REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 49/2013

In the matter between:

ASOKA S SENEVIRATNE **APPLICANT**

And

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA **FIRST RESPONDENT**

THE DIRECTOR OF THE NATIONAL PLANNING COMMISSION **SECOND RESPONDENT**

Neutral citation: *Seneviratne v The President of the Republic of Namibia* (A 49/2013) [2015] NAHCMD 14 (5 February 2015)

Coram: PARKER AJ
Heard: **30 October 2014**
Delivered: **5 February 2015**

Flynote: Applications and motions – Application for declaratory order – Question to be answered by court is whether the applicant was recruited from his home country of New Zealand for the post of Special Adviser to the Director General of the National Planning Commission – Court found that applicant was ordinarily resident in Namibia when he was recruited for the post – Applicant had only left Namibia temporarily on sick leave and vacation leave in New Zealand – Principle in *De Wilde v The Minister of Home Affairs* (A 147/2013) [2014] NAHCMD 160 (22 May 2014) on

test for ordinarily residence applied – Court concluded that applicant was locally recruited – Consequently, court held that applicant has not established a right which the court may protect by declaratory order – Application, accordingly, dismissed with costs.

Summary: Applications and motions – Application for declaratory order – Question to be answered by court is whether the applicant was recruited from his home country of New Zealand for the post of Special Adviser to the Director General of the National Planning Commission – Applicant was ordinarily resident in Namibia and employed as Special Assistant to the Director General of the National Planning Commission – While so employed and so ordinarily resident in Namibia the applicant left Namibia temporarily on sick leave and vacation leave – He was expected to return to Namibia and to his employment – While on sick leave and vacation leave the President appointed applicant to the post of Special Adviser to the Director General of the National Planning Commission – Applicant's letter of appointment is addressed to the applicant at the National Planning Commission, Windhoek – On the papers court held that applicant was locally recruited – Court concluded that applicant has, therefore, not established a right which may be protected by declaratory order – Consequently the application was dismissed with costs.

ORDER

The application is dismissed with costs. The applicant shall pay only 60 per cent of the respondents' costs.

JUDGMENT

PARKER AJ:

[1] The applicant has brought an application by notice of motion. He prays the court to grant the relief set out in paras 1 to 5 of the notice of motion, together with any further or alternative relief or a further and alternative relief under prayer 6. Prayer 5 relates to a costs order. Prayer 1 calls on the court to direct the respondents to pay the applicant N$306 088 in lieu of one way ticket from New Zealand to Namibia and repatriation from Namibia to New Zealand. Prayers 2 and 3 are for declaratory orders.

[2] Prayer 1 is the thrust and forms the totality, in monetary terms, of the relief sought in the notice of motion; and the basis of that relief is the declaratory order sought in prayer 2. Prayer 2 reads:

> 'Declaring second respondent's attempt to allege that applicant was locally recruited and therefore not entitled to repatriation *ultra vires* as it is in conflict and attempts to nullify first respondent's gazetted appointment of applicant and legal opinion provided to second respondent by Attorney General on applicant's condition of service and it is in conflict with clause 10 of the contract of employment entered into by and between second respondent and applicant.'

[3] Prayer 3, too, is for a declaratory order and is related to prayers 1, 2 and 4. Looking at the relief sought in prayer 2 and its relationship with prayers 1, 3 and 4, I conclude that if prayer 2 is rejected, prayers 1, 3 and 4 fall to be rejected, too, and the application should inevitably fail, as a matter of course.

[4] The respondents have moved to reject the application, and in the answering affidavit, the respondents have raised a point *in limine* that the court (ie the High Court) has no jurisdiction to hear the matter. They have also answered the application on the merits. Mr Mukonda, counsel for the applicant, filed heads of argument timeously. Mr Khupe, counsel for the respondents, did not. Mr Khupe applied to the court to condone the late filing of his heads of argument. I have considered the application, and I am satisfied that counsel has given a satisfactory explanation for the delay in filing the heads. Consequently, I grant the application and, accordingly, condone his late filing of his heads of argument.

[5] Doubtless, the only critical question that this court should answer is this: Was the applicant recruited locally or from abroad in New Zealand for his new post of Special Adviser to the Director General (DG) of the National Planning Commission (NPC) (ie para 2 of the notice of motion). If the applicant was recruited from abroad (in New Zealand), he is entitled to the relief sought in paras 1, 2, 3 and 4 of the notice of motion; but, if the applicant was recruited locally, he is not entitled to the relief sought in prayers 1, 2, 3 and 4 of the notice of motion; and in that event the application should be dismissed.

[6] It is my view that a factual background to the present dispute between the applicant and the respondents will open the way clear in determining the main issue in this application which is identified in para 5 above, and is contained in prayer 2 of the notice of motion as regards both the jurisdictional point *in limine* and the merits of the case. In this regard I make the following factual findings and conclusions thereanent.

[7] The United Nations Development Programme (UNDP) recruited the applicant from New Zealand, the applicant's home country, for employment as a consultant to NPC. The consultancy contract period was 1 July 2006 to 31 July 2008. The post the applicant filled at the NPC was that of Special Assistant to the DG of the NPC. This is the consultancy contract the applicant had with the UNDP, although he was employed in the Public Service of Namibia.

[8] Upon the expiration of the consultancy contract, mentioned previously, the UNDP paid to the applicant his separation benefits, including payment of money in lieu of the UNDP repatriating the applicant to his home country of New Zealand. The amount covered the cost of air tickets and shipment of personal effects. It is important to note that the applicant did not leave Namibia after he had received those moneys to enable him to travel, and to ship his personal effects, to New Zealand. This fact is not relevant for our present purposes. What is relevant is that the applicant continued to live in Namibia and proceeded to seek employment with the Government of Namibia (GRN). The NPC engaged the Public Service

Commission (PSC) on the possible employment of the applicant as a public servant. The applicant worked for the NPC while waiting for the formalization of his employment with the NPC which occurred in the end. The applicant was, accordingly, offered employment as a public servant in the position of Special Assistant to the DG of NPC on the Public Service Personnel Grade 4A. The applicant accepted the offer and a contract of employment was concluded on 1 October 2008. It is worth noting that as regards the Grade 4A job the applicant was locally recruited because he was ordinarily resident in Namibia. There is no dispute about that.

[9] The applicant was not happy with the post of Special Assistant and being recruited locally. He undertook an exercise of persistently lobbying the DG of NPC for a bigger post and enhanced conditions of service. The then DG supported the applicant's desire that he be appointed Special Adviser to the DG.

[10] While still working for the NPC as a public servant, the applicant applied to the Permanent Secretary of the NPC to go on sick leave from 29 December 2008 to 21 January 2009, and the motivation for the sick leave application was obtained from a Prof Holdaway of Greenlane Clinical Centre, Auckland, New Zealand. In this regard, I should signalize the point that the applicant's contract of employment as a public servant with the NPC was to come to an end at the expiration of 12 months from 1 August 2008; that was 31 July 2009. See clauses 1 and 2 of the contract of employment that was filled of record.

[11] While ostensibly in New Zealand on sick leave the applicant extended his sick leave by taking a further 8 days' vacation leave from 22 January to 2 February 2009. The applicant was, therefore, expected back in his position as Special Assistant to the DG on 3 February 2009. Thus, when the applicant was on sick leave and vacation leave in New Zealand, he was a public servant in the Public Service of Namibia and, *a fortiori*, he was ordinarily resident in Namibia. He was only temporarily abroad in New Zealand on sick leave and vacation leave. See *De Wilde v The Minister of Home Affairs* (A 147/2013) [2014] NAHCMD 160 (22 May 2014) (Unreported), para 20.

[12] While receiving medical attention and holidaying in New Zealand, the applicant informed the NPC by fax, ostensibly sent by the applicant from New Zealand – I use 'ostensibly' advisedly for reasons appearing below – that he had been appointed Special Adviser to the DG. The fax is dated 22 January 2009. It is inexplicable that while the applicant knew in New Zealand about his appointment, it would seem the NPC was not aware. It was rather the applicant who informed his employer that he had been so appointed. Besides, curiously, the fax was sent by a Chandra Seneviratne and not by the applicant, Dr Asoka Seneviratne. The mystery deepens further. The fax indicates Dr Asoka Seneviratne as the author of the fax message but the signature above the name Dr Asoka Seneviratne appearing on the fax is not the same as the signature appearing against Staff Member (ie Dr Asoka Seneviratne) on the contract of employment that was done, as I have said previously, on 1 October 2008.

[13] Keeping these factual findings and conclusions thereanent in my mental spectacle, I proceed to consider the respondents' point *in limine* on jurisdiction. Mr Khupe, counsel for the respondents, submitted that 'the nature of the applicant's claim is a labour matter and should have been instituted in the labour forums and court'. Thus, the respondents' contention is that this court, sitting as the High Court, has no jurisdiction to entertain the claim. Mr Mukonda, counsel for the applicant, submitted the other way to the effect that the applicant was 'a political appointee', appointed as Special Adviser to the Director General of the National Planning Commission in terms of s 1 of the Special Advisers and Regional Representatives Appointment Act 6 of 1990, read with art 32(3)*(i)(ee)* of the Namibian Constitution. That being the case, so the applicant contends, he was not an employee within the meaning of s 1 of the Labour Act 11 of 2007.

[14] I fail to understand the meaning of the term 'political appointee'. The term is not found in Act 6 of 1990 or the Namibian Constitution or any law I know of. As far as I am concerned, the term is slangy and pedestrian; it has no meaning or place in law. Be that as it may, it is my view that the fact that the applicant was appointed by the President in terms of the Act is not ipso facto conclusive that the applicant was

not subject to the Labour Act. A person who is employed in the Public Service of Namibia and who is subject to the Public Service Act 13 of 1995 is an employee within the meaning of s 1 of the Labour Act and is accordingly subject to that Act. The question, therefore, is this: Was the applicant employed in the Public Service?

[15] As the applicant himself acknowledges, according to s 1(4) of Act 6 of 1990, 'The conditions of service of a Special Adviser, including conditions as to remuneration and allowances, shall be determined by the President'. And in the instant matter the President determined in the aforementioned letter of appointment, dated 9 October 2008, that 'Your (ie the applicant's) appointment and conditions of employment will be similar to that of a Permanent Secretary …' A Permanent Secretary is appointed as a public servant. He or she is subject to the Public Service Act and the Labour Act.

[16] Thus, at first brush, one is tempted to conclude that the applicant was a public servant, and subject to the Public Service Act and the Labour Act. However, I think the choice of the adjectival phrase 'similar to' in the letter of appointment is critical. It leads, in my opinion, to the conclusion that the President was not making a public service appointment, although the conditions of service of the applicant including remuneration, were pegged to those of a Permanent Secretary. In any case, appointment of Permanent Secretaries is made by the Prime Minister from a list of candidates submitted to the Prime Minister by the Secretary to the Cabinet in terms of s 19(1)*(a)* of the Public Service Act. Based on these reasons, I think I should reject the respondents' point *in limine*. The applicant was not a public servant and was not subject to the Labour Act. I should, with respect, say that the advice given by the Attorney-General is wrong. In any case, the court is not bound by the advice of a member of the Executive in judicial proceedings. This conclusion applies with equal force to the applicant's pleading in para 2 of the notice of motion.

[17] I now proceed to determine the application on the merits. On the papers I find that the applicant had set about to craft a disingenuous scheme whereby it would be taken that he was recruited from abroad for his new post of Special Adviser to the DG. For my part I should say that all is labour lost. It is as clear as day that the

applicant was locally recruited, based on the following considerations. The applicant, as I have found previously, was ordinarily resident in Namibia during the time that he was appointed to the post of Special Adviser to the DG. He had only left Namibia temporarily to seek medical attention in New Zealand and to take eight days' vacation leave from his employment in Namibia. He was to return to his post on 3 February 2009. His temporary absence from Namibia does not, as a matter of law, detract from the fact that he was ordinarily resident in Namibia during those days. See *De Wilde v The Minister of Home Affairs, loc. cit*. Indeed, the letter of appointment for the post of Special Adviser under the hand of the President is addressed to the applicant at the NPC in Windhoek. Accordingly, it is with firm confidence that I reject the applicant's contention that he was recruited from New Zealand for the post of Special Adviser to the DG of NPC.

[18] Based on these reasons, I hold that the applicant has not established a right which this court may protect by a declaratory order. Consequently, the declaratory orders sought in paras 2 and 3 of the notice of motion are refused. It follows inevitably, as I indicated previously, that the court cannot grant the orders sought in paras 1 and 4 of the notice of motion. It follows that the application fails. As respects costs; I think the respondents are not entitled to all their costs because their point *in limine* on jurisdiction failed.

[19] In the result, the application is dismissed with costs. The applicant shall pay only 60 per cent of the respondents' costs.

C Parker

Acting Judge

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APPEARANCES

APPLICANT : R Mukonda
Of Mukonda & Co. Inc., Windhoek

RESPONDENTS: M Khupe
Of Government Attorney, Windhoek