REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 176/2014

In the matter between:

AUGUST MALETZKY **APPLICANT**

And

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

THE JUDGE PRESIDENT OF THE HIGH COURT OF NAMIBIA **SECOND RESPONDENT**

THE MINISTER OF JUSTICE **THIRD RESPONDENT**

THE ATTORNEY-GENERAL **FOURTH RESPONDENT**

Neutral citation: *Maletzky v The President of the Republic of Namibia* (A 176/2014) [2016] NAHCMD 50 (3 March 2016)

Coram: PARKER AJ

Heard: **29 October 2015**

Delivered: **3 March 2016**

Flynote: Statute – Rules – Rules of court – Judge-President having discretionary powers under s 39 of the High Court Act No. 16 of 1990 to make rules (with approval of the President) for regulating the conduct of proceedings of the High Court – Such rules are to ensure the proper dispatch and conduct of the business of the court – Court found that rule 5 of the rules made by the Judge-President serves important legal and social purposes, namely, to protect the public against charlatans

masquerading as legal practitioners and to maintain and enhance the integrity and effectiveness of judicial process and due administration of justice – As to when statute in the form of enabling legislation or delegated delegation has amended the common law – Court held that courts require clear and unequivocal language to effect a change to the common law – Court held further that legislation (or delegated legislation) must not be presumed to alter the common law.

Summary: Statute – Rule 5 of rules of court – Applicant contending that rule 5 amends the common law on one's right to freedom to contract and pursue cession – Court rejected applicant's contention on the basis that such amendment can be effected only by clear and unequivocal language – But there is no clear or unequivocal language in rule 5 tending to show that rule amends the common law in respect of one's right to freedom to contract and to pursue cession – Court found that applicant has failed to prove that which he asserts – Accordingly, court rejected applicant's contention that rule 5 is *ultra vires* the power of the second respondent (the Judge-President) to make rule 5 under s 39 of the High Court Act 16 of 1990 – Consequently, court dismissed the application with costs.

Flynote: Constitutional law – Rule 5 of rules of court – Constitutionality of – Court held that upon authority of *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 where it is contended that a regulation is unconstitutional, the party so contending bears the *onus* of persuading the court that the said regulation is not reasonably justified in a democratic State, and not the State to show that it is – Court held further that there is no good reason why the *Kauesa onus* should not apply to rules and regulations which are delegated legislation – Applicant contending that rule 5 offends the anti-discrimination provisions of art 10 of the Namibian Constitution and therefore unconstitutional – Court held that inherent in the meaning of 'discrimination' in art 10 is an element of unjust or unfair treatment brought about principally by unjustified and illegitimate treatment – Court found that applicant has failed to discharge the *Kauesa onus* – Consequently, court dismissed the application.

Summary: Constitutional law – Rule 5 of rules of court – Constitutionality of – Where it is contended that a regulation is unconstitutional, the party so contending bears the *onus* of persuading the court that the said regulation is not reasonably justified in a democratic State, and not the State to show that it is – Applicant contends that rule 5 unreasonably discriminates against 'cessionaries' – Court found that rule 5 serves important legal and social purposes – The rule serves to protect the public against charlatans, all charlatans without exception, masquerading as legal practitioners – Additionally rule 5 is there to protect, maintain and enhance the integrity and effectiveness of the judicial process and due administration of justice – Having so found the court concluded that applicant has failed to discharge the *Kauesa onus* that rule 5 offends the anti-discrimination provisions of art 10 of the Namibian Constitution – Consequently, court dismissed the application with costs.

ORDER

The application is dismissed with costs, including costs of two instructed counsel and one instructing counsel.

JUDGMENT

PARKER AJ:

[1] The applicant has brought this application by notice of motion, wherein he prays for the relief set out in the notice of motion in the following terms –

'1. Declaring rule 5(1), (2)(a), (b), (c) and (d), together with rule 5(3), rule 5(4) of the Rules of the High Court unconstitutional;

2. Costs of this application against the respondents if they elect to oppose this Application;

3. Further and/or alternative relief.'

[2] The applicant, a lay litigant, represents himself. The respondents have moved to reject the application, and have raised a point *in limine*, and it relates to the applicant's *locus standi* to bring the application. Mr Frank SC (with him Ms Schimming-Chase) represents the respondents. There is also the respondent's application to strike out certain portions of the applicant's replying affidavit dealing with the issue of *locus standi*. Those were the only interlocutory matters set out in the parties' case management report filed with the court on 24 June 2015. And it is indicated there that it is the parties' understanding that all those issues together with the main issues of the application be dealt with at a single hearing. I agree. Of the view I take of this case, the issue of *locus standi* can be dealt with together with the merits of the main issues and the matters the respondents desire to be struck out because they are related to the issue of *locus standi* of the applicant; and so it makes sense to hear all of them at a single hearing and together.

[3] At the commencement of the hearing the applicant informed the court that he, too, had points *in limine* in the bag – I use 'bag' advisedly – which he wished to raise. I exercised my discretion to allow the points to be raised at this late hour, even though the applicant's conduct amounts to ambushing the respondents and surprising the court; conduct which the court does not countenance. The point has not been raised in the pleadings and no foundation has been laid for it on the papers. The reason I have allowed it is that the applicant is a lay litigant representing himself. I see that two of the points are irrelevant to the issues that the case begets and which the court ought to adjudicate on, and one is simply frivolous and vexatious.

[4] I shall consider the frivolous and vexatious one first. The applicant sought to question Mr Frank representing the respondents. He sought to bring into play certain matters involving Mr Frank *qua* the then chairperson of the Disciplinary Committee

for Legal Practitioners, in a case where the Committee was a party, that is, in the case of *Disciplinary Committee for Legal Practitioners v Murorua and Another* 2012 (2) NR 481 (HC) where I and two judges sat. I wrote the majority judgment. I informed the applicant that the submission he was making was totally out of place in the instant proceedings. The reasons being that the submission the applicant began to bombard the court with sought to cast aspersions on the reputation of a very senior member of the organized legal profession of the land without a phantom of justification; and, *a fortiori*; because, as a matter of law, findings of fact in another court or tribunal are not relevant to prove a fact in issue or a fact relevant to the issue of other proceedings between different parties. This is the rule in *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35, confirmed by the *House of Lords in Land Securities PLC v Westminster City Council* [1993] 4 All ER 124. See PJ Schwikkard, *Principles of Evidence*, (1994), p 94.

[5] In sum, I conclude that applicant's submission on the point was meant to serve no purpose other than to insult, annoy and denigrate. And this; the court could not countenance. As I said in *Andreas Vaatz v The Municipal Council of the Municipality of Windhoek* Case No. A 287/2010 (Unreported) –

'[15] It must be remembered that basic human rights without commitment to responsible behaviour are made into purposeless absolutes. But I do not think the Namibian Constitution, with the noble ideals of basic human rights and rule of law embedded in its bosom, says that those basic human rights are absolutes – to be enjoyed by an individual without the individual looking to see if in pursuit of his or her enjoyment of his or her rights he or she is violating other individuals' basic human rights. In the instant case, the applicant did not look to see.'

[6] The applicant in the instant case has approached the seat of judgment for the protection of his basic human right guaranteed to him by the Constitution. That does not give him the right – none at all – to cast aspersions on anyone. He has a duty to ensure that the basic human rights guaranteed by the Constitution to individuals are

not ‘made into purposeless absolutes’ when he approaches the court to protect any one of them in relation to him.

[7] Based on these reasons, the point *in limine* there is rejected because it is irrelevant, and undoubtedly frivolous and vexatious.

[8] I pass to consider the other point *in limine*. There, the applicant seeks to object to the respondents being represented by a Senior Counsel. My response is simply that the very Namibian Constitution which the applicant relies on for support in his case guarantees the right of litigants to be represented by legal practitioners of their choice. See art 12(1)*(e)* of the Namibian Constitution. If the litigants have pursued their Constitutional entitlement and have chosen Mr Frank to represent them, I should say categorically that it is of no concern of the applicant. This conclusion debunks applicant’s point *in limine* in that regard. The preliminary point is, accordingly, rejected as having not a scintilla of merit.

[9] As respects the last preliminary point, the long and short of it is encapsulated in the following statement in the applicant’s replying affidavit: ‘whether it is permissible for the Government Attorney (employee of the Executive) to represent the Second Respondent … a member of the Judiciary’.

[10] To start with; the applicant’s point rests on the wrong premise; and so, it is bound to fail. *Pace* the applicant, the Government Attorney is not an employee, that is, servant of the Executive. The Government Attorney is a servant in the employ of the State, and he or she is appointed to the post in terms of s 3*(a)* of the Government Attorney Proclamation, 1982. And the second respondent is a judicial officer in the employ of the State, and he is appointed to the post in terms of art 82, read with art 80, of the Namibian Constitution. The post of Government Attorney lies in the Bureaucratic Executive and the *locus* of the post of the second respondent is in the Judiciary.

[11] To take this analysis to its logical conclusion, I proceed to consider the relevant provisions of Proclamation, 1982 which prescribes the functions of the Government Attorney's office. They are –

'4. Such functions as may be performed in accordance with the law, practice or custom by attorneys, notaries or conveyancers –

(a) …

(b) may be so performed –

(i) …

(ii) in connection with any matter in which any department or any government as aforesaid though not a party has an interest or is concerned, or in respect of which, in the opinion of the Government Attorney or any person acting under his authority, it is in the public interest that the functions concerned shall be performed by the said office.'

[12] As I see it; the Government Attorney's office has exercised its discretion pursuant to s 4*(b)(ii)* of Proclamation 1982 that it is in the public interest that the office instructs counsel to represent the second respondent, who is a judicial officer in the employ of the State and whose act as such (the making of rules of court), which has led to his being dragged to court by the applicant was performed in pursuit of carrying out his official statutory functions. On any pan of scale, I would hold that the act of the Government Attorney's office in this regard is reasonable and complies with s 4*(b)(ii)* of Proclamation, 1982, and, therefore, it cannot be faulted. In any case, no competent court has set aside the exercise of discretion by the Government Attorney's office upon review of it, as Mr Frank appeared to submit. The decision of the Government Attorney remains lawful and valid. With respect; I fail to see how as the applicant contends, the exercise of discretion by the Government Attorney offends the *trias politica* of the notion of separation of powers. The Government

Attorney is not interfering with the exercise of powers of the Judiciary or the Legislature. It is with firm confidence that I reject the applicant's point *in limine* on the issue. With respect, it has not a phantom of merit.

[13] Having gotten the applicant's points *in limine* out of the way, I proceed to consider the matter which, as I have intimated previously, is a Constitutional challenge to rule 5 of court. As I said earlier, the respondents' *in limine* point on applicant's lack of *locus standi in judicio* and the striking out of certain portions of the applicant's replying affidavit are interwoven with the merits, and so I should, as I have said previously, consider them together.

[14] The applicant contends that the part of rule 5 of the rules mentioned in the notice of motion are unconstitutional on the basis, according to the applicant, that –

'(f) The entire rule 5 and its subsections are *ultra vires* the rule making powers of Judge-President, in that they amend the Common law right of Cession and freedom of contract, while such amendments remain the exclusive preserve of the Legislature; and

(g) Rule 5(4) unreasonably discriminates against Cessionaries who are unable to afford legal representation to enforce their rights in the High Court of Namibia, and is in breach of Article 10(1) and (2) of the Namibian Constitution as well as Article 12(1) of the Namibian Constitution.'

[15] I do not see in the applicant's papers in what manner the applicant contends rule 5 of the rules amends the common law right to freedom to contract and to pursue cession. The width of the wording of rule 5, which should be clear to any careful and reasonable reader of the rule, shows that rule 5 is merely a procedural mechanism. The rule serves important legal and social purposes as set out in the second respondent's answering affidavit, which applicant denies only baldly and puts forth Delphic responses, and with irrelevancies, dealing with the law of cession as

found in a work by 'Visser, Pretorius, Sharrock and Mischke, *The South African Mercantile and Company Law*, 7th ed, pages 89 – 91'.

[16] On the respondents' papers I find that the purpose of rule 5 is to protect the public against charlatans – all charlatans without exception – masquerading as legal practitioners. It is also to protect, maintain and enhance the integrity and effectiveness of the judicial process and due administration of justice. These, in my view, are important rational and legitimate purposes. Upon the authority of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) I accept the statements by the second respondent on the purposes of rule 5, and I reject the applicant's statements merely on the papers.

[17] As I have said more than once, rule 5 does not amend, and is not capable of amending, the common law right to freedom to contract and to pursue a cession. It is trite that the common law can only be amended by clear words of a statute. In that regard, it has been said, 'Our courts require clear and unequivocal language to effect a change to the common law'. (GE Devenish, *Interpretation of Statutes*, Sec. Imp. (1996), p 161; and the cases there cited) Furthermore, legislation (or delegated legislation) must not be presumed to alter the common law. See *Du Preez v Minister of Finance* 2012 (2) NR 643 (SC). There is no clear and unequivocal language in rule 5 tending to show that the common law has been changed; and so, it cannot seriously be argued that rule 5 amends the common law in respect of one's right to freedom to contract and to pursue cession. The *ippssima verba* of rule 5 support this irrefragable conclusion. The applicant has presumed, contrary to the authorities, that rule 5 has amended the common law.

[18] In my opinion, a reasonable and careful reader would not come to the conclusion that rule 5 amends the common law rights to freedom to contract and to pursue cession when rule 5 does not say so in clear and unequivocal language. The conclusion, is therefore, inescapable that the applicant's contention is, with respect, a figment of applicant's own imagination. Indeed, the applicant's contention can be a

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reductio ad absurdum in this comparative mode. For example, rule 45 of the rules of court provides:

'(7) A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.'

[19] A party, who is reasonable and fair-minded, cannot be heard to contend that his right to freedom to contract has been taken away merely because the rule puts in his or her way those requirements which he must satisfy if he desires to rely on the contract in proceedings in the court. The rule is merely a procedural mechanism aimed at regulating the manner in which contracts may be admitted in proceedings in court.

[20] This illustration demonstrates that such procedural mechanisms are not alien to the rules of court. They are reasonable and justifiable. They regulate the application and implementation of substantive law in judicial proceedings brought by all persons as explained *infra*.

[21] The conclusion is inevitable that it has not been shown in what manner rule 5 takes away the applicant's common law right to freedom to contract and to pursue a cession when the common law in that regard has not been amended by rule 5 of the rules, as Mr Frank submitted. It is not enough for a litigant to merely conclude that such right has been taken away when not even a modicum of factual foundation has been laid for it. *Pillay v Krishna* 1946 AD 946 told us long time ago that he (she) who asserts must prove in order to succeed. The applicant has not proved what he asserts. He cannot succeed. Rule 5 has not been shown to be *ultra vires* the power of the second respondent to make rules pursuant to the exercise of his discretionary power under s 39 of the High Court Act to make rules (with the approval of the President) for regulating the conduct of the proceedings of the High Court.

[22] The aforegoing reasoning and conclusion sound the demise of the applicant's challenge on common law grounds. I have shown that what he asserts can be reduced to absurdity, and he has not proved what he asserts. Applicant does not fare any better in his challenge on constitutional basis.

[23] Applicant asserts that rule 5(1), (2)*(a)*, *(b)* and *(c)*, 5(3) and 5(4) are unconstitutional. Why does he so assert? It is simply this. He says, 'Rule 5(4) unreasonably discriminates against cessionaries who are unable to afford legal representation to enforce their rights in the High Court of Namibia, and is in breach of Article 10(1) and (2) of the Namibian Constitution as well as Article 12(1) of the Namibian Constitution'.

[24] *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 tells us that where it is contended that a regulation is unconstitutional, the party so contending bears the *onus* of persuading the court that the said regulation is not reasonably justifiable in a democratic State, and not the State to show that it is. I see no good reason why this cogent and insightful principle should not apply with equal force to rules of court when rules and regulations are all delegated legislation in our law. It follows that the next level of the enquiry is to determine whether the applicant has discharged the *Kauesa onus* cast on him in these proceedings.

[25] Throughout the entire lines in the applicant's founding papers the only statements I see which come any closer to an attempt to discharge the *Kauesa onus* are these statements:

> '(g) Rule 5(4) unreasonably discriminates against Cessionaries who are unable to afford legal representation to enforce their rights in the High Court of Namibia, and is in breach of Article 10(1) and (2) of the Namibian Constitution as well as Article 12(1) of the Namibian Constitution.'

[26] The applicant does not even begin to get off the starting blocks in his attempt to discharge the *Kauesa onus*. One should not lose sight of the fact that inherent in

the meaning of the word ‘discrimination’ in art 10 of the Namibian Constitution is an element of unjust or unfair treatment brought about principally by unjustified and illegitimate unequal treatment. (*Tuhafeni Helmuth Hamwaama and Others vs Attorney General of Namibia and Others* Case No. A 176/2007 (judgment, 31 July 2008) (Unreported), para 23, relying on *Müller v The President of the Republic of Namibia* 1999 NR 190 (SC))

[27] Rule 5, as I have said previously, is not an enabling legislative provision. It is a delegated legislation made in lawful accordance with rule 39 of the High Court Act. I have demonstrated that it does not amend the common law. It is a procedural mechanism aimed at promoting just and expeditious business of the court. Rule 5 requires *all persons*, irrespective of their ‘sex, race colour, ethnic origin, religion, creed or social or economic status’, who desire to be cessionaries through cession agreements to satisfy the requirements in rule 5. That being the case, I fail to see the unequal treatment that the applicant has suffered or is about to suffer when rule 5 applies to *all persons* who are desirous of becoming cessionaries through cession agreements, and, *a fortiori*, when the rule is for legitimate and rational legal and social purposes, as I have found previously. It follows reasonably and inexorably that so long as *all persons* are subject to rule 5, the requirement of equality before the law is met. (Underlined and italicized for emphasis)

[28] One last point. The applicant’s contention in respect of the constitutional challenge can also be a *reductio ad absurdum* in this way. What the applicant contends – unwittingly and not in so many words – is this: ‘I am one of such charlatans masquerading as legal practitioners (referred to in the second respondent’s answering affidavit); and so, rule 5 is aimed at me; and so the court should protect me as my art 10 (of the Namibian Constitution) right has been violated’. (Underlined for emphasis) Otherwise; I see no good reason why the

applicant should go to such lengths to bring the present application to challenge the constitutionality of a rule of court which is there to protect the public from charlatans who masquerade as legal practitioners and, therefore, serves important reasonable, legitimate and justifiable legal and social purposes, and which is there to maintain and enhance the integrity and effectiveness of the judicial process and due administration of justice.

[29] Based on these reasons, I conclude that the applicant has failed to discharge the *Kauesa onus* of persuading the court that rule 5 'is not reasonably justified in a democratic State'. By a parity of reasoning, I hold that the applicant has not placed any evidence – none at all – before the court tending to show that rule 5 of the rules of court has infringed or threatened his right to fair trial guaranteed to him by art 12(1) of the Namibian Constitution. In sum, the applicant has not established in what manner rule 5 of the rules of court has infringed or threatened his right to fair trial under art 12(1) of the Constitution.

[30] It follows that the challenge on constitutional grounds also fails. Consequently, I conclude that rule 5 of the rules of court is not unconstitutional. It is Constitution compliant.

[31] As I see it, the aforegoing analyses and conclusions dispose of any interlocutory matters relating to applicant's *locus standi* and the respondents' striking out application. They have been considered in this single hearing and in this composite judgment.

[32] In the result, the application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

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C Parker

Acting Judge

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APPEARANCES

APPLICANT :	A Maletzky
	In person
RESPONDENTS:	T J Frank SC (assisted by E Schimming-Chase)
	Instructed by Government Attorney, Windhoek