

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

HC-MD-CIV-MOT-GEN-2020/00236

In the matter between:

ANDRE FRIEDEL CASTRO DAUSAB

APPLICANT

and

NAMIBIA CORRECTIONAL SERVICE

RESPONDENT

Neutral Citation: *Dausab v Namibia Correctional Service* (HC-MD-CIV-MOT-GEN-2020/00236) [2020] NAHCM 435 (23 September 2020)

Coram: Masuku J

Heard: 07 September 2020

Delivered: 23 September 2020

Flynote: Founding affidavit – Effect of illegible commissioner of oaths stamp - Legislation – Justices of the Peace and Commissioners of Oaths Act 16 of 1963 – Regulations 1 to 4 – Failure to comply with the provisions thereof – provisions merely directory and not peremptory – non-compliance cured by defaulting party tendering a reasonable explanation – where same not done, non-compliance is fatal.

Summary: The applicant deposed to a founding affidavit in support of his application which the commissioner of oaths omitted to sign at the bottom

thereof. The commissioner of oaths did however append what appears to be his stamp, although illegible, on page two of the founding affidavit. As a result of this omission and illegibility which consequently resulted in various other non-compliances, the respondents raised as one of its points *in limine*, the non-compliance with Regulations 1 to 4 of the Justices of the Peace and Commissioners of Oaths Act , 16 of 1963.

Held: It is settled law that non-compliance with the said regulation is not fatal provided that there has been substantial compliance for the reason that the provisions are directory and not peremptory in nature.

Held that: The non-compliance by the commissioner of oaths with the provisions of the Regulations can be condoned by the court sitting, provided that some reasonable explanation for the non-compliance has been tendered by the defaulting party.

Held further: That had it been argued or shown by the applicant that there was substantial compliance, the court may have been in a position to exercise its discretion favourably towards him.

Held that: The court, in these matters, does not exercise any discretion in favour of a party that has not made any case for the court's exercise of its discretion.

Court consequently striking the matter from the court's roll with an order as to costs.

ORDER

1. The application is struck from the roll for non-compliance with Regulation 1 to 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

RULING

MASUKU, J:

Introduction

[1] Serving before court for determination is an urgent application brought by the applicant for the following relief:

‘1.The applicant pray for the Honourable court to kindly condone his non-compliance with the rules of the court; and thus also condone the approaching of the court with an application that may contain basic defects

2 The applicant therefore pray that the Honourable Court to kindly in its discretion and within its capacity to hear, preside and prosecute this matter solely on the merits, due to the fact that the applicant compiled the application without having any legal training, and is a layperson who is incapacitated in a dreadful situation that earnestly and urgently calls for an immediate intervention of this honourable court

3 The Applicant pray that the honourable Court to kindly order the Respondent to absolutely adhere and without delay, commit to the ORDER OF THE HONOURABLE COURT, as sought and called for by the Applicant, as indicated within the affidavit of this application from page 13 (line 68) up to page 16 (line 80)

4 The Applicant pray that the Honourable Court to hear the matter on urgent basis as laid out in Certificate of Urgency.’

[2] It is evident from the relief set out in the notice of motion that the applicant seeks orders that are not particularly specific. However, from a reading of the applicant’s founding affidavit, one can deduce the specific orders sought and these range from, amongst others; compensation for discrimination; torture as well as the return of certain personal items.

[3] As aforementioned, the application was brought on an urgent basis. Whether the matter is indeed urgent or not will be dependent on the court’s finding in relation to the validity of the founding affidavit which is the very foundation of this application.

[4] The respondent opposed the application, raising various points of law *in limine*, including lack of urgency; misjoinder; the inappropriateness of bringing an application for a damages claim; the failure by the applicant to substantiate the amounts claimed; the form and substance of the application not being in compliance with the Rules of Court, as well as the nullity of the founding affidavit and its annexures in as far as it does not comply with the Regulations of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963.

[5] In order to determine whether there even is an application before court to begin with, it is wise to first deal with the allegations of the nullity of the founding affidavit. This is dealt with in the preceding paragraphs.

Non-compliance with Regulations 1 to 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963

[6] A commissioner of oaths is described as a person who is competent to administer an oath. According to Herbstein & Van Winsen,¹ a commissioner of oaths may, within the area for which he or she is appointed, administer an oath or affirmation to or take a solemn or attested declaration from any person, unless prohibited from doing so in terms of regulations made under section 10 of the Justices of Peace and Commissioners of Oaths Act.

[7] The applicant swore to an affidavit before a commissioner of oaths but the commissioner omitted to sign the founding affidavit which was tendered in support of this application at the end thereof. Further to this, all annexures attached to the affidavit are not initialed by either the deponent or the commissioner of oaths. The respondents raised as a point *in limine* that the founding affidavit was irregular in that it was not in compliance with Regulations 1 to 4 of the Justices of the Peace and Commissioners of Oaths Act.

¹ Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, Vol 1 p449.

[8] For the sake of completeness, it would be prudent to outline the provisions of the said Regulations below:

'1. (1) An oath is administered by causing the deponent to utter the following words: "I swear that the contents of this declaration are true, so help me God". (2) An affirmation is administered by causing the deponent to utter the following words: "I truly affirm that the contents of this declaration are true". 2. (1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation 1 he shall ask the deponent - (a) whether he knows and understands the contents of the declaration; (b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on his conscience. (2) If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1(1). (3) If the deponent acknowledges that he knows and understands the contents of the declaration but objects to taking the oath or informs the commissioner of oaths that he does not consider the oath to be binding on his conscience the commissioner of oaths shall administer the affirmation prescribed by regulation 1(2). 3. (1) The deponent shall sign the declaration in the presence of the commissioner of oaths. (2) If the deponent cannot write he shall in the presence of the commissioner of oaths affix his mark at the foot of the declaration: Provided that if the commissioner of oaths has any doubt as to the deponent's inability to write he shall require such inability to be certified at the foot of the declaration by some other trustworthy person. 4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration. (2) The commissioner of oaths shall sign the declaration and state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.'

[9] When regard is had to the provisions of the Regulations cited above, it is clear that the applicant's founding affidavit is defective in a number of respects. There is what purports to be a commissioner of oaths stamp at the very beginning of the affidavit but, same is illegible. It is thus not clear whether the words as provided for in Regulation 1 were in fact uttered, and if they were uttered, who caused them to be so uttered; the designation, amongst other

things, of the commissioner of oaths that placed the stamp on the affidavit is not known as is required in terms of Regulation 4.

Analysis

[10] It is settled law that non-compliance with the regulations is not fatal, provided that there has been substantial compliance for the reason that the provisions of the said are directory and not peremptory in nature.²

[11] It was held in *Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder (Pty) Ltd*³ that the court has a discretion, in a suitable case, to allow evidence to be produced on the question whether in reality the provisions were satisfied or not, before a decision is arrived on the information so produced.

[12] The learned authors Herbstein & Van Winsen state that the provisions of the said regulations are directory and not peremptory and therefore, the court has a discretion as to how it deals with the matter.

[13] It was stated in *S v Munn*⁴ that:

‘Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence, where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above.’

[14] In *S v Msibi* 1974 (4) 821 (T) it was held that:

‘In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been substantial compliance with the requirements.’

[15] A reading of the case law clearly suggests that the non-compliances with the regulations can be overlooked by the court sitting provided of course that some reasonable explanation for the non-compliance has been tendered.

² *Herbstein & Van Winsen ibid* p 451.

³ 1981 (1) SA 697 (O) at 699 A-D.

⁴ 1973 (3) 734 (NC) at 737H.

[16] However, it is evident from the papers that the issue was raised by the respondent in its Rule 66 (1)(c) papers but same was not addressed by the applicants in his reply. In fact, the applicant went to the extent of stating in his reply that the points raised by the respondent including the defective affidavit, did not have any bearing on the application at hand for the reason that he is a lay litigant and the court was duty bound to enforce its constitutional duty as well as that of the applicant, to hear the matter and not merely strike it from the roll.

[17] It is worth noting that the issue of the non-compliance with the regulations was raised in argument but the applicant did not address the issue. The only reason he proffered to the court for the non-compliances was for it to take notice of the fact that he is a lay litigant and to rather deal with the merits of the applications as opposed to the preliminaries. What is clear is that had it been shown by the applicant that there was substantial compliance, the court would have been in a position to exercise its discretion favourably towards him.

Conclusion

[18] The applicant had the prerogative to present evidence to the court that he had to a certain extent, complied substantially with the regulations seeing that they are merely directory and not peremptory in nature. It does of course suffice to state that the affidavit as it stands is irregular. There is thus no proper application before the court. The proceedings are therefor fit to be struck from the roll.

Order

[19] The order that the court makes in the circumstances is the following:

4. The application is struck from the roll for non-compliance with Regulation 1 to 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.
5. There is no order as to costs.
6. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES

APPLICANT: A. Dausab
Applicant in person

RESPONDENT: N. Tjahikika
Of The Office of the Government Attorney
Windhoek