REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00400

In the matter between:

DANIEL SIBOLEKA MUSWEU **APPLICANT**

and

THE CHAIRPERSON OF THE APPEAL TRIBUNAL **FIRST RESPONDENT**
HENRY MUHONGO **SECOND RESPONDENT**
ZAMBEZI COMMUNAL LAND BOARD **THIRD RESPONDENT**
MASUBIA TRADITIONAL AUTHORITY **FOURTH RESPONDENT**

Neutral citation: *Musweu v The Chairperson of the Appeal Tribunal* (HC-MD-CIV-MOT-REV-2017/00400) [2019] NAHCMD 203 (12 June 2019)

Coram: ANGULA DJP
Heard: **15 April 2019**
Delivered: **12 June 2019**

Flynote: Application – Review of decision of an Appeal Tribunal – Rule 65 or rule 76 – A crossbreed or a hybrid of a notice of motion between rules 65 and 76 is irregular, improper and not permissible – Review application must always be in terms of rule 76.

Summary: The applicant brought a review application in terms whereof he sought an order reviewing and setting aside the decision of the Appeal Tribunal – This application for review was brought in terms of rule 65 read with rule 66 – Respondents raised a point in law *in limine* that a review application must be brought in terms of rule 76 and that failure do to so was fatal to the proceedings.

Held, applications for review of administrative actions in terms of rule 76 and general applications in terms of rule 65 each require different procedures to be followed and for good valid and compelling reasons.

Held, although there is no prescribed form for a rule 76 application, it is clear that all its requirements as prescribed in that rule must appear in the notice of motion and should not read as the notice of motion prescribed in rule 65.

Held, a crossbreed or a hybrid notice of motion, borrowing elements from rule 65 and 76 is irregular, improper and fatal to the proceedings.

Held, the matter is struck from the roll.

ORDER

1. The matter is struck from the roll and is regarded as finalized.

2. The applicant is to pay the costs of the respondents.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is a review application filed by the applicant on 9 November 2017 seeking the following relief in his notice of motion:

1. Calling upon the Respondents to show cause why the decision of the Appeal Tribunal delivered on 3 June 2017 should not be reviewed and set aside.

2. Costs of suit.

3. Further and/or alternative relief.

[2] The applicant in his notice of motion furthermore informed the respondents that:

'TAKE NOTICE FURTHER that if you intend to oppose this application you are required to –

(a) Notify applicant's legal practitioner in writing within 15 days from date of service of this application, of your intention to oppose this application, by servicing a copy of your intention to oppose on applicant at the address stated herein and filing the original at the registrar.

(b) and within 14 days of the service of notice of your intention to oppose, to file your answering affidavits, if any and further that you are required to appoint in such notification an address within a flexible radius from the court, referred to in rule 65(5) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT:

(a) you are to show cause why the decision or proceedings referred to in the above mentioned relief should not be reviewed and corrected or set aside; and

(b) within 15 days after receipt of the application, serve on the applicant a copy of the complete record and file with the registrar the original record of such

> proceedings sought to be corrected or set aside together with reasons for the decision and to notify the applicant that he or she has done so. If no notice of intention to oppose is given, the application will be moved on the 15 day of November 2017 at 09:00 AM.'

[3] The applicant is the headman of Munitongo Village at Nansefu, Nsundwa area. He resides at Munitongo Village at Nansefu, Zambezi Region, Republic of Namibia.

[4] The first respondent is the Chairperson of the Appeal Tribunal, appointed by the Minister of Land Reform in terms of section 39(6) read with Regulation 25 of the Communal Land Reform Act, 2002, (Act No. 5 of 2002), 'the Act'.

[5] The second respondent is Henry Muhongo, the headman of the Muhongo Village, Nasefu Nsundwa area, Zambezi Region, Republic of Namibia and residing at 19 Diaz Street, Suiderhof, Windhoek, Khomas Region, Namibia.

[6] The third respondent is the Zambezi Communal Land Board, whose service address is Ministry of Land Reform, Katima Mulilo, Zambezi Region, Republic of Namibia. The third respondent is only cited for any interest it might have in the outcome of this matter.

[7] The fourth respondent is the Masubia Traditional Authority, whose place of business is at, Bukalo Village, Katima Mulilo, Zambezi Region, Republic of Namibia. The fourth respondent is only cited for any interest it might have in the outcome of this matter.

[8] The second respondent filed his notice to oppose on 7 December 2017 and subsequently filed the record on 25 September 2015 and its answering affidavit on 19 January 2018.

[9] The first, third and fourth respondents filed their notice to oppose on 12 February 2018. They did, however, not file their answering affidavits within the time period set out in the notice of motion but instead raised points of law in terms of rule 66(1) of the Rules of this Court. The points of law raised are briefly the following:

‘(a) The review application is instituted in terms of rule 65 and not rule 76 and therefore such failure to comply with rule 76 is fatal.

(b) Applicant failed to comply with rule 66(1) in that in its notice of motion, it requests the respondents to file answering papers within 14 days, whereas rule 66(1)*(b)* provides that the time limit for Government in these circumstances should not be less than 21 days.

(c) Unreasonable delay; that the application is brought two years after the decision sought to be set aside was made.’

[10] The second respondent filed papers in support of the points of law raised by the first, second and fourth respondents’ and made common cause with them in that regard. I will first consider the points of law raised. For the sake of brevity I will refer to first, second, third and fourth respondents collectively as ‘respondents’ without indicating their number unless it is necessary.

Review Application not proper

[11] The respondents state that the applicant in his notice of motion requests the respondents to oppose the application and file answering papers in terms of rule 65 read with rule 66. There, however is no reference to rule 76(9), in which the applicant may add or vary the terms of the application and supplement the supporting affidavits after the record of the proceedings at which the decision sought to be set aside, was taken. Mr Ncube together with Mr Sibeya, for the respondents submitted that this is significant because once the applicant has complied with rule 76(9), there are certain procedural steps in terms of rule 77 that the respondents may take, such as within 5 days to oppose the review and within 20 days of expiry of the 10 days period in rule 76(9), to deliver any affidavit in answer to the allegations made by the applicant.

[12] Counsel further argued that where an applicant seeks to review the decision or proceedings of an inferior court, a tribunal, an administrative body or an official, such application must be brought exclusively under rule 76, because the said rule

was designed to regulate such proceedings whenever a decision or proceedings are sought to be reviewed and set aside.

[13] Counsel for the respondents further submitted that the rulemaker of the present rules, in comparison to the erstwhile rule 53, went to great lengths to provide separate rules and separate forms of applications, and that rule 76 is framed in peremptory terms.

[14] In effort to ward off the respondents' attack, Mr Muluti who appeared for the applicant, argues in his written submissions that the respondents failed to comply with the provisions of rule 66(1)*(a)*[1] read with rule 77(1)*(a)*[2]. Counsel further argued that the application has complied with rule 76(1) – that all the necessary parties have been cited in the application; that in its application, it called on the respondents to show cause why the decision or proceedings should not be reviewed and corrected or set aside; that an affidavit has been deposed to which sets out all the grounds and facts on which the applicant relies to have the proceedings of the first respondent set aside. Counsel further argues that rule 76 does not prescribe a different Form on which the review application is to be brought before Court and that rule 65(4) does prescribe that Form 17 should be used in all applications except *ex-parte* applications.

[15] In conclusion Mr Muluti submits that the applicant's review application is brought in terms of rule 65, read with rule 76 and as such, it is compliant with the rules of this court and is accordingly proper before court.

The Review application before court

[16] The notice of motion filed is titled 'rule 65(4) – Application: Notice of Motion Review'. This notice of motion further calls the respondents who wish to oppose do

[1] **66.** (1) A person opposing the grant of an order sought in an application must - (a) within the time stated in the notice give the applicant notice in writing that he or she intends to oppose the application and in that notice appoint an address within a flexible radius of the court at which he or she will accept notice and service of all documents;

[2] **77.** (1) If the person referred to in rule 76(1) or any party affected desires to oppose the granting of the order prayed in the application he or she must - (a) within five days after receipt by him or her of the application or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and must in such notice appoint an address within a flexible radius at which he or she will accept notice and service of all process in those proceedings.

so and file answering papers in terms of rule 66. The notice further calls upon the respondents to show cause why the decision to be reviewed should not be set aside and that the respondents should within 15 days of the receipt of the application, serve on the applicant and file with the registrar a complete original record. Thus the notice of motion is a hybrid. It is a combination of both a general application brought in terms of rule 65 and one which is brought in terms of rule 76. The application creates a confusion in the minds of the respondents and the Court as to the exact nature of the application.

[17] The application begs the question whether it is a normal general application or is it a review application. A further question arises. An applicant aggrieved by the decision of an administrative body and/or official and who seeks to attack that administrative action of such administrative body and/or official and have it reviewed, does he or she have a choice to institute proceedings under either rule 65 or rule 76 of the Rules of Court or to bring a hybrid application with a mixture of both as the applicant did in this case?

[18] Parker J in *Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibia Institutions Supervisory Authority and Registrar of Stock Exchanges*[3], stated the following at para 10 -

> '[10] The purpose behind rule 76(1) is clear, if regard is had to rule 65, rule 78 and rule 79. It seeks to delineate separate procedures for the various forms of applications which come before the High Court, and has decided to make separate rules for the different forms of applications; and in that behalf, the rule maker has made rules for (a) every application other than a review application (b) an election application, and (c) an application under POCA, for example. To bring all (a), (b) and (c) applications under rule 65 would undoubtedly go against the intention of the rule maker and defeat the purpose of making separate rules for the different forms of applications that come before the court. That could never have been the intention of the rule maker. It should be remembered that the contents of the separate rules for the separate forms of applications are carefully crafted so as to take into account the nature, scope and purpose of a specified form of application that comes to the court. Ueitele J put it this way in *Inspector General of Namibia Police and Another v*

[3] Namibia Financial Exchange (Pty) Ltd v The Chief Executive Officer of the Namibian Financial Institutions Supervisory Authority and Registrar of Stock Exchanges (HC-MD-CIV-MOT-GEN-2016/00233) [2016] NAHCMD 365 (17 November 2016).

Dausab-Tjiueza 2015 (3) NR 720 (HC), para 19: '… The differences between rule 65 and rule 76 are not simply incidental and minor; they are diverse and substantial'. Another crucial consideration we must not overlook is that rule 76(1), in material part and for our present purposes, concerns all proceedings 'to bring under review the decisions or proceedings of an administrative body or an administrative official', that is, every administrative-law review.

[11] Having sought and identified the intention of the rule maker 'in the language, scope and purpose' of rule 76(1), read with the relevant parts of the rules as a whole (see *Compania Romana de Pescuit (SA) v Rosteve Fishing* 2002 NR 297, at 301 H-I; and Lourens M du Plessis, *The Interpretation of Statutes*, Butterworths, Durban (1986), p 127), it is clear that there is a strong indication – in the absence of any considerations pointing to a contrary conclusion – that the maker of rule 76(1) 'intended disobedience to be visited with nullity'.'

[19] Ueitele J in *The Inspector General of the Namibian Police v Dausab-Tjiueza* (A 191/2014) [2015] NAHCMD 25 (29 January 2015), to which Parke J referred in para 18 above stated the following at para 17 of the judgment stated as follows:

'[17] I am therefore of the view that when a person seeks to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or an administrative official that application must, as a general rule, be brought under rule 76, because rule 76 is the rule which is designed to regulate proceedings where a decision of an inferior court, a tribunal, an administrative body or administrative official is challenged. The current rules (including rules 65 and 76) are not enacted to protect a litigant or for the benefit of a particular litigant but the legislative intent behind the current rules of this court is to facilitate the inexpensive, just, fair and speedy resolution of disputes between parties as mandated by Article 12 of the Namibian Constitution. (Underling for emphasis).

[18] I am of the further view that there are good reasons why the procedure that must be followed when the court is asked to review a decision of an administrative body should be different from the procedure that must be followed in respect of general applications. One reason is the fact that under our constitutional dispensation the courts are entrusted with the mandate to enforce respect for the rights (one of which is the right to fair administrative action[4]) promised in our Constitution. It must

[4] As set out in Article 18 of the Namibian Constitution.

also be kept in mind that when an administrative official takes an administrative decision or performs an administrative act, that act or decision acquires legal force until it is set aside by a competent court[5]. The remedy of judicial review is not so much concerned with the correctness of the decision or the action taken by an administrative body but with the process followed in arriving at the decision or taking the action. The legality of the administrative process can be assessed with regard to the record of the proceedings followed by the administrative body. I fail to see how this court could in this matter, fairly assess the lawfulness and legality of the administrative process followed by the Inspector General of the Namibian Police in the absence of a record of those proceedings.

[19] I am of the further view that the differences between rule 65 and rule 76 are not simply incidental and minor they are diverse and substantial. The differences between the procedures which must be followed in an application under Rule 65 and an application for review under Rule 76 are:

(a) Rule 65 sets out the procedure to be followed with applications generally whereas Rule 76 sets out the procedure to be followed when a person seeks to bring under review the decision or proceedings of an *inferior court, a tribunal, an administrative body or administrative official.*

(b) An application under Rule 65 of the rules of Court prescribes Form 17 as the form to which the application must conform whereas Rule 76 does not prescribe any form but in peremptory terms (it uses the word must) requires an applicant in a review application to call upon an administrative official to -

(i) show cause why the impugned decision or proceedings should not be reviewed and corrected or set aside; and

(ii) within 15 days after receipt of the application, serve on the applicant a copy of the complete record and file with the registrar the original record of such proceedings sought to be corrected or

[5] This principle has been articulated as follows by Shivute, CJ in the matter of *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Others* NNO 2014 (2) NR 320 (SC) at p 329:

'The principle of legality is one of the incidents that flows from the rule of law. It follows then that, by virtue of the presumption of regularity, administrative acts — even those that may later be found to have been invalid – attract legal consequences until they are set aside or avoided.'

set aside together with reasons for the decision and to notify the applicant that he or she has done so.

(c) Rule 76(10) requires an application brought under Rule 76 to be assigned to a managing judge immediately after it has been filed with the Registrar, it does not have to wait for the pleadings to close whereas in respect of an application under Rule 65 the application is assigned to managing judge upon closure of pleadings or upon circumstances contemplated under Rule 66(4).

(d) The period within which to file an answering affidavit, in respect of an review application under Rule76 is not calculated with reference to the date on which the administrative official enters his or her notice of intention to oppose the application (as is the case in respect of an application under Rule 65) but with reference to the date on which the applicant supplemented its supporting affidavit. See in this regard Rule 77 which provides as follows:

Opposition to review application

77 (1) If the person referred to in rule 76(1) or any party affected desires to oppose the granting of the order prayed in the application he or she must -

(a) within five days after receipt by him or her of the application or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and must in such notice appoint an address within a flexible radius at which he or she will accept notice and service of all process in those proceedings; and

(b) *within 20 days after the expiry of the time referred to in rule 76(9), deliver any affidavits he or she may desire in answer to the allegations made by the applicant*.

(2) The applicant has the rights and obligations in regard to replying affidavits set out in rule 65.

(3) The set down of applications in terms of rule 65 applies with necessary modifications required by the context to the set down of review proceedings brought in terms of this rule'. Italicized and underlined for emphasis.'

[20] This court has on numerous occasions pronounced itself on the important differences in procedure with regards to applications for review of administrative actions in terms of rule 76 and general applications in terms of rule 65. It is clear that the two rules stipulates different procedures to be followed and there are valid and compelling reasons why the two rules are different.

[21] In the present matter, Mr Muluti submits that the applicant has complied with rule 76 because he has called on the necessary parties to show cause why the decision should not be set aside and that he has also called on the respondents to file the record of the proceedings at which the decision sought to reviewed and set aside was taken. However what Mr Muluti fails to recognize is the fact that the applicant also calls the parties to file answering papers within 15 days to oppose and within 14 after opposing to file answering papers. This is clearly not in compliance with rule 76, neither is it provided for in that rule. The argument further fails to recognise that there are other requirements such as rule 76(10) which must comply with a rule 76 application. Although there is no prescribed Form for a rule 76 application, it is clear that all its requirements as prescribed in that rule must appear in the notice of motion and further that the notice of motion should not read as that prescribed in rule 65. In the present matter, when considering the notice of motion filed, that applicant sought, so to say, borrowed certain requirements from rule 76 and some from rule 65. This is irregular, improper and confusing. The application must be a clear cut rule 76 application, not one which is a crossbreed.

[22] In the present matter, the record of proceedings which concerns the review application has not been filed with this court. This is one of the reasons why it is very important for the rule 76 procedure to be followed, to avoid irregularities and confusion. If a proper application was filed in terms of the rules, this would most probably have been complied with. It is not possible for the court to properly consider the grounds advanced by the applicant to review and set aside the proceedings without the record of proceedings. The legality of the administrative process can only be assessed with reference to the record of the proceedings followed by the administrative body. It is not possible for this court to fairly assess the lawfulness and

legality of the administrative process followed by the Appeal Tribunal without the record of proceedings.

[23] In so far as it might be necessary to repeat what this court has already stated by the mouths of Parker J and Ueitele J, referred to earlier in this judgment, all proceedings aimed at review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official must be brought under rule 76 of this Court's rules. For that reason, I hold that the application filed by the applicant is irregular for non-compliance with the provisions of rule 76 and there is therefore no proper review application before court.

[24] As a result, I make the following order:

1. The matter is struck from the roll and is regarded as finalized.

2. The applicant is to pay the costs of the respondents.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	P MULUTI Of Muluti & Partners, Windhoek
FIRST, THIRD and FOURTH RESPONDENTS:	J NCUBE Of Office of the Government Attorney, Windhoek
SECOND RESPONDENT:	O S SIBEYA Of Sibeya & Partners Legal Practitioners, Windhoek