

REPUBLIC OF NAMIBIA

**HIGH COURT OF
WINDHOEK**



NAMIBIA, MAIN DIVISION,

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2019/00439

In the matter between:

KAZEONGERE ZERIPI TJEUNDO

APPLICANT

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1ST RESPONDENT

ELECTORAL COMMISSION OF NAMIBIA

2ND RESPONDENT

**ATTORNEY GENERAL OF THE REPUBLIC OF
NAMIBIA**

3RD RESPONDENT

POPULAR DEMOCRATIC MOVEMENT

4TH RESPONDENT

RALLY FOR DEMOCRACY AND PROGRESS

5TH RESPONDENT

ALL PEOPLE'S PARTY

6TH RESPONDENT

REPUBLIKEIN PARTY

7TH RESPONDENT

LANDLESS PEOPLES MOVEMENT

8TH RESPONDENT

UNITED DEMOCRATIC FRONT

9TH RESPONDENT

SWANU OF NAMIBIA

10TH RESPONDENT

CONGRESS OF DEMOCRATS

11TH RESPONDENT

NUDO OF NAMIBIA

12TH RESPONDENT

SWAPO PARTY OF NAMIBIA

13TH RESPONDENT

UNITED PEOPLE'S MOVEMENT

14TH RESPONDENT

CHRISTIAN DEMOCRATIC VOICE PARTY

15TH RESPONDENT

DEMOCRATIC PARTY OF NAMIBIA	16 TH RESPONDENT
MONITOR ACTION GROUP	17 TH RESPONDENT
NAMIBIAN ECONOMIC FREEDOM FIGHTERS	18 TH RESPONDENT
NATIONAL DEMOCRATIC PARTY	19 TH RESPONDENT
NATIONAL PATRIOTIC FRONT OF NAMIBIA	20 TH RESPONDENT
WORKERS REVOLUTIONARY PARTY	21 ST RESPONDENT

Neutral Citation: *Kazeongere Zeripi Tjeundo v Government of the Republic of Namibia and Others* (HC-MD-CIV-MOT-GEN-2019/00439) [2019] NAHCMD 534 (05 December 2019)

CORAM: SIBEYA, AJ
Heard: 12 November 2019
Reasons: 05 December 2019

Flynote: Urgent Application – Lack of jurisdiction raised – Matter brought in High Court instead of Election Court – Election matters to be heard in Election Court – High Court not to be seen usurping powers and functions of the Electoral Court – Lack of urgency – Costs should not bar persons from accessing court to vindicate their rights.

Summary: The applicant, a regional councilor, was aggrieved by the decision of the second respondent, the Electoral Commission of Namibia (the ECN) to disallow public servants from appearing on the National Assembly candidate list. He then approached this court to review, correct and set aside such decision. The ECN raised several preliminary issues, where they stated that this court does not have the jurisdiction to hear the application, that it lacks urgency, that applicant lacks locus standi in certain prayers and non-joinder of certain persons and political parties.

Held, that, the Electoral Court is an envisaged specialised court mandated to deal exclusively with electoral disputes.

Held, further that, this court should not be seen to usurp the powers and functions of the Electoral Court.

Held, further that, an applicant in an urgent application should fully set out the circumstances that render the matter urgent and account for the period preceding the application, in the founding affidavit.

Held, further that, in the exercise of discretion, courts should avoid imposing costs or should impose costs on a limited scale so as not to bar applicants from accessing courts when they seek to enforce what they believe to be their constitutional rights.

ORDER

1. This court declined to exercise jurisdiction in this matter and dismissed the application in respect of prayer 3.1.
2. The remainder of the prayers in the application are struck from the roll and regarded as finalized.
3. The respondent is awarded 50% of costs and such costs to include costs of one instructing and one instructed counsel.

JUDGMENT

SIBEYA AJ:

[1] Out of choice, the applicant, a regional councilor who was aggrieved by the decision of the Electoral Commission of Namibia (the ECN) to disallow public servants from appearing on the National Assembly candidate list, approached this court to review, correct and set aside such decision.

[2] An urgent application was launched on notice of motion filed with this court on 07 November 2019 and set down for hearing on 12 November 2019 at 10h00AM.

[3] The relief sought was the following:

‘1 That the Applicant’s non-compliance with the forms and service provided for by the Rules of this Honourable Court is condoned and that the matter be heard as one of urgency as contemplated by rule 73(3). The Applicant seeks relaxation of rule 76 for the purposes of seeking review relief in terms of prayer 3.1 below.

2 Condoning and granting leave to the Applicant to effect service as per paragraph 30.1 herein on the 1st to 4th Respondents via Deputy Sheriff and on the 5th to the 21st Respondents via electronic mail as interested parties on the addresses listed herein.

3 That a rule nisi be issued calling upon the 1st to 21st Respondents to show cause, if any, on a date and time determined by this Honourable Court, why an order in the following terms should not be granted:

3.1 Reviewing and or correcting and setting aside the decision of the Electoral Commission, taken on 15 October 2019, denying National Assembly candidates who are public servants and/or from holding remunerated service as public servants to be listed and then only to list candidates who do not hold such positions

3.2 Alternatively, in the event that the Honourable Court determines not to condone the applicant’s lack of compliance with rule 76:

3.2.1 Declaring that candidates for election to the National Assembly who are members of the public service are not disqualified for candidacy by virtue of their public service office;

3.2.2 Declaring that members of the public service are deemed to have resigned from remunerated public service effectively from the date on which they are elected to office in the National Assembly;

3.2.3 Declaring the directive of the Electoral Commission as ultra vires and repugnant to the constitution and accordingly of no legal force or effect;

3.2.4 Directing and ordering the Fourth Respondent to forthwith re-instate my name as a candidate on the revised list of candidates submitted by the Fourth Respondent and to allow me to partake as a candidate in the elections to the National Assembly;

3.2.5 Directing the Fourth respondent to resubmit the candidate list as approved by the Central Committee and the Second Respondent to accept such list.'

[4] The brief synopsis of this matter is that the applicant whose names appear on the National Assembly candidate party list for the fourth respondent (PDM), is employed as a regional councilor for Opuwo Rural Constituency. He was appointed in terms of the Regional Councils Act.¹ Applicant is therefore a member of the regional council and falls in the category of persons disallowed by the ECN to be part of the candidate list for National Assembly. Aggrieved by the decision of the ECN, the applicant sought an order from this court to review, correct and set aside the decision of the ECN.

[5] The applicant was represented by Ms. Van Wyk, while the second respondent, ECN, (the respondent) was represented by Dr. Akweenda.

[6] The respondent raised the following points of law *in limine*:

6.1 lack of jurisdiction - that this court has no jurisdiction to entertain election related issues as such matters falls within the jurisdiction of the Electoral Court;

¹ Act 22 of 1992.

6.2 lack of *locus standi* - that the applicant lacks *locus standi* to institute an application on behalf of other candidates referred to in prayers 3.2.1 and 3.2.2 of the notice of motion;

6.3 lack of urgency - that the ECN directed political parties on 15 October 2019 that civil servants, inclusive of members of the regional councils, should not be on the lists of candidates for the National Assembly, but applicant only filed his application on 08 November 2019 to be heard on 12 November 2019. This was when the voters were due to cast their votes on 13 and 27 November 2019 respectively. It was argued therefore that the application lacked urgency or such urgency, if present, is self-created;

6.4 non-joinder - that the applicant failed to join the National Assembly candidates appearing on the party lists, who are public servants and on whose behalf the applicant purportedly sought a declarator.

[7] All points of law *in limine* raised were extensively argued by both counsel and this court appreciates both counsel's resourceful and instructive arguments.

Lack of Jurisdiction

[8] Dr. Akweenda strenuously submitted that the relief sought by the applicant relates to election issues, and that therefore the relief falls squarely within the jurisdiction of the Electoral Court and resultantly this court lacks jurisdiction to hear the application.

[9] Ms Van Vyk was not to be outpaced as she submitted that notwithstanding the fact the Electoral Court has jurisdiction over this matter, equally so, is this court and thus invited this court to hear the merits of the application.

[10] In matters where it is alleged that a court lacks jurisdiction to hear any proceeding, the court should first resolve the aspect of jurisdiction before any other fragment of the dispute. Angula DJP, in *Minister of Urban and Rural Development v The*

Town Council of the Municipality of Grootfontein & Others at para 18² cited a paragraph with approval from *Shikwetepo v Khomas Regional Council & Others*³ where it was stated that:

‘if the jurisdiction of this court, sitting as the High Court, was being challenged at the threshold, it would not be competent for this court to determine anything else without first deciding the issue of jurisdiction, that is, without deciding whether it has jurisdiction, in the first place, to determine anything about the application, including whether it should be heard on an urgent basis.’

[11] I associate myself with the above passage and state further that unless jurisdiction as a point of departure is resolved, a court cannot entertain any other dispute ancillary to the case, as such may be found to be beyond the scope of the court.

[12] At the outset, it should be mentioned that Article 80(2) of the Namibian Constitution (the Constitution) provides as follows:

‘The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon all appeals from the lower courts.’

[13] Section 2 of the High Court Act⁴ also provides that:

‘The High Court shall have jurisdiction to hear and to determine all matters which may be conferred or imposed upon by this Act or the Namibian Constitution or any other law.’

² (HC-MD-CIV-MOT-GEN-2019/00100) [2019] NAHCMD 204 (18 June 2019).

³ Unreported Judgment of this court, Case No. A364/2008 delivered on 24 December 2008.

⁴ Act 16 of 1990.

[14] The High Court derives its inherent jurisdiction over all disputes from the Constitution. While discussing the original jurisdiction of the High Court, this court in *Onesmus v Minister of labour and Another*⁵ at para 14 – 15 stated that:

'[14] The constitutional vesting in the High Court of original jurisdiction cannot be glossed over – it is of particular significance, also in this application. The court does not only have jurisdiction to deal with cases brought before it on appeal regarding 'the interpretation, implementation and upholding of [the] Constitution and the fundamental rights and freedoms guaranteed thereunder', it also has the power to do so as a court of first instance.

[15] Moreover, it does not draw on any statute for those powers: it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament. This, in my view, follows from the broader constitutional structure, which the founders of the Constitution and the fundamental rights and freedoms guaranteed thereunder. Although every organ of State and agency thereof bears responsibility to uphold and protect the Constitution, the superior courts (with the Supreme Court at the apex thereof) are the ultimate legal guardians thereof. In the effective discharge of their onerous responsibilities to maintain and protect the Constitution's supremacy, which may necessitate the need to review the Acts of Parliament or the actions of the Executives or its agencies, the superior courts cannot depend on a statutory licence from Parliament to do so – lest they only get one in truncated form or none at all. Hence the need to establish and empower the superior courts in the Constitution itself, to provide for the appointment and removal of judges presiding over them, and to create a self-contained constitutional mechanism for the judicial protection of the Constitution and the fundamental rights and freedoms guaranteed thereunder.'

[15] The foundation of the supremacy of the Constitution was cemented by Damaseb DCJ in *Agnes Kashela v Katima Mulilo Town Council and Others*⁶ at para 59 where he cited the following passage with approval from *MW v The Minister of Home Affairs*⁷:

⁵ 2010 (1) NR 187 (HC).

⁶ 2018 (4) NR 1160 (SC) para 59.

⁷ 2016 (3) NR 707 (SC) para 46.

[46] The Constitution is the source of all law and must take precedence over other laws which are subordinate to it. Constitutional provisions are not determined by the content of legislation. Therefore, the framers of the Namibian Constitution intended the phrase 'ordinarily resident' to have a meaning distinct from permanent residence – contrary to the finding of the court a quo that the two meant the same thing.'

[16] The question that lingers in one's mind is what is to be made of the provisions of the Electoral Act⁸ that confer jurisdiction over electoral issues to the Electoral Court.

[17] The purpose of the Electoral Act is:

'To provide for the establishment and constitution of the Electoral Commission of Namibia and its powers and functions, to provide for the registration of voters, nomination of candidates, conduct of the election of persons to the office of President, conduct of the election of members of the National Assembly, conduct of the election of members of regional councils and local authority councils, to provide for the holding of a referenda; to provide for the registration and deregistration of political parties and the funding of political parties and organizations; to provide for the establishment of electoral tribunals and the Electoral Court and their powers and functions; and to provide for incidental matters.'

[18] Section 167(1) of the Electoral Act establishes an Electoral Court. Subject to the Electoral Act, the Electoral Court retains all the powers of this court conferred by Article 78(4) and Article 80 of the Constitution.⁹ The Electoral Court is constituted by the Judge-President and two other Judges.

[19] The powers and functions the Electoral Court are set out in section 168¹⁰ where it is stated, *inter alia*, that:

'168. (1) The Electoral Court has the power to –

⁸ Act 5 of 2014.

⁹ Section 167(2) of the Electoral Act.

¹⁰ The Electoral Act.

- (a)...
- (b)...
- (c) adjudicate and decide any matter concerning any contravention of this Act;
- (d).....
- (e) review any decision of the Commission relating to any electoral issues; and
- (f) hear and determine any matter which relates to the interpretation of any law relating to electoral issues referred to it by the Commission...'

[19] It is apparent from the notice of motion that the purpose of this application is to review and set aside the decision of the ECN to disallow National Assembly candidates on party lists who are public servants or in the public service, as in the ECN's perspective such candidates do not qualify for election to the National Assembly. I state without fear of contradiction that this matter concerns the review of the decision of the ECN which relates to an electoral issue. This review is therefore squarely within the confines of section 168(1)(e) of the Electoral Act.

[20] It is trite that jurisdiction is determined on the premise of the claim in the pleadings. Langa CJ in *Chirwa v Transnet Ltd & Others*¹¹ held that:

'a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.'

¹¹ 2008 (4) SA 367 (CC).

[21] In the process of the analysis of the pleadings in attempt to resolve a jurisdictional challenge, it is not the court's duty to say that the alleged facts by the applicant would also sustain another claim, realisable in another court.

[22] A closer scrutiny of the Electoral Act reveals that the legislature intended create the ECN, Electoral Tribunals and the Electoral Court seized with the determination of all electoral related issues. While being mindful of the inherent jurisdiction of this court, the legislature conferred all the powers of this court on the Electoral Court in order to empower the Electoral Court to deal with electoral issues.¹²

[23] I am of the view that the fact that the legislature created an Electoral Court presided over a panel of three Judges, demonstrates how significant electoral issues are in our independent democracy. Careful handling of electoral issues is salient to the sustenance of our democracy. It is thus the intention of the legislature that electoral issues should be subjected to a profound analysis and determination by a panel of three members. I am further of the view that embodied in the Electoral Court is an envisaged specialised court mandated to deal exclusively with electoral disputes. The respondent also expects its electoral issues to be adjudicated upon by a specially constituted panel of Judges according to law and dedicated to hearing electoral disputes.

[24] In a similar vein, Masuku J in *Auala v Gomes*,¹³ when faced with a jurisdictional challenge on the High Court as to the appropriate court which should deal with custody of a minor child, cited the with approval a passage by Parker AJ in *NK v SK*¹⁴, where the following was said:

¹² See: *Chirwa v Transnet Ltd & Others* (supra) para 110-111, although this matter concerned a labour dispute, the principle advanced that structures which are created to provide a comprehensive framework for certain dispute resolution should not be undermined, find application herein.

¹³ (HC-MD-CIV-MOT-GEN-2019/00194) [2019] NAHCMD 363 (20 September 2019) at para 27-28.

¹⁴ [2015] NAHCMD 242 (7 October 2015), para 3.

'It is crucial to point out that where a statute vests powers in the Lower Court or a tribunal to determine a dispute or determine a matter, the High Court should decline doing anything that tends to usurp that court's or that tribunal's powers and functions given to it by legislation when that Lower Court or tribunal has not determined the dispute or matter. This proposition or rule of practice is so trite that I need not cite authority therefor.'

[25] I am not persuaded, on the papers before court, that I should exercise jurisdiction over the review of the decision of the ECN. This court should not be seen to usurp the powers and functions of the Electoral Court. For the above reasons and conclusions, I find that the Electoral Court is the forum best suited to entertain and adjudicate reviews of the decisions of the ECN and I thus decline to exercise jurisdiction over this matter. Consequently prayer 3.1 in the notice of motion, falls to be dismissed.

Urgency

[26] It is further my finding that the applicant did not explicitly set out the circumstances regarding urgency by not fully accounting for the period of 15 October to 08 November 2019 when this application was launched to be heard on 12 November 2019. There is therefore no explanation why this application was not brought earlier. At best, counsel for the applicant, attempted to introduce factual allegations to explain the delay in filing the application contrary to what I call the *Stipp* principle.¹⁵ It has become elementary that in motion proceedings, all pleadings and evidence are contained in the founding affidavit. The rationale for this principle is not only for the benefit of the court but further to alert the other parties, of the case to be met and in respect of which such other parties should adduce evidence in their own affidavits.

¹⁵ *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC) 634.

[27] Bearing in mind that the elections were due to commence on 13 November 2019 for the security personnel, seagoing staff and voters at foreign missions, to cast their votes, the applicant did not meet the requirements of rule 73(3)(a) for his application to be heard as one of urgency on the eve of the elections.

[28] This court holds the view that the conduct of the applicant borders more on self-created urgency. Where the court find the urgency to have been self-created, it should refuse to exercise its discretion to hear the application on an urgent basis without hesitation, as pointed out in *Bergmann v Commercial Bank of Namibia Ltd*¹⁶. The court thus refuses to exercise its discretion to hear this matter as one of urgency. It follows consequentially that the remaining prayers in the notice of motion therefore fall to be struck from the roll on this basis.

Non-joinder (Observation)

[29] It is worth mentioning further that a lot of persons and political? parties were not cited in this application. All things being equal, the application would have had to be stayed pending the joinder of these persons. For the reasons advanced above, however, such a course is rendered unnecessary in the peculiar circumstances of this case.

Conclusion

[30] In view of the foregoing conclusions arrived at, it has become unnecessary to deal with the remaining points *in limine*.

Costs

¹⁶ 2001 NR 48 (HC).

[30] Regarding costs, the rule is that, unless otherwise stated by legislation, costs are in the discretion of the court.¹⁷ This discretion should be judiciously exercised. There is however a general rule that costs follow the event, entailing that costs should be awarded to the successful party, unless there are special circumstances establishing the contrary.

[31] The applicant did not seek costs against the respondents but equally submitted that should he not succeed no costs should be awarded against him as he was pursuing his constitutional rights. That notwithstanding, our legal principle provides that every case must be decided on its own merits and the basic rule that, except in certain circumstances where legislation otherwise provides, all awards of costs are in the discretion of the court.

[32] The general principle was set out in the case of *Affordable Medicines Trust and Others v Minister of Health and Others*¹⁸ where Justice Ngcobo said the following:

'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is *frivolous or vexatious*. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.'

[33] In the exercise of my discretion, I consider that this application was launched to be heard a day before the elections; that respondent was dragged to this Court instead of the Electoral Court; that substantive answering papers were filed by the respondent to answer to the allegations by the applicant, I therefore hold the view that the respondent deserves

¹⁷ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction*

Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 674.

¹⁸ 2006 (3) SA 247 (CC) at para 138-139.

to be awarded costs. I am further mindful that the applicant brought the application in his quest to vindicate his political rights and costs should not be imposed, or if need be, should be imposed on a limited scale, lest such costs may be viewed as bar to stop litigants from enforcing what they believe to be their constitutional rights. In the premises, I consider that although the respondent is entitled to its costs, such costs, because of the need to avoid inducing a chilling effect on those genuinely seeking to access the courts to vindicate their rights, the costs due to the applicant will be reduced to 50%.

Order

[36] In the result, the following order is issued:

1. This court declined to exercise jurisdiction in this matter and dismissed the application.
2. The remainder of the application is struck from the roll.
3. The respondent is awarded 50% costs and such to costs to include costs of one instructing and one instructed counsel.
4. The matter is removed from the roll and is regarded as finalised.

O SIBEYA
ACTING JUDGE

APPEARANCES

APPLICANT : C VAN WYK
Of Legal Assistance Centre,
Windhoek

2ND RESPONDENT: S AKWEENDA (with him N Tjahikika)
Of Government Attorney,
Windhoek