

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. HC-MD-CIV-MOT-REV-2018/00013

In the matter between:

CORNELIS WENDELL BEUKE

APPLICANT

and

THE NAMIBIA EMPLOYERS' ASSOCIATION

1ST RESPONDENT

**THE MINISTER OF HIGHER EDUCATION,
TRAINING AND INNOVATION**

2ND RESPONDENT

**THE MINISTER OF LABOUR, INDUSTRIAL
RELATIONS AND EMPLOYMENT CREATION**

3RD RESPONDENT

Neutral Citation: *Beuke v The Namibia Employers' Association* (HC-MD-CIV-MOT-REV-2018/00013) [2019] NAHCMD 227 (4 July 2019)

CORAM: MASUKU J

Heard: 08 November 2018

Delivered: 04 July 2019

Flynote: Administrative Law – review of decisions – Principles of natural justice – to be given effect – noncompliance therewith – decision ultra vires and reviewable.

Answering affidavits in motion proceedings – Purpose of - Effect of deponent thereto not being authorised - necessary averments to be made – answering affidavit struck out.

Interpretation of statutes – If words employed by law giver are clear and unambiguous - same to be given their ordinary grammatical meaning.

Summary: The applicant instituted an application seeking to review and set aside two decisions made by the first respondent, communicated by way of letters dated 6 February 2018 addressed to the second and third respondents. The applicant, in addition, seeks an order declaring the two letters issued by the first respondent on 6 February 2018 to the second and third respondents as null and void.

The first respondent opposed the application and deposed to an answering affidavit opposing the review application instituted by the applicant which affidavit was struck out by the court on the basis that the deponent failed to aver that he was authorised by the first respondent to oppose the application and that the absence of such averments fatal. Left for determination is the question whether the applicant is entitled to the relief that he seeks on the basis of the facts advanced in his founding affidavit.

Held that: The fundamental principles of natural justice not employed by the first respondent and that as a result, its decision is ultra vires and reviewable.

Held that: the deposition of an affidavit in support of the case of a legal *persona*, is not a matter that requires authority as that is a decision of the potential deponent.

Held further that: A deponent to an answering affidavit must state that he has authority to oppose the application and that consequently, because in casu such averment not alleged, the answering affidavit stands to be struck out.

Held that: In view of the deficiencies in the answering affidavit, the application to be determined on the allegations in the founding affidavit as well as the record that served before the first respondent.

Held further that: The purpose of an answering affidavit is to deal squarely from the allegations of fact made in the founding affidavit, failing which, the factual averments in the founding affidavits stand unchallenged in line with the Plascon Evans rule.

Court consequently reviewing and setting aside the decisions of the first respondent with costs.

ORDER

1. The effect of the decision of the first respondent to issue the letter dated 6 February 2018 addressed to the second respondent under heading 'Notice of termination and delegation of our time that representative for NEA on the board of directors of the Namibian Training Authority (NTA)', is hereby reviewed and set aside.
2. The effect of the decision of the first respondent to issue the letter dated 6 February 2018 addressed to the third respondent under heading 'Notice of termination and delegation of alternate representative for NEA on the Labour Advisory Council (LSC),' is hereby reviewed and set aside.
3. The First Respondent is ordered to pay the costs of the Applicant.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The applicant, dissatisfied with the conduct of the first respondent, has instituted an application seeking to review and setting aside two decisions, made by the first respondent, communicated by way of letters dated 6 February 2018 addressed to the second and third respondents. The applicant, in addition, seeks an order declaring the two letters issued by the first respondent on 6 February 2018 to the second and third respondents as null and void.

[2] The first respondent opposed the application and to that effect, deposed to an answering affidavit opposing the review application instituted by the applicant. The answering affidavit has a number of deficiencies that I shall address as this judgement unfolds.

The parties

[3] The applicant is Mr. Cornelis Wendell Beuke an adult male labour consultant. He is a Namibian male adult.

[4] The first respondent is the Namibia Employers' Association a voluntary association duly registered by the Ministry of Labour, Industrial Relations and Employment Creation.

[5] The second respondent is the Minister of Higher Education, Training and Innovation duly appointed as such in terms of the Constitution of Namibia.

[6] The third respondent is the Minister of Labour, Industrial Relations and Employment Creation.

Background facts

[7] The applicant was the President of the first respondent from August 2015 until his resignation via a 'WhatsApp message' sent on Tuesday 23 January 2018, to a WhatsApp group established for the first respondent's executive committee.

[8] On 12 December 2016, the third respondent appointed the applicant, in terms of section 94 (2) (a) of the Labour Act¹, (the Act) as a member of the Labour Advisory Council for a period of 3 years from February 2017 to February 2020.

[9] On 16 January 2018, the applicant was appointed a director of the Namibia Training Authority board in terms of section 9 (1) (a) of the Vocational Education and Training Act², (the VET Act).

[10] On 5 February 2018, there was an extra-ordinary Executive Committee meeting of the first respondent. The resignation of the applicant as president of the first respondent, referred to in para 7 above, was discussed at that meeting. The meeting resolved to accept the resignation. Furthermore, a resolution to notify the relevant stakeholders on whose 'governance and management structures' the applicant was representing the interests of the first respondent that by virtue of the applicant's resignation as president of the first respondent, he would no longer be a representative of the first respondent at any level and therefore he shall not represent the interests of the first respondent was also taken. In addition, that meeting delegated Ms Eva-Liza Nailenge to represent the first respondent in the Labour Advisory Council and seconded Mr Simon Raines to represent the first respondent on the Board of the Namibia Training Authority.

¹ Act No.11 of 2007.

² Act No. 1 of 2008.

[11] On 6 February 2018 the Chairperson of the first respondent dispatched a letter addressed to the Permanent Secretary of the second respondent. It appears to me that this letter was dispatched for the purpose of implementing the resolution reached at the meeting of 5 February 2018. The letter reads as follows in part:

'I write to inform you that Mr Cor Beuke has tendered his resignation from the Namibian Employers Association (NEA). By virtue of his resignation from the NEA, Mr Beuke no longer represents the interest contemplated in section 9 (1) (a) of the Vocational Training and Education Act (act 1 of 2008), a member nominated by employer representatives on the Labour Advisory Council in terms of which he was appointed.

Subsequently Mr Simon Raines, in his capacity deputy secretary-general of the NEA is hereby delegated to represent the NEA on the NTA board of directors with immediate effect, should it carry the Minister's approval.'

[12] A similarly worded letter was dispatched for the attention of the Permanent Secretary for the third respondent. The letter read in relevant part as follows:

'I write to inform you that Mr Cor Beuke has tendered his resignation from the Namibian Employers Association (NEA). By virtue of his resignation from the NEA, Mr Beuke no longer represents interest contemplated in section 94 (1) (b) of the Labour Act (act 11 of 2007), representing the interest of a registered employers' organisation in terms of which he was appointed.

Subsequently, Ms Eva-Liza Nailenge, in her capacity as general secretary of the NEA is hereby delegated to represent the NEA on the LAC with immediate effect, should this notice carry the Minister's approval.'

[13] On becoming aware of the two letters dated 6 February 2018, dispatched by the first respondent to the second and third respondents' Permanent Secretaries, the applicant wrote a letter addressed to the first

respondent through his legal practitioners on 8 February 2018. In that letter, the applicant requested that both the 6 February 2019 letters be withdrawn. The applicant amongst other matters raised the following complaints-

- i. that paragraph one of the 6 February 2019 letter was factually incorrect in that he did not resign from the first respondent but rather resigned as president of the first respondent's board only;
- ii. the applicant further took the view that the first respondent had no jurisdiction or authority to direct the second and third respondents to remove him as director and council member respectively;
- iii. that the first respondent had a duty to give applicant the opportunity to present his side before reaching a decision to remove him;
- iiii. that there is no evidence of fact which supports the notion that the applicant can no longer represent the interests of registered employer's organisations or employers in general.

[14] The letter of 8 February 2018, was responded to on 9 February 2018, by the first respondent's legal practitioners. The applicant's legal practitioners dispatched another letter on 21 February 2018 addressed to the second and third respondents making representations as to why the applicant should not be removed as a council member and board member respectively and notifying the second and third respondents of the applicant's intention to institute a review application to set aside the letters of 6 February 2018. I briefly address the statutory scheme in respect of appointments to the Labour Advisory Council and the Namibia Training Authority board.

Relief sought

[15] In his notice of motion, the applicant seeks the following orders from this court:

- (a) The review and setting aside the decision of the first respondent to issue the letter dated 6 February 2018 addressed the second respondent under heading “notice of termination and delegation of our time that representative for NEA on the board of directors of the Namibian training authority (NTA)”
- (b) review and setting aside the decision of the first respondent to issue the letter dated 6 February 2018 addressed to the third respondent under heading “notice of termination and delegation of alternate representative for NEA on the Labour advisory Council (LSC)”
- (c) Declaring the two letters issued by the first respondent on 6 February 2018 to second and third respondent as null and void”
- (d) That first respondent pays the costs of the application on a scale of client on attorney.

Authority

[16] By way of the replying affidavit to the answering affidavit, the applicant raised a point in limine³ related to the authority of the deponent to the first respondent’s answering affidavit to oppose the application.

[17] The deponent to the answering affidavit at paragraph 2 states the following:

‘I am duly able to depose to this affidavit, and do so for and on behalf of the defendant. The facts stated here in are both true and correct, and for within my personal knowledge, unless the context otherwise indicates.’ (Emphasis added).

[18] In response to those averments by the deponent to the answering affidavit, the applicant responds as follows:

³ Replying affidavit record page 86 para 4.1, record page 87 paragraphs 4.2, 5 and 6.

'I respectfully submit that no resolution or any form of authorisation whereby Mr Beukes was authorised to oppose this application and/or deposed to the answering affidavit in opposition thereof has been attached to confirm such authorisation.

Furthermore, I respectfully submit that the answering affidavit does not include a statement that he indeed has been authorised to do so. In paragraph two of the affidavit it is merely stated that "I am duly able to depose to this affidavit and to saw for and on behalf of defendant" (sic). I respectfully submit that it is a requirement that he has to be authorised to do so by the first respondent.

I am advised and respectfully submit that due to the fact that the first respondent is an artificial person, it can only act through its agents, which agents and the action taken by them should be properly authorised, evidenced and endorsed. Failing which renders the first respondent is not before the court on the affidavit cannot be considered and should be struck.' (Emphasis added).

[19] I understand paragraph 2 of the answering affidavit to address the ability of the applicant to depose to the founding affidavit for and on behalf of the first respondent. It is common cause that the first respondent is not a natural *persona* but rather a legal *persona*. In circumstances where a person purports to initiate or to defend proceedings on behalf of a legal *persona*, that person invariably requires authority to initiate, defend, oppose and to prosecute those proceedings on behalf of the legal *persona*. I am of the view that the deposition of an affidavit in support of the case of a legal *persona*, is not a matter that requires authority as that is a decision of the potential deponent.

[20] In regard to my finding on this point, I seem to be in good company because that is an issue that the learned Judge President faced, albeit in a different context, namely in an application in *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd*.⁴ In dismissing an attack on the authority of a deponent to an affidavit, which the learned JP held to be weak, he relied on

⁴ *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298.

Ganes v Telecom Namibia Ltd,⁵ where the Supreme Court of South Africa poignantly said:

'The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

[21] In view of the short treatise above, I come to the conclusion that the deponent to the answering affidavit on behalf of the first respondent did not state that he had authority to oppose the application on behalf of the first respondent. In the circumstances, it becomes clear as noontide, in the absence of that necessary allegation, to hold that the opposition to the application, is not authorised by the respondent.

[22] As a result, the court has no option but to strike out the answering affidavit. The court cannot have regard to papers that have been irregularly filed by an unauthorised party. That, however, is not the end of the matter. I must still determine whether the applicant is entitled to the relief that he seeks on the basis of the facts he advanced in the founding affidavit.

Purpose of answering affidavit

[23] I shall briefly digress and address an important matter that arises from the answering affidavit, which affidavit has been struck out on the basis that it does not contain a necessary averment to the effect that the deponent is duly authorised to oppose the application.

[24] The deponent of the said affidavit, at paragraph 3 of the answering affidavit, states as follows:

'I have read the applicant's notice of motion and supporting affidavit. I confirm the first respondent's position of the application. Further, I am advised that I do not need to traverse each and every allegation made by the deponent in the founding affidavit and/or the grounds upon which the applicant attempt to seek this honourable

⁵ *Ganes v Telecom Namibia* 2004 (3) SA (SCA) 615 at 625G-H.

court's intervention in the decision of the first respondent. That said, allegations set out in the founding affidavit of the applicant, filed in support of the application which are;

3.1 not specifically dealt with, must be deemed to be placed in dispute;

3.2 at variance with those contained herein, are placed in dispute.”

[25] The purpose of an answering affidavit in motion proceedings is to respond squarely to the facts contained in the founding affidavit. A litigant is duty bound in his or her answering affidavit, to address each and every allegation of fact contained in the founding affidavit which such litigant ought to be able to answer. The effect of not addressing an allegation of fact is that the court must accept that such allegation is admitted.

[26] I find authority for this position view in *Makhuva and Others v Lukoto Bus Service (Pty) Ltd and Others*⁶ where the learned Judge dealt with the need to answer to allegations of fact contained in an answering affidavit. The learned Judge held as follows:

‘In the course of argument I put it to counsel for applicants that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are “taken note of” would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E - D where it is stated that whilst “quiescence is not necessarily acquiescence”, a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him. As to admissions, denials, confessions and avoidance in pleadings see Rules 22(2) and 25(1) and as to affidavits in motion proceedings see Rule 6(4)(d) and 6(4)(e). It is clear that affidavits really constitute both pleadings and the evidence in support of the allegations made, and the rules as to pleadings should, to that extent, be applied to affidavits.’

⁶ 1987 (3) SA 376 (V) at 386 E-F.

[27] If I had not struck out the answering affidavit, I would have adjudicated this matter on the authority of the seminal judgment of *Plascon-Evans*.⁷ Therefore, given that the facts in the founding affidavit largely stand undisputed, unless they are so far-fetched that it is unreasonable to rely on them, the application stands to be determined on the founding affidavit and the record that served before the first respondent.

[28] I have addressed the purpose of an answering affidavit as well as the manner in which facts contained in the founding affidavit must be placed in issue and the effect of a failure to place facts contained in the founding affidavit in issue as a guide to legal practitioners and litigants alike.

The statutory scheme

[29] The Labour Advisory Council is appointed in terms of section 94 (1) of the Labour Act. This provision reads as follows;

'94 (1) The Labour Advisory Council consists of the following individuals appointed by the Minister in accordance with this section:

(a) a chairperson, who must be a Namibian citizen; and

(b) 12 other members, comprising –

(i) four individuals to represent the interests of the State;

(ii) four individuals to represent the interests of registered trade unions; and

(iii) four individuals to represent the interests of registered employers' organisations.

(2) Before appointing a member of the Labour Advisory Council, the Minister must, by notice in writing, invite nominations from –

(a) registered trade unions, if the member is to represent them; or

(b) registered employers' organisations, if the member is to represent them."

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[30] I now turn to interpret the above provision. Statutory interpretation, is really about the court trying to ascertain the intention of the Legislature. The court does that by, first, looking at the words employed by the Law-giver. If the words employed are clear and unambiguous, they must naturally be given their ordinary grammatical meaning.

[31] I am of the view that the words used in the above provisions, are unambiguous and clear. As such, I find that s 94 (1) is to the effect that an individual may be appointed to the Labour Advisory Council if that individual represents the interests of a registered employers' organisation and has been nominated by a registered employers' organisation after the Minister invites nominations for appointment as members of the Labour Advisory Council⁸. No absurdity or hardship would arise from attributing the ordinary, grammatical meaning of the words utilised by the legislature to the provision under consideration.

[32] The Board of Directors of the Namibia Training Authority is appointed in terms of s 9 (1) (a) of the Vocational Training and Education Act⁹. The said provision reads as follows;

'9 (1) The Board consists of eleven members appointed by the Minister, subject to section 15 of the State-owned Enterprises Governance Act, as follows –

(a) five members nominated by employer representatives on the Labour Advisory Council'.

[33] The ordinary, literal and grammatical meaning of this provision is that the representatives of employers who sit on the Labour Advisory Council are the parties clothed with authority to nominate persons such as the applicant to be board members of the Namibian Training Authority board of directors. The

⁸ This is the literal, ordinary and grammatical meaning of this provision. See *Torbitt v International University of Management* 2017 (2) NR 233 (SC).

⁹ Act No. 1 of 2008.

first respondent does not, in terms of section 9 (1) (a), nominate such board members. I return to the question in respect of which I must adjudicate, that is, whether or not I should set aside the decisions of the first respondent as contained in the letters dated 6 February 2019.

The challenges to the 6 February 2018 letters

[34] The applicant is of the view that the first respondent did not follow a fair process before issuing the letters of 6 February 2018 because it failed to make enquiries as to the correctness of the facts on which the decision was predicated¹⁰. The applicant is further of the view that the first respondent failed to adhere to or comply with basic fundamentals of fairness¹¹ in that the applicant was not afforded an opportunity to respond to the allegations.

[35] In that regard, the applicant takes the view that the first respondent did not apply its mind to the facts or applicable principles before reaching the decision to issue the letters. The applicant further takes the view that the first respondent did not have the authority to instruct the second and third respondents to remove him from the Labour Advisory Council or from the board of directors of the Namibia Training Authority.

Is the applicant a member of the first respondent?

[36] An answer to the above question is a factual inquiry. I am of the view that the letters of 6 February 2018 communicated to the recipients of those letters that the applicant had resigned from the first respondent and that by virtue of his resignation from the first respondent, he no longer represented the interests of an employers' organisation. I find this position to be inaccurate and not a true representation of the facts.

[37] The applicant on the facts before me only resigned as president of the first respondent and did not, as a fact, resign as a member of the first

¹⁰ Founding affidavit page 13 paragraph 25.5, founding affidavit page 12 paragraph 24.4.

¹¹

respondent. The letters of 6 February 2018 were therefore inaccurate insofar as they communicated the resignation of the applicant from the first respondent. I find that the first respondent did not at all apply, or properly apply its mind to the facts. Had the first respondent properly applied its mind it would surely not have found as a matter of fact that the applicant resigned from the first respondent as opposed to what the applicant actually did, which was to resign only as President of the first respondent.

Was a fair process followed?

[38] The first respondent is a voluntary organisation that is registered in terms of the Labour Act. The first respondent, as a voluntary organisation, must give effect to certain elementary but fundamental principles of fairness. These principles emanate from the common law and are commonly referred to as the principles of natural justice.

[39] The first respondent, by way of its decision, communicated by means of its letters dated 6 February 2018, adopted the position that the applicant resigned and as a result was no longer its member. This position is contrary to the clear unambiguous communication by the applicant. Insofar as the first respondent terminated the membership of the applicant without conducting a hearing, I find that the first respondent acted in breach of the principles of natural justice¹².

[40] The first respondent is enjoined in terms of the rules of natural justice to grant the applicant a hearing before terminating his membership in the first respondent. On this basis I find that the decision was *ultra-vires* the common law and is reviewable.

[41] In any event, the first respondent, as a voluntary association, governed by its constitution, is duty bound to comply with the clause 6.7 of its constitution. Clause 6.7 requires the first respondent to grant a hearing to its

¹² Opperman vs President of Professional Hunting Association of Namibia 2000 NR 238 at 247, See also Bekker vs Western Province Sports Club Inc. 1972 (3) SA 803 (C) at 811.

member prior to terminating such member's membership. In *Opperman supra*, the Supreme Court found that voluntary associations, such as the first respondent, are bound by their constitution and rules. It is common cause that there was no hearing before the decision to terminate the membership of the applicant in the first respondent.

Conclusion

[42] As a result of the two findings I make at paragraphs 36 and 37 of this judgment, I do not need to address the additional grounds raised by the applicant to review and set aside the letters dated 6 February 2018. I therefore find that the decisions communicated by the letters dated 6 February 2018, are reviewable and I accordingly set them aside.

Costs

[43] I find that costs in this matter must follow the result. The applicant has sought costs on the punitive scale. I decline to grant a costs order on the higher scale as requested by the applicant as there is no acceptable or justifiable reason for the award of costs on the higher scale. Ordinary costs would be condign in this matter.

Order

-

[44] I need to mention that the order, as couched by the applicant, is badly phrased and does not accurately address the applicant's grievance. I have, for purposes of clarity, rephrased the order so that it accurately addresses the applicant's complaint. In view of the considerations recorded above, I find it fitting to make the following order:

5. The effect of the decision of the first respondent to issue the letter dated 6 February 2018 addressed to the second respondent under heading 'Notice of termination and delegation of our time that

representative for NEA on the board of directors of the Namibian Training Authority (NTA)', is hereby reviewed and set aside.

6. The effect of the decision of the first respondent to issue the letter dated 6 February 2018 addressed to the third respondent under heading 'Notice of termination and delegation of alternate representative for NEA on the Labour Advisory Council (LSC),' is hereby reviewed and set aside.
7. The First Respondent is ordered to pay the costs of the Applicant.
8. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: Mr. P. De Beer
Of De Beer Law Chambers Windhoek.

FIRST RESPONDENT: Mr. S. Philander
Of ENS Africa | Namibia,
Windhoek.