



REPORTABLE

CASE NO: SA 54/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

IMAFON FIONA AKPABIO

First Appellant

and

MINISTER OF JUSTICE

First Respondent

BOARD FOR LEGAL EDUCATION

Second Respondent

Coram: DAMASEB DCJ, SMUTS JA and FRANK AJA

Heard: 2 June 2023

Delivered: 23 June 2023

Summary: The appellant, a Nigerian national, wishes to be admitted to practice law in Namibia. The appellant approached the Board for Legal Education (the BLE) to recommend to the Minister of Justice (the Minister) to prescribe her LLB degree obtained from Obafemi Awolowo University, Nigeria in terms of s 5(4) of the Legal Practitioners Act 15 of 1995 (the LPA). The BLE then requested the appellant to produce a prospectus for the period of her studies for the LLB degree. The appellant was unable to produce the prospectus for the entire period of her LLB degree and the BLE could as a result not make the required recommendation to the Minister. The appellant challenged the BLE's decision in the High Court on notice of motion and claimed that a proper interpretation of s 5(4) and s 11(2) of the LPA did not require

the furnishing of a complete prospectus by her and that alternatively it could also rely on her certificate and official transcript of results. The court *a quo* held that the appellant could not provide the official transcript of her academic record for the period of 1987 to 1991, which is an essential component for prescribing the appellant's qualification in terms of s 11(2) of the LPA and furthermore that when the BLE requested for the prospectus it acted within the powers conferred upon it by the LPA. The High Court had also declined the appellant's request to refer to oral evidence whether or not she had furnished the transcript of results to the BLE.

On appeal, it was *held* that this Court will not lightly interfere with the exercise of the court *a quo*'s discretion whether or not to refer a matter to oral evidence, unless the court *a quo* acted on the wrong principle, took into account irrelevant considerations or disregarded relevant ones. The first instance court should refer a matter to oral evidence if the interests of justice demand it especially because of the overriding objective of the High Court Rules (rule 1) which requires the court to resolve disputes as speedily as possible and without incurring costs unnecessarily.

Held that, on the papers there was a genuine dispute of fact whether or not the appellant had furnished the BLE with the official transcript of her LLB degree and that if she did, the court *a quo* would have had to direct the BLE to consider the application for prescription of her LLB degree as required by s 11(2) and (3) of the LPA.

Held that, the court *a quo* failed to take into consideration the overriding objective when it refused to refer to oral evidence the disputed issue of whether the BLE had been given by the appellant her LLB degree transcript.

Held further that, in performing its function to compare a foreign LLB degree with that offered at UNAM, the BLE may adopt any means that fall within a range of reasonable options. But such means should not take precedence over that prescribed by the legislature. Presentation to the BLE of either the 'original' or 'authenticated copies of certificates and of official transcript' is, in terms of s 11(2), the sole jurisdictional basis for the exercise of the power to recommend under s 5(4). Once those have been presented by a person seeking prescription, s 11(3) ordains that it 'shall be accepted as sufficient information to enable the BLE to make its

recommendation to the Minister' and although the issue of the prospectus enjoyed great prominence in the BLE's refusal to make a recommendation to the Minister, during oral argument, counsel for the BLE stated that the BLE would be satisfied if the transcript is furnished to it.

Held further that, the court *a quo*'s refusal to refer the matter to oral evidence left it with no option but to dismiss the application. Had the court referred the matter to oral evidence and found that Ms Akpabio had in fact furnished the BLE with a valid transcript of the LLB degree, it would have ordered the BLE to consider the application to prescribe the degree on the strength of the transcript, as that is one of the bases on which the BLE is authorised by s 11(2) of the LPA to make a recommendation to the Minister.

Appeal upheld and matter remitted to the High Court.

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and FRANK AJA concurring):

Introduction

[1] The appellant (Ms Akpabio) is a Nigerian national who wishes to be admitted to practice law in Namibia. Ms Akpabio is legally resident on our shores and maintains that she has the constitutional right to pursue her chosen profession in the country of her lawful residence. She obtained her undergraduate and post-graduate qualifications (LLB and LLM) in law from Nigerian universities, over 30 years ago. She was admitted and practiced as a legal practitioner in Nigeria, acted as a corporate legal advisor in that country, worked as a magistrate in Botswana and was admitted as a legal practitioner in Tanzania – all on the strength of the legal qualifications obtained in Nigeria.

[2] As will more fully become apparent below, Ms Akpabio is required by the Legal Practitioners Act 15 of 1995 (the LPA) to have the Bachelor of Laws degree (LLB) that she obtained in Nigeria recognised in Namibia before she can do the course of legal practitioners' training at the Justice Training Centre (JTC). Section 16(1) of the LPA states: 'There shall, for the purposes of this Act, and subject to section 11(1)(b), be provided at the Justice Training Centre established by the University of Namibia, a course of post-graduate study for the training of candidate legal practitioners'. Ms Akpabio wants to join that course.

[3] It is common cause that the LLB Ms Akpabio obtained in Nigeria was duly accredited by the Namibia Qualifications Authority (the NQA) as being equivalent to the LLB degree offered at the University of Namibia (UNAM). The second respondent, the Board for Legal Education (BLE) which runs the JTC, does not question (a) the existence of Obafeni Awolowo University (Awolowo) where Ms Akpabio obtained her LLB, (b) the authenticity of her qualifications, (c) her admission in both Nigeria and Tanzania as a legal practitioner and (d) her work experience.

The legislative scheme

[4] The BLE is created by s 8 of the LPA and, amongst other functions, has the power under s 5(4) of the LPA to recommend to the Minister of Justice (the Minister) the prescription of any degree or equivalent qualification in law from a foreign university or other comparable educational institution, as being sufficient for the holder of such a degree to be admitted to the JTC and to sit for the Legal Practitioners Qualifying Examination (LPQE) as contemplated by s 6 of the LPA.

[5] The combined effect of s 4(1) and s 5 of the LPA is that a person may apply to the High Court to be admitted as a legal practitioner if he or she holds a degree in

law from UNAM, or an equivalent qualification in law from a university or a comparable educational institution situated outside Namibia which has been prescribed by the Minister, and he or she has been issued with a certificate by the BLE stating that he or she –

- a) has satisfactorily undergone practical legal training at the JTC; and
- b) has passed the LPQE.

[6] The power to prescribe a foreign LLB degree as being equivalent to that offered by UNAM is exercised by the Minister on recommendation of the BLE. In terms of

s 5 (4) of the LPA:

‘(4) The Minister may from time to time, on recommendation of the Board, prescribe by notice in the *Gazette* –

- (a) for the purposes of subsection (1)(a), any degree or equivalent qualification in law from a university or other comparable educational institution in a foreign country, the legal system of which is based on common law, which shall be accepted as a sufficient qualification for the purposes of that subsection;
- (b) for the purposes of subsection (1)(c), any degree or equivalent qualification in law from a university or other comparable educational institution in a foreign country, the legal system of which is not based on common law, which shall be accepted as a sufficient qualification for the purposes of that subsection.’

[7] In terms of ss 11(2) and 11(3) of the LPA:

‘11(2) Where, for the purpose of making a recommendation to the Minister in terms of section 5(4), the Board is required to consider how a particular degree or equivalent qualification in law obtained outside Namibia compares with a degree in law obtained

from the University of Namibia, the Board shall cause to be lodged with it originals or authenticated copies of certificates and of official transcript issued by the competent authority of the relevant university or educational institution, or where such university or institution no longer exists, a verification by any other competent authority in the country where such university or institution was situated as to the certificates and official transcript issued by the university or institution in question: Provided that if, in the case of a degree or qualification obtained before 21 March 1990, the Board is satisfied that neither the original or an authenticated copy of the certificate and the official transcript can be provided for reasons which the Board considers sufficient and credible in the particular case, the Board may allow duplicates thereof to be lodged for the purpose of this subsection.

11(3) the certificates and official transcript lodged with the Board in terms of subsection (2), whether originals or authenticated copies or, where allowed, duplicates, shall be accepted as sufficient information to enable the Board to make its recommendation to the Minister.'(Emphasis supplied).

The dispute

[8] It is common cause that in 2018, Ms Akpabio applied to the BLE and the Minister to have her LLB degree obtained in 1991 from Awolowo prescribed under s 5 (4) to enable her (a) to register at the JTC, (b) to do the course of practical legal training and (c) to sit for the LPQE. A dispute has since arisen because the BLE declined to make a recommendation to the Minister to prescribe Ms Akpabio's LLB degree. The reason then advanced by the BLE is that Ms Akpabio failed to submit a prospectus for the duration of her law studies at Awolowo from 1987 to 1991. It is common cause Ms Akpabio was able to furnish to the BLE only a partial prospectus for the period 1984 - 1986 and not for the remainder of the period of her residency at Awolowo, being the period 1987 to 1991.

[9] It is also not in dispute that Ms Akpabio made efforts to obtain the Awolowo Law Faculty prospectus for the period 1987–1991 but was informed by her *alma mater* that it cannot be traced. That notwithstanding, the BLE officially informed the

Minister – who in turn informed Ms Akpabio – that because of her failure to submit the balance of the prospectus for the period of her study at Awolowo, it is not in a position to make a recommendation in terms of s 5(4) of the LPA.

[10] It is that refusal by the BLE that aggrieved Ms Akpabio and prompted her to approach the High Court for relief. A refusal to exercise a power is also a decision capable of being challenged.

The pleadings

[11] The relief sought by Ms Akpabio in her amended notice of motion is best briefly summarised. She seeks an order that, on a proper construction of s 5(4) of the LPA, the BLE's 'restrictive method' of requiring the production of a prospectus for the entire period of study for an LLB degree in a foreign country 'is not the only method to be adopted by the BLE'. That s 5(4), read with s 11(2) and (3) of the LPA allows the BLE to, in the alternative: (a) rely on the official transcript and certificate and (b) to use 'appropriate alternative methods where' the institution from which the degree was obtained 'is no longer in operation' or 'due to passage of time' the institution is 'unable to locate part of the prospectus used during the period of her studies'. Ms Akpabio states that because she is unable to obtain from Awolowo parts of the prospectus for the period 1987 to 1991, the prospectus for the period 1984 to 1986 together with the LLB certificate and transcript should 'be deemed sufficient' for the purposes of s 5(4) of the LPA.

[12] Because Ms Akpabio's studies of law in Nigeria preceded Namibia's independence, her undergraduate and post-graduate degrees, her passing of the Nigerian Bar Exam, and her work experience should 'be deemed relevant'

considerations for the purpose of prescription of her LLB and her being allowed to enrol at the JTC.

[13] A further order sought is that the BLE and the Minister 'jointly review' the current practice of requiring complete course prospectuses, as the practice does not take into account the possibility that because of the lapse of time between graduation and when the prospectus is required, same might not be available. Therefore, for those who had graduated more than ten years before applying for prescription of their degrees, consideration should be given by the BLE to their work experience or higher qualifications where there are issues with the location of prospectuses. Ms Akpabio also seeks an order for the 'amendment' of the LPA if that is necessary for her to obtain the relief sought.

[14] Ms Akpabio seeks the setting aside of the BLE's refusal to prescribe her LLB degree for the reason given by the BLE, as being contrary to s 11 of the LPA. She seeks a further order that the BLE and the Minister be directed to prescribe her LLB degree as it complies with s 11 of the LPA because 'she submitted authenticated copies of the LLB certificate, the official transcript of qualifications, the LLB qualification showing the internationally recognised core subjects for an LLB degree and because of her 'higher law qualifications'.

[15] Ms Akpabio deposed to a founding affidavit which she subsequently augmented without objection by the respondents. I will briefly set out the salient allegations contained in those affidavits which are not apparent from the 'introduction' above.

[16] According to Ms Akpabio, on 5 February 2018 she applied to the BLE for the prescription of her LLB degree and to be enrolled at the JTC. She maintains that the application included the following: The JTC application form and a covering letter; a certified true copy of the LLB certificate; a certified true copy of the LLB transcript; a certified true copy of the Nigeria Law School qualifying certificate; a certified true copy of the NQA evaluation report; and two letters of recommendation.

[17] Ms Akpabio alleges that in order to comply with the BLE's requirements, she wrote to Awolowo's Faculty of Law for copies of the prospectus for the entire period of her studies there. The faculty officer could only locate and send to her a copy of the prospectus for the period 1984 to 1986. The Faculty officer wrote: 'The Curriculum of the Law Faculty as at the time you commenced studies in 1986; (sic). This is contained in the Faculty of Law Hand book 1984 – 1986 herewith attached. That of subsequent years 1987 – 1991 could not be traced at the moment'.

[18] According to Ms Akpabio, all her subsequent attempts to get the complete prospectus for the entire period of study at Awolowo yielded no result. She then informed the BLE as much. The official position then taken by the BLE is that in the absence of the complete prospectus, it is unable to make an assessment of Ms Akpabio's LLB degree for the purpose of a recommendation in terms of s 5(4) of the LPA. The first BLE letter to the erstwhile minister of justice reads:

- '1. Reference is made to your letter dated 20 February 2017 as well as the application on the above subject matter.
2. I have the honour to give an update regarding Mrs. Akpabio's application.

3. The Board for Legal Education (the Board) had received a request to consider recommending for prescription a Bachelor of Laws (LLB) degree awarded to Mrs. Imafon Akpabio by the Obafemi Awolowo University, Federal Republic of Nigeria in 1991.
4. After due consideration, the Board resolved to inform Mrs. Akpabio that it was unable to consider how the qualification obtained from Obafemi Awolowo University compared to a degree in law obtained from the University of Namibia as required by section 5(4) read with section 11(2) as (amended) of the Legal Practitioners Act, 1995.
5. The Board thus requested the complete and detailed academic curriculum from her utilised during the period 1986 to 1991 in order to provide the Board with an informed opinion on the aforesaid qualification as part of the statutory recognition process.
6. Mrs. Akpabio has since informed the Board that after numerous requests to the Faculty Officer at the Obafemi Awolowo University's Faculty of Law, she could not be provided with the detailed curriculum during the period of 1987-1991 as it could not be traced.
7. The Board at its meeting of 25 October 2018 resolved that in the absence of the requested detailed curriculum, it is not in a position to consider the question of whether or not to recommend the prescription of the qualification.
8. The Board therefore is unable to recommend that the degree of Bachelor of Laws (LLB) awarded by the Obafemi Awolowo University be prescribed as it is not in a position to consider how such degree compares with a degree in law obtained from the University of Namibia.'

[19] The BLE's stance was communicated by two successive ministers of justice to Ms Akpabio. The erstwhile minister of justice wrote to Ms Akpabio as follows:

- '1. Your application to the Board for Legal Education and your subsequent letter dated 11 September 2018 bears reference.

2. After due consideration the Board for Legal Education resolved that it was unable to consider how the qualification obtained from Obafemi Awolowo University compared to a degree in law obtained from the University of Namibia as required by section 5(4) read with section 11(2) of the Legal Practitioner's Act, 1995 (Act No. 15 of 1995).
3. In the absence of a detailed curriculum, the Board is not in a position to consider the question of whether or not to recommend the prescription of the qualification and is therefore unable to make a recommendation to the Minister. Furthermore, as in accordance with the Act, I am unable to act unless I have received a recommendation from the Board.
4. Kindly obtain the required documentation and resubmit your application to the Board for Legal Education.'

[20] On 31 August 2020, Ms Akpabio directed a further letter to the new minister of justice. In that letter she seeks a reconsideration of the matter concerning the prescription of her degree. In the last paragraph of that letter she states the following:

' . . . I will be able to provide any other documents and take any other step you may deem fit after considering my application. I had previously submitted copies of my certificates, transcript, curriculum vitae, prospectus and other required documents to the Board of Legal Education and I can still avail them again if so required.'

[21] The incumbent minister of justice replied to Ms Akpabio on 29 September 2020 in response to her letter, informing her thus (in so far as it is relevant):

- '(2) I am aware of your application for prescription of your LLB degree to the Board for Legal Education in 2018 and of the subsequent decision of the former Minister of Justice in this matter.
- (3) I have carefully reviewed your application for the reconsideration of this decision and after due consideration, I remain of the view that in absence of a detailed curriculum, the Board for Legal Education is still not in a position to consider the question of whether or not to recommend the prescription of the

LLB qualification offered by the Obafemi Awolowo University from 1986 to 1991.

- (4) If the Board for Legal Education is unable to make a recommendation to the Minister in terms of section 11(2) of the Legal Practitioners Act, 1995 (Act No. 15 of 1995), then I am unable to act in terms of section 5(4)(b) of the Legal Practitioners Act, 1995 unless I have received a recommendation.
- (5) Kindly obtain the required documentation and resubmit your application to enable the BLE for Legal Education to make a proper recommendation'. (My underlining for emphasis)

[22] Ms Akpabio proceeds to make legal contentions which, by and large, mirror the contentions made under the prayers in her notice of motion. In summary, she maintains that the assessment of a degree for the purpose of s 5(4) cannot depend solely on an evaluation of a prospectus. Doing so works injustice against those who, through no fault of their own, cannot obtain a prospectus from the university where they studied. The assessment process should also consider, she maintains, the fact that the person is in possession of an undisputed LLB degree certificate, together with the transcript; the work experience of the applicant; proof that as part of the course of study an applicant did internationally recognised core courses for an LLB degree and the reputation of the foreign university.

Answering affidavit

[23] Mr Nekwaya who is a member of the BLE deposed to the answering affidavit on behalf of the BLE. Mr Nekwaya states that the BLE does not understand how a 'University of good repute can simply not trace a curriculum of a course it offered during the period 1987-1991'. According to him, the university 'should have kept proper records of the curriculum or syllabus of courses it offered in the past'.

[24] The thrust of the BLE's case as can be gleaned from Mr Nekwaya's affidavit is that for the BLE to be in a position to do a comparison between the UNAM LLB degree and that offered at a foreign educational institution, it is by law required to have regard to the content of the law degree curriculum of the foreign educational institution; or to the official transcript and certificates in the event that the institution no longer exists.

[25] According to Mr Nekwaya, Ms Akpabio even failed to attach to her founding affidavit a copy of the transcript of her academic record. He adds: 'Not only does [Ms Akpabio] not produce a detailed curriculum as proof of the content of her studies, she also, and significantly so – fails to produce her official academic transcript for the [BLE's] consideration'.

[26] The hierarchy in importance that the BLE attaches to the curriculum of a foreign degree course, compared to certificates and the official transcripts, becomes apparent from Mr Nekwaya's further assertion that: 'For such a comparison to take place the [BLE] is by law required to have regard to the detailed curriculum of the foreign academic institution where [Ms Akpabio] obtained her law degree'. Crucially, Mr Nekwaya states: 'Without a complete and detailed curriculum of . . . Obafemi Awolowo University . . . for the years 1987 to 1991 [the BLE] is simply not in a position to even consider whether or not to recommend the prescription of the law degree obtained by [Ms Akpabio]'.

[27] Mr Nekwaya makes clear that the BLE does not question the authenticity of the LLB degree obtained by Ms Akpabio.

Reply

[28] In reply, Ms Akpabio alleges that in 2018 and 2021, when applying for admission to the JTC, she submitted to the BLE a copy of her academic transcript for the LLB degree. As to the assertion that she failed to attach the transcript to the founding affidavit, she states that an academic transcript is a personal document which is availed to an appropriate authority when required by it and (it appears for reasons of privacy) is not to be uploaded on the High Court's e-justice litigation system. She added, for good measure, that 'moreover, the authenticity of my LLB transcript is not in dispute and that the original copies are available as well'.

The High Court

[29] In the way Ms Akpabio's relief is framed, the court *a quo* had to consider whether the respondents (in particular the BLE) acted unreasonably and or *ultra vires* their powers in terms of the LPA in refusing to prescribe Ms Akpabio's foreign LLB degree.¹

[30] The High Court first addressed the question whether Ms Akpabio provided the BLE with the official transcript of her academic record for the period 1987 to 1991. It concluded that it 'is apparent from the record that [Ms Akpabio's] academic record or official transcript does not form part of the record' – a clear reference to the record of the proceedings before the High Court. The learned judge then deprecated what he characterized as the 'unscrupulous' attempt by Ms Akpabio to hand up at the hearing 'what appeared to be her official transcript' 'without affording the respondents sight of the transcript'.

¹ The High Court judgment is reported on the High Court's official website as: *Akpabio v The Minister of Justice & another* (HC-MD-CIV-MOT-GEN-2021/00012) [2022] NAHCMD 185 (12 April 2022).

[31] The learned judge records that he refused to accept the documents because 'the transcript was to be provided to the BLE for consideration . . . and that [the] court cannot usurp the functions of the BLE'. Crucially, the learned judge records in his judgment that Mr Small for the BLE submitted that Ms. Akpabio never submitted the official transcript to the BLE while Ms Akpabio 'insisted' that the official transcript was submitted to the secretary of the BLE.

[32] The learned judge *a quo* held²:

'The predicament facing [Ms Akpabio] is that, she did not file of record copies of the documents submitted to the Board for consideration for the court to assess the nature and content of such documents in order to determine who of the parties is on the right side of the law, so to speak. In the absence of proof that the official transcript was submitted to the Board and considering the denial of receipt of transcript by the Board, I find that [Ms Akpabio] had not established that the official transcript was submitted to the Board.'

[33] Curiously, the court *a quo* records that 'Notwithstanding the fact that the BLE admitted that the applicant submitted a certified copy of the LLB transcript, the BLE backtracked and stated that the transcript which they received was a typed list of subjects of courses. As alluded to, the applicant could not prove service of the official transcript on the BLE'. (It is curious because the court does not explain where the admission was made and when and where it was backtracked on. One would have expected that such contradiction would in any event have undermined the BLE's version and strengthened Ms Akpabio's case that it was submitted).

² *Ibid* para 39.

[34] The High Court proceeded to consider whether the BLE acted unreasonably or *ultra vires* the LPA in requiring the production of the complete prospectus. The court held that the BLE had an 'implied' or 'ancillary' power under s 5(4) to require for comparison of the two law degrees the prospectus used for the foreign law degree. Accordingly, the court found, the BLE's decision to request the complete prospectus from Ms Akpabio and to refuse to recommend the degree because of her failure to present the BLE with the same 'is rationally connected to the powers conferred upon it by the Act'.

[35] The learned judge then records that it was suggested by counsel for the BLE that if the BLE was presented with the original or certified copy of the official transcript, together with the applicable prospectus for the duration of the period of study, or in the absence thereof, the prospectus applicable shortly before and the prospectus applicable shortly after the period of study, the BLE 'may' reconsider its decision.

[36] It is apparent from the above summary that the High Court in its reasons placed emphasis on Ms Akpabio's alleged failure to produce the official transcript of her LLB degree to the BLE. Yet, as I made clear earlier in this judgment³, the BLE's refusal was focused on Ms Akpabio's alleged failure to produce the complete prospectus of her LLB degree.

[37] At all events, the court *a quo*'s conclusion that Ms Akpabio failed to furnish the official transcript of her qualifications to the BLE is at odds with the following finding by the court in the same judgment:

³ *Vide* paras [18] – [21].

[9] It is common cause between the parties that the following documents were submitted to the secretary of the Board, namely:

- a) The Justice Training Centre application form and covering letter;
- b) Certified true copy of Bachelor of Laws certificate;
- c) Certified true copy of Bachelor of Laws transcript;
- d) Certified true copy of the Nigerian Law School qualifying certificate;
- e) Certified true copy of the Namibian Qualification Authority (NQA) Evaluation Report; and
- f) Two letters of recommendation.' (My underlining)

The appeal

[38] Aggrieved by the decision of the High Court, Ms Akpabio appealed to this Court and advanced the following salient grounds of appeal.

[39] In the first place, Ms Akpabio contends that the court *a quo* erred in finding that she did not lodge her LLB transcript and prospectus as required by s 5(4) read with s 11(2) and (3) of the LPA, so as to enable the BLE to recommend to the Minister to prescribe her LLB degree. She further contends that the issue of her not submitting a copy of her official transcript was belatedly raised by the BLE in Mr Nekwaya's answering affidavit. According to Ms Akpabio, the learned judge *a quo* misdirected himself in finding that the BLE acted within the scope of the exercise of its ancillary powers by insisting on the submission of a prospectus which Awolowo could not locate – notwithstanding that s 11(2) and (3) of the LPA make provision for prescription of a degree based on a degree certificate and an official transcript.

[40] Ms Akpabio further contends that the court *a quo* erred by not referring to oral evidence (in terms of rule 67(1)(a) of the High Court Rules) the dispute whether she had in fact furnished the BLE with the transcript of her qualifications. She states that

the then Secretary of BLE, Ms Amber Coerecius, who received the transcript of her LLB degree as part of the application, was available to confirm her version that she submitted the transcript to the BLE.

[41] Ms Akpabio further contends that the court *a quo* misdirected itself in finding that the BLE's refusal to prescribe her LLB degree because of the absence of a complete prospectus was unreasonable and in contravention of Art 18⁴ of the Namibian Constitution.

Condonation application

[42] Ms Akpabio seeks condonation for the late filing of the notice of appeal. In her supporting affidavit, she sets out why she did not comply with the time periods required by the rules of court. She explains that after her application was dismissed by the High Court, instead of appealing she approached the Chief Justice to invoke this Court's review jurisdiction in terms of s 16 of the Supreme Court Act 15 of 1990. While she *bona fide* believed that she could obtain that relief, the Supreme Court declined to exercise its review jurisdiction on 29 June 2022. She then took a further 14-days before she filed her notice of appeal. She states that she utilised the further 14-day delay to prepare the documents for the noting of the appeal as she is representing herself.

[43] Ms Akpabio also seeks condonation for the late filing of the appeal record. In her submission, she explains why she did not file the record within the time period required by the rules of court. Those reasons are not controverted by the respondents and include the fact that she made several efforts to meet with the instructing legal practitioner for the respondents to agree on what should be included

⁴ 'Administrative Justice'.

in the record. The respondents' legal practitioner was however unavoidably unavailable to meet with her resulting in a further delay in the lodging of the record.

[44] Finally, Ms Akpabio seeks condonation for the late filing of security for costs of the appeal. Her explanation in that regard is, first, that she was unable to have a meeting with the respondents' instructing legal practitioner to agree on the amount of security. Secondly, when they met they could not agree on the amount of security to be provided: The respondents demanded security in the amount of N\$ 35 000 which she could not afford but after some discussion the amount agreed was N\$ 5000, which she paid. This too resulted in an unavoidable delay.

[45] The condonation applications in respect of the various non-compliances are not opposed and the explanations therefor are, in my view, reasonable and satisfactory. Besides, as is apparent from the body of this judgment, Ms Akpabio has good prospects of success on appeal as to justify the grant of the condonation applications. Most importantly, the issues raised in this appeal are of utmost public importance because they involve a proper interpretation of the BLE's power to recommend foreign law degrees and potentially affect a broader community of lawful residents in the country.

[46] It is trite that non-compliance with all of the implicated rules results in an appeal lapsing or deemed to have been withdrawn. It follows that the condonation should be granted and the appeal reinstated.

Submissions

[47] The gravamen of Ms Akpabio's case on appeal is that she had proved that she submitted the official transcript of her qualifications to the BLE and that at no stage prior to the current litigation did the BLE deny receiving the transcript. The BLE therefore acted *ultra vires* its powers in not recommending her degree on the strength of the official transcript she submitted. Ms Akpabio impugns the High Court's finding to the contrary. She also argues that the BLE's insistence on the complete prospectus is unreasonable in that she had demonstrated that despite her best efforts, the complete prospectus could not be obtained and that it was incumbent on the BLE in those circumstances to adopt alternative means of performing its recommendation power under s 5(4).

[48] Mr Small for the BLE focused his argument on the issue of the transcript and accepted that in the way the matter had since progressed, the BLE would support an order to have the matter referred back to the High Court for the reception of oral evidence on whether Ms Akpabio had proved that she provided the BLE with the official transcript of her qualifications as part of her application to have her degree prescribed.

Analysis

[49] Ms Akpabio's case is that during the entire period since 2018 when she applied to the BLE, the latter and two successive ministers of justice justified the non-prescription of her degree on her alleged failure to furnish the complete prospectus for the entire period of her studies at Awolowo. Her case is that at no stage did the BLE ask her (if she had not done so) to furnish the transcript of her degree, or deny that she had provided it to the BLE. According to her, the issue of the transcript was

raised by BLE for the first time in the High Court when she took the BLE to court. According to Ms Akpabio, that necessitated her handing up the transcript to the managing judge during case management and explained that she did not wish to upload it on e-justice due to reasons of privacy.

[50] Although the issue of the prospectus enjoyed great prominence in the BLE's refusal to make a recommendation to the Minister, during oral argument *a quo*, counsel for the BLE stated that the BLE would be satisfied if the transcript is furnished to it. That much was repeated by Mr Small in oral argument before this court. It must follow that the issue of the transcript was decisive as to the outcome of the dispute between the parties. The court *a quo* therefore had before it the unambiguous assertion by Ms Akpabio that she had furnished the transcript to the BLE together with the fact that the issue was raised by the BLE for the first time in court proceedings. The question then is, should the learned judge *a quo* have referred to oral evidence the dispute whether or not Ms Akpabio had furnished the official transcript to the BLE so that, if on balance of probabilities it is shown that she had, the BLE be ordered to consider Ms Akpabio's application to prescribe her degree based on the transcript provided to the BLE.

Genuine dispute of fact

[51] A genuine dispute of fact arose on the papers whether Ms Akpabio had furnished the BLE with the official transcript of her LLB qualification as part of her application for the prescription of her degree. As will be recalled, the BLE's witness, Mr Nekwaya, alleged that Ms Akpabio failed to furnish the BLE with such information. That allegation is however not supported by the contemporaneous correspondence between the protagonists; nor is any reference made to such alleged failure in the

interaction between the BLE and Ms Akpabio and in the interaction between two the successive ministers with Ms Akpabio. Mr Nekwaya's denial must also be tested against the common cause fact that the BLE had at all times advanced as the impediment to the exercise of its recommendation power under s 5(4), Ms Akpabio's common cause failure to furnish it with the complete prospectus of her course of study at Awolowo.

[52] Ms Akpabio's version that the BLE's allegation that she did not furnish the transcript to it was made for the first time during the litigation process (and not prior) is therefore not far-fetched to have been rejected on the papers. The significance of this issue is accentuated by the fact that while the BLE considered the prospectus as the primary means for the exercise of its recommendation power under s 5(4) of the LPA, the course curriculum is not specifically mentioned under s 11(2) and (3) of the LPA—whereas the degree certificate and the official transcript of qualifications are.

Is the denial of referral request a misdirection?

[53] It is common cause that during oral argument Ms Akpabio made a request to the presiding judge to entertain oral evidence of the then BLE secretary in order to support her version (in opposition to Mr Nekwaya's) that she had submitted the official transcript of her LLB qualifications to the BLE. The learned judge retorted that since she proceeded by way of motion, Ms Akpabio was under an obligation but failed to attach the official transcript to the founding affidavit.

[54] With respect, the court *a quo* misconceived the real issue before it. The issue was not so much whether in the proceedings before the High Court, Ms Akpabio failed to prove the existence of the official transcript. As the learned judge *a quo*

correctly recognised (*vide* para [31] above) it is not the court but the BLE that has the power to act in terms of s 5(4) of the LPA. The real issue therefore was whether Ms Akpabio made out the case that she had produced the official transcript to the BLE. Because if she did, the BLE was under an obligation to consider the transcript for the exercise of its power under s 5(4) of the LPA, as required by s 11(2) and (3).

[55] Only a genuine dispute of fact may be referred to oral evidence.⁵ It is trite that in deciding whether or not to refer a matter to oral evidence, the court exercises a discretion. But it is a discretion to be exercised judicially. This Court has previously held that where on the papers a serious dispute of fact arises in review proceedings, the court ought to refer the matter to oral evidence.⁶ On appeal, this Court will not lightly interfere with the exercise of such discretion, unless the court *a quo* acted on wrong principle, took into account irrelevant considerations or disregarded relevant ones. Above all, the court must refer a matter to oral evidence if the interests of justice demand it. The latter will include the need to resolve disputes as speedily as possible and avoiding parties incurring costs unnecessarily.

[56] It is worth reminding ourselves of the overriding objective contained in Rule 1 of the High Court Rules. Rule 1 states:

(3) The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by –

...

(d) Ensuring that cases are dealt with expeditiously and fairly;

⁵ *Oshakati Tower (Pty) Ltd v Executive Properties CC & others* 2009 (1) NR 99 (HC).

⁶ *Mbänderu Traditional Authority & another v Kahuure & others* 2008 (1) NR 55 (SC).

...

- (4) The factors that a court may consider in dealing with the issues arising from the application of the overriding objective include –

...

- (e) Any prejudice that may be suffered by a party as a consequence of any order proposed to be made or any direction proposed to be given by the court.’

Accordingly rule 1(2) states that ‘. . . the overriding objective . . . governs the application of these rules’. In other words, rule 67(1) governing referral of a matter to oral evidence is subject to, and must be interpreted in accordance with, the overriding objective.

[57] I showed that the court *a quo* took the view that comparing the UNAM LLB degree course with the curriculum of a foreign educational institution is a legitimate exercise of its discretionary power under s 5(4). I do not cavil at the learned judge’s reasoning that the BLE has the power to adopt any of a range of reasonable options,⁷ for the purpose of undertaking a comparison between the UNAM LLB degree program and a foreign one as contemplated by s 5(4). But because of the peremptoriness of the language used in s 11(3) it cannot be correct (as suggested by Mr Nekwya⁸ on behalf of the BLE and apparently approved by the High Court) that proof by reliance on an official transcript is only an alternative to some other means chosen by the BLE such as production of a prospectus.

⁷ *Trustco Ltd t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others* 2011 (2) NR 726 (SC) para 31.

⁸ See paras [24] and [26] of this judgment.

[58] Once a transcript is furnished – in the language of s 11(3) – it ‘shall be accepted as sufficient information to enable the Board to make its recommendation to the Minister’. The High Court’s dismissal of Ms Akpabio’s application in the face of a genuine dispute whether or not she actually presented the official transcript of her LLB degree to the BLE is, therefore, a misdirection warranting this court’s interference.

[59] I take the view that in view of the genuine dispute of fact that had arisen, the following considerations ought to have been, but were not, considered by the learned judge *a quo* whether or not to refer the dispute on the transcript of qualifications to oral evidence. The BLE had at no stage prior to the court proceedings required Ms Akpabio to produce the transcript *in lieu* of the complete prospectus. I had shown that according to Mr Nekwaya, Ms Akpabio (as he put it ‘and significantly so’) failed to furnish the official transcript of her degree to the BLE. Mr Nekwaya however does not say and provides no documentary proof that the BLE had during the process of considering Ms Akpabio’s application required her to furnish the transcript to it. There are no annexures to Mr Nekwaya’s affidavit proving any direction to Ms Akpabio by the BLE to submit any document contemplated by s 11(2) and (3).

[60] Therefore, Mr Nekwaya’s version on the issue of the official transcript is not supported by the contemporaneous record of the interaction between the BLE and the Minister, and between those two authorities and Ms Akpabio. There is, on the contrary, evidence to show that Ms Akpabio pleaded with the BLE and the Minister that the authorities instead consider the transcript of her qualification in the absence of the prospectus.

[61] At para [19] above, I quoted from Ms Akpabio's letter to the Minister, which letter was copied to the secretary to the BLE, placing on record that she had previously submitted the certificates and the transcript to the BLE. That letter is annexed to Ms Akpabio's founding affidavit and has not been refuted or contradicted by Mr Nekwaya.

[62] Another consideration in favour of referral to oral evidence is that the dispute between the BLE and Ms Akpabio has taken a long time and affects her ability to pursue her chosen profession. Ms Akpabio presented to the managing judge what purports to be a transcript she allegedly presented to the BLE for the prescription of her degree. The authenticity of that document was disputed by counsel for the BLE. Counsel for the BLE however conceded that if presented to the BLE, the transcript would be decisive of Ms Akpabio's application for the prescription of her LLB degree.

[63] Further, there was in my view no demonstrable prejudice that the respondents would have suffered prejudice had the dispute been referred to oral evidence. I am therefore satisfied that the court *a quo* erred in not referring the dispute on the transcript to oral evidence.

[64] The High Court dismissed Ms Akpabio's application on the substantive grounds (relative to the issue of the prospectus and the non-production of the transcript) after having declined to refer to oral evidence Ms Akpabio's disputed claim that she had furnished to the BLE the official transcript of her LLB degree, for the purpose of the BLE making a recommendation to the Minister in terms of s 5(4) of the LPA. The High Court's refusal to refer the matter to oral evidence left it with no option but to dismiss the application. Had the court referred the matter to oral

evidence and found that Ms Akpabio had in fact furnished the BLE an original or authenticated transcript of the LLB degree, it would have ordered the BLE to consider the application to prescribe on the strength of the transcript as that is the statutorily ordained basis on which the BLE is authorised by s 11(2) and (3) of the LPA to make a recommendation to the Minister.

Conclusion

[65] I wish to in conclusion correct the problematic interpretation and application of s 5(4) of the LPA which was approved by the High Court: That requiring an applicant seeking prescription of a foreign degree to produce evidence of the prospectus for the course of study is, in and of itself, sufficient ground for not prescribing such a law degree under s 5(4).

[66] As I have already explained, in performing its function to compare a foreign LLB degree with that offered at UNAM, the BLE may adopt any means that fall within a range of reasonable options. But such means should not take precedence over that prescribed by the legislature. In the first place, presentation to the BLE of either the 'original' or 'authenticated' 'copies of certificates and of official transcript' is, in terms of s 11(2), the sole jurisdictional basis for the exercise of the power to recommend under s 5(4). Once those have been presented by a person seeking prescription, s 11(3) ordains that it 'shall be accepted as sufficient information to enable the BLE to make its recommendation to the Minister'.

Costs

[67] Ms Akpabio is successful to the extent that the matter is referred back to the court *a quo* for the reception of oral evidence. She is appearing in person without the assistance of a legal practitioner and is therefore not entitled to costs. She made no special request for an award for disbursements. There will therefore be no order as to costs or disbursement in the appeal. As for the costs in the High Court, Ms Akpabio may still choose to be represented by a legal practitioner when the oral evidence is received. In the circumstances, it is best that the costs *a quo* remain in the cause.

Order

[68] In the result, the following order is made :

1. The condonation application for the non-compliances with the rules of this court are condoned and the appeal is reinstated.
2. The appeal succeeds and the judgment and order of the High Court are set aside and the order of the High Court is replaced with an order in the following terms:
 - '(i) The application is referred for the hearing of oral evidence in terms of rule 67 of the Rules of the High Court on a date and time to be determined by Sibeya J, on the issue whether as part of her application for the prescription of her LLB degree in terms of s 5(4) of the Legal Practitioners Act 15 of 1995 (LPA), the applicant [Ms Akpabio] submitted to the second respondent [the Board for Legal Education] the original or authenticated copies

of her LLB degree certificate and official transcript issued to her by Awolowo in 1991 as contemplated by s 11(2) of the LPA;

- (ii) The evidence to be led shall be that of any competent witness whom the parties or either of them may elect to call in compliance with rule 92 of the Rules of the High Court;
- (iii) Either party may subpoena any person to give evidence at the hearing in compliance with rule 37 of the Rules of the High Court, whether such person has consented or not;
- (iv) The costs both of the application and of the referral to oral evidence shall be costs in the cause.'

3. There is no order of costs in the appeal.

DAMASEB DCJ

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT: I F Akpabio

In person

RESPONDENTS: AJB Small (with him F Da Silva)

Instructed by Government Attorney