

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-MOT-REV-2022/00209

In the matter between:

BETTY MBILE SILUMBU

APPLICANT

and

FANUEL KAPAPERO, N. O.

FIRST RESPONDENT

EXECUTIVE DIRECTOR: MINISTRY OF EDUCATION,

SECOND RESPONDENT

ARTS & CULTURE

MINISTER OF EDUCATION, ARTS & CULTURE

THIRD RESPONDENT

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA

FOURTH RESPONDENT

PUBLIC SERVICE COMMISSION

FIFTH RESPONDENT

Neutral citation: *Silumbu v Kapapero N.O.* (HC-MD-LAB-MOT-REV-2022/00209) [2022] NALCMD 72 (16 November 2022)

Coram: PARKER AJ

Heard: 2 November 2022

Delivered: 16 November 2022

Flynote: Labour law – Disciplinary hearing – Legal representation – The Public Service Act 13 of 1995 allowing the charged applicant representation – Court found that Act 13 of 1995 does not absolutely preclude legal representation – That being

the case, legal representation may be allowed in exceptional circumstances, including complexity of the case, seriousness of the charge and possible severe sanction upon a guilty verdict.

Summary: Labour Law – Disciplinary hearing – Legal representation – The Public Service Act allows representation for a charged staff member – In this matter, first main charge alleges that the applicant, a School Principal, prompted a fight between herself and a teacher and the applicant used abusive language within the earshot of pupils – The second alternative charge alleges that the applicant wilfully failed to carry out lawful instructions of the Inspector of Education – Both charges are dismissable offences – The chairperson of the disciplinary hearing denied the applicant legal representation at the hearing – The applicant brought the application to review and set aside the chairperson’s decision and for an order of mandamus to allow legal representation at the hearing – Court found that the charges the applicant faced were serious as they affected her reputation and livelihood – Court concluded that a legal practitioner was in the circumstances better suited because of his or her training to lead the evidence of the applicant and cross-examine witnesses called to support the charges – Consequently, court set aside the impugned decision and ordered mandamus to issue, calling on the chairperson to allow legal representation for the applicant.

Held, at common law there is no absolute right to legal representation at administrative internal disciplinary hearings because such hearings are not arbitral or judicial proceedings, but legal representation may be allowed if exceptional circumstances existed, including the complexity of the case, the seriousness of the charge and the possible sanction of dismissal or suchlike severe sanction if the employee was found guilty of the charges.

Held, further, if exceptional circumstances existed and the applicant was denied legal representation, that would not pass the test of fairness.

Held, further, absolute exclusion of legal representation at internal disciplinary hearings of staff members could not have been the intention of the Parliament when it enacted s 26(8)(a) of the Public Service Act 13 of 1995, and so, any rule made

under the Act that provided absolute exclusion of legal representation at internal disciplinary hearings is ultra vires the Act and, therefore, invalid.

Held, further, the common law requirement that disciplinary hearings be fair may require, in a particular case, that legal representation may be necessary and ought to be allowed.

ORDER

1. The decision of the first respondent taken on 22 August 2022, refusing the applicant to have legal representation at her disciplinary hearing, is reviewed and set aside.
2. The first respondent, or any person acting in his stead or in the position of chairperson of the disciplinary hearing must allow the applicant to have legal representation at her disciplinary hearing.
3. There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] In the instant review application in a labour matter, the applicant employee seeks the following substantive relief:

(1) an order reviewing and setting aside the decision of the first respondent taken on 22 August 2022 ('the decision'), refusing the application of the applicant employee that he be represented by a legal practitioner at the disciplinary hearing held by the first respondent.

(2) an order allowing the applicant to secure legal representation for her disciplinary hearing.

[2] It is important to note at the threshold that none of the five respondents have filed opposing papers. Nevertheless, 'the absence of opposition (in motion proceedings) does not entitle the applicant to judgment – as if by default.'... 'The onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of.'¹ Consequently, Mr Mayumbelo, counsel for the applicant moved the application and made oral submissions. I should say to the credit of Mr Mayumbelo that he did well to refer the court to the relevant authorities emanating from the Labour Court and the Supreme Court on legal representation at internal administrative disciplinary hearings involving employees.

[3] The prevailing principle is this. The general rule at common law is that there is no absolute entitlement to legal representation at internal administrative disciplinary hearings simply because they are not arbitral or judicial proceedings. In the same breadth, the common law requirement that disciplinary hearings be fair may require, in a particular case, that legal representation may be necessary and ought to be allowed.²

[4] On the authorities, I hold that if exceptional circumstances existed, legal representation ought to be allowed. Thus, as respects the instant matter, it should be said that an absolute and total exclusion of legal representation at disciplinary hearings could not have been the intention of the Parliament when it enacted s 26(8) (a) of the Public Service Act 13 of 1995 ('the PSA'). Consequently, as a matter of statute law, clause 6.9(f) of the Public Service Staff Rule (PSSR) X.1 is ultra vires s 26(8)(a) of the PSA and, therefore, invalid.

¹ *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) para 15.

² *Kurtz v Nampost Namibia Ltd and Another* 2009 (2) NR 696 (LC). See also *Sasman and Another v The Chairperson of the internal Disciplinary Panel of the Windhoek International High School* Case No. SA 30/2013.

[5] In *Kurtz v Nampost*³ I held that factors that would constitute exceptional circumstances include complexity of the case (ie, the charge the employee is facing) and the severity of the sanction that may be imposed if found guilty.

[6] In the present matter, I find that the charges are complex and serious. The main charge alleges that as a school Principal, the applicant prompted a fight between herself and Ms Lilian Potalazo (a staff member) and she used abusive language on the school compound and within the earshot of pupils. The second alternative charge is that the applicant refused to carry out lawful instructions of the Inspector of Education. Doubtless, both offences are dismissable offences.

[7] In the notice of the disciplinary hearing, the applicant was informed that he had the right to be present and heard, either personally or through a representative, to give evidence or call witnesses to give evidence in support of the case, and to cross-examine any person called to give evidence in support of the charge. The charges concern her reputation and her livelihood. Once the respondents acknowledge that she has a right to appear by a representative, then I see no good reason why that representative should not be a legal practitioner. 'If justice is to be done, he (or she) ought to have the help of someone to speak for him (or her); and who better than a lawyer who has been trained for the task,' so stated Lord Denning MR in *Pett v Greyhound Racing Association Ltd*.⁴

[8] Like Lord Denning in *Pett*, I do not see any good reason why the applicant should not be allowed to be represented by a legal practitioner when the charges are complex and serious and when her reputation and livelihood are on the line.

[9] In virtue of the foregoing, particularly that exceptional circumstances existed, justifying a departure from the common law rule, I conclude that the hearing would not pass the test of fairness, if the applicant was denied legal representation.⁵ Consequently, I find that the applicant has made out a case for the relief sought.

³ *Kurtz v Nampost Namibia Limited* ibid para 4.

⁴ *Pett v Greyhound Racing Association Ltd* [1968] 2 ALL ER 545 (CA) at 549B-G; applied in *Kurtz v Nampost Namibia Limited* footnote 2 para 27.

⁵ See *Kurtz v Nampost Namibia Ltd* para 15; and the authorities there cited.

[10] I have mentioned previously that the applicant seeks an order reviewing and setting aside the decision and ordering the first respondent to allow the applicant to have legal representation at the applicant's disciplinary hearing. The second order she seeks is mandamus. I held in *Tumas Granite Cc v Minister of Mines and Energy and Another* that mandamus lies to serve two purposes: (a) to compel the performance of a specific duty; and (b) to remedy the effects of an unlawful action already taken'.⁶

[11] Based on these reasons, I hold that the applicant has been successful; and so, she is entitled to an order setting aside the decision and an order of mandamus. In the result, I order as follows:

1. The decision of the first respondent taken on 22 August 2022, refusing the applicant to have legal representation at her disciplinary hearing, is reviewed and set aside.
2. The first respondent, or any person acting in his stead or in the position of chairperson of the disciplinary hearing must allow the applicant to have legal representation at her disciplinary hearing.
3. There is no order as to costs.

C PARKER
Acting Judge

APPEARANCES:

⁶ *Tumas Granite Cc v Minister of Mines and Energy and Another* 2013 (2) NR 383 (HC) para 6.

APPLICANT:

C Mayumbelo
Of AngulaCo Inc, Windhoek

RESPONDENTS:

No appearance