e-justice system on 26 October 2022. Counsel does not explain why she did not appear for the case management conference held on 26 October 2022, during which the set down date for the hearing of the matter was ordered, although she had been seized with the matter some 20 days previously. One would have thought, the case management conference would have given counsel the opportunity to tell the court the difficulties that stood in her way to enable the court to consider a date suitable to both parties for the hearing of the application. Having missed such propitious opportunity, it is too late in the day for counsel to

¹ See, eg, *Balzer v Vries* 2015 (2) NR 547 (SC).

² *Ibid.*

file an affidavit at this late hour to tell the court about those difficulties.

[11] Consequently, I hold that the respondents' reliance on counsel's unjustified failure to act promptly as the circumstances demanded cannot constitute a reasonable and an acceptable explanation for the delay in bringing the rescission application, that is, out of the prescribed time limit.

[12] Indeed, as to the first requisite mentioned in para 7 above, the crucial component of the respondents' failure to bring the rescission application within the prescribed time limit is this: The 'Respondents were under the impression, as advised by their legal practitioner of record, that the rescission application would be instituted in terms of Rule 103(1) (of the High Court Rules) only to realise at the last minute that the Labour Court Rules provide for rescission applications in Rule 16 ...' But that cannot be true, because in the end, the respondents still relied also on rule 103 of the High Court Rules in the notice of motion.

[13] In any case, the legal practitioner's lack of knowledge of the rules cannot assist the respondents. It cannot constitute good cause in a rescission application. In *Maia v Total Namibia (Pty) Ltd*,³ the full court stated unflinchingly and categorically that in conducting litigation, the legal practitioner must familiarise himself or herself with the rules of court. If they did not and the rules are not followed, the court will not come to their aid and grant condonation readily. In the result, I hold that the explanation on any pan of legal scales cannot be reasonable and acceptable. On the facts and circumstances of this case, I think I should take a cue from the full court and decline to come to the aid of the respondent. It follows that in my judgment, the applicant has failed to establish reasonable explanation for the delay in bringing the rescission application.

[14] The respondents make the untenable point that the non-compliance with rule 16(1) of the rules does not prejudice the applicant. I disagree. The prejudice is that the respondents, without good cause, are denying the applicant her right to have her civil right determined by the court within a reasonable time – a right guaranteed to her by article 12(1)(a) of the Namibian Constitution. *A fortiori*, the present matter is a labour matter, and the Supreme Court tells us that labour disputes must be resolved expeditiously.⁴ I pass to consider the second requisite of good cause.

³ *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC).

⁴ *National Housing Enterprise v Hinda-Mbazira* 2014 (4) NR 1046 (SC).

The requisite of reasonable prospects of success

[15] As to the second requisite, discussed in para 7 above, the gravamen of the respondents' contention is that 'the issues for determination (at the disciplinary hearing) are not complex so as to warrant the assistance of a legal practitioner'. It would seem the respondents have misread the judgment. The judgment in which the order sought to be impugned was made is a fully reasoned judgment, based on case law.

[16] The judgment is clear. The complexity of the matter in question is not the only factor courts take into account in determining whether legal representation should be allowed at disciplinary hearings. In the aforementioned judgment, referring to authorities, I discussed all the relevant factors. The respondents do not, even with a whimper, aver anywhere in their founding papers that the court applied the wrong principles of law in making its decision on facts which are common cause.

[17] I would have thought the judgment should be abundantly clear to any careful, open-minded and fair-minded reader of the judgment. In para 3 thereof I referred to the general principle of the common law on legal representation at administrative disciplinary hearings and the qualification thereto. In para 4 thereof I set out a very basic principle of statutory interpretation as to the jurisprudential relationship between an enabling Act and its subsidiary or subordinate legislation (eg rules, regulations and by-laws).

[18] For obvious reasons, I rehearse the principle here. In our law, a fundamental lineament of statutory interpretation, coupled with the principle of legality, is this. Subordinate or subsidiary legislation must be read subject to its enabling Act. This is in line with the well-established rule of interpretation of statutes that a regulation (or any other subordinate legislation) cannot confer greater power than its enabling Act.⁵ The result is that a subordinate legislation cannot make provisions that are inconsistent with its enabling Act. Clause 6.9(f) of the Public Service Staff Rule (PSSR) X.1 does exactly what our statute law prohibits. The irrefragable consequence is that that clause is ultra vires s 26(8)(a) of the Public Service Act and, therefore, that clause is invalid, as a matter of the principle of legality. The reason is that clause 6.9(f) of the PSSR, as I stated in the judgment, does not fall within the scope of what is authorised by the enabling Act.⁶

⁵ *Namibia Port Authority v MV 'Rybak Leningrada* 1996 NR 355 at 361B-C.

⁶ GC Thorton QC *Legislative Drafting* 3ed (1987) at 358.

[19] In words of one syllable, a provision in an enabling Act may be Constitution compliant, while a provision in a subsidiary legislation made under that enabling Act is *ultra vires* the Act and therefore invalid. Doubtless, what I said in paras 3 and 4 of the judgment and what I have said in para 17 above are – to use a pedestrian language – Statute Law 101.

[20] Mr Ncube's bravura in his submission that the court held that clause 6.9(f) is unconstitutional is misplaced. The statement is not entirely correct. The word 'Constitution' or any of its grammatical derivatives does not appear anywhere in the entire judgment. Mr Ncube's submission is untethered to reason or facts. Mr Ncube's submission, with the greatest deference to him, is fallacious and self-serving. It is, accordingly, roundly rejected.

[21] I say in parentheses that such ungrounded submission could pass as being of no moment but for the fact that, sadly, Mr Ncube had peddled his plainly egregious contention, which manifested itself in his unsound submission, to two of our fine and industrious political and administrative leaders, viz. The Right Honourable Prime Minister (the fourth respondent) and the esteemed Executive Director of the Ministry of Education, Arts and Culture (the third respondent). Labouring under bad advice, these fine and industrious political and administrative leaders were made to depose to affidavits in the founding papers wherein they rehearsed the bad advice.

[22] *Namibia Tourism Board v Kauapirura-Angula*,⁷ referred to the court by Mr Ncube is of no assistance on the point under consideration. As I have said, a careful and unassumptive reading of the judgment will find that, on the authorities, in considering whether to allow legal representation at administrative disciplinary hearings, the complexity of the case is not the only factor to take into account; as I laid it out in paras 5-8 of the judgment.

[23] As respects *Kauapirura-Angula*, Mr Ncube does not tell the court what the employee's standing in the community was; neither does the judgment. In the instant matter, the applicant is a school teacher. A teacher, in my view, stands in a special reputational relationship with not only the pupils or students of the school and their parents and guardians and her co-teachers but also, and more important, with the community in which she serves. I hold firmly to the view that *Kauapirura-Angula* is of no assistance on the point under consideration. Compared with the applicant, I dare say, the employee in *Kauapirura-Angula* is an unknown quantity in the community where his or her workplace is situated.

⁷ *Namibia Tourism Board v Kauapirura-Angula* [2009] NAHCMD 118

[24] It is for such important considerations and others that courts have taken into account in their determination of such question not only the complexity of the case before administrative disciplinary hearings. Contrary to the authorities that are gathered in the judgment, the court in *Kauapirura-Angula* considered – it might have had its own reasons for so doing - only the factor of complexity of the case before the disciplinary hearing. Mr Ncube is so much enamoured with it. I am not.

[25] Consequently, I conclude that the respondents have failed to establish that there are reasonable prospects of success on the main application. They have failed to satisfy the second requisite of good cause.

[26] Based on these reasons, I conclude that the condonation application fails, and is refused. The irrefragable consequence is that there is no application properly before the court to rescind the judgment and order, dated 16 November 2022.

[27] In the result, I order as follows:

1. The condonation application is dismissed.
2. The application to rescind the judgment and order of the court, dated 16 November 2022, is struck from the roll.
3. There is no order as to costs.
4. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
C Mayumbelo of	J Ncube of

Chris Mayumbelo & Co., Windhoek	Office of the Government Attorney, Windhoek
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