

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING URGENT APPLICATION

Case no.: HC-MD-CIV-MOT-GEN-2020/00290

In the matter between:

PHELEM MASEKA MASULE

APPLICANT

and

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	1st RESPONDENT
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	2nd RESPONDENT
CHAIRPERSON PUBLIC SERVICE COMMISSION	3rd RESPONDENT
PUBLIC SERVICE COMMISSION	4th RESPONDENT
DIRECTOR GENERAL OF THE ANTI-CORRUPTION COMMISSION	5th RESPONDENT
ANTI-CORRUPTION COMMISSION	6th RESPONDENT
EXECUTIVE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION	7th RESPONDENT
HANNU SHIPENA (N.O.)	8th RESPONDENT
JUSTINE KANYANGELA	9th RESPONDENT
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	10th RESPONDENT

Neutral citation: *Masule v Prime Minister of the Republic of Namibia* (HC-MD-CIV-MOT-GEN-2020/00290) [2024] NAHCMD 76 (1 March 2024)

Coram: RAKOW J

Heard: 18 January 2024

Delivered: 1 March 2024

Flynote: Practice – Applications and motions – Rule 121 of the High Court Rules – Section 9 of the Public Service Act 13 of 1995 – Leave to execute the judgment – High potential of sustaining irreparable harm if the relief is not granted – Respondent has slim prospects of appealing the matter successfully.

Summary: The applicant seeks leave to execute the judgment of this court, delivered on 25 April 2023, to be allowed to take up employment in the position of Chief: Investigation and Prosecution with the Anti-Corruption Commission, pending the appeal by the First, sixth and tenth Respondents.

Held that the applicant is qualified for the job and was in fact recommended for the position by the Public Service Commission and the Interview Panel. This position has further not been filled since before 29 November 2019 when it was advertised in the newspapers. At all times there has been an acting Chief Investigator in the position and at some stage the applicant was acting in the said position.

Held that the court further took into account that the applicant will reach the age of 60 at the end of March 2024 and if relief is granted will effectively only work for one month in the position, reducing the possible harm that the respondent might suffer significantly. This harm is however not irreparable as the respondent will still have a claim against the pension money and property of the applicant, should their appeal be successful. The respondent has in any event not indicated to the court's satisfaction, what irreparable harm they might suffer if the relief is granted. On the other hand, the applicant faces a high potential of sustaining irreparable harm if the relief is not granted in that he will end his career as a civil servant in his current rank and never have the satisfaction of achieving the top position that he was recommended for.

Held further that the respondent has slim prospects of appealing the matter successfully and for that reason I will grant the application of the applicant for the execution of the relief that he initially received from this court

ORDER

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1. The judgment dated 25 April 2023 be carried into execution pending the appeal lodged with the Supreme Court.
 2. Cost of this application awarded to the applicant on party to party scale.
 3. The matter is finalised and removed from the roll.
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JUDGMENT

RAKOW J:

Introduction

[1] The applicant seeks leave to execute the judgment of this court, delivered on 25 April 2023, to be allowed to take up employment in the position of Chief: Investigation and Prosecution with the Anti-Corruption Commission (ACC), pending the appeal by the first, sixth and tenth respondents.

[2] From the founding affidavit, opposing affidavit, and supporting affidavits, the following background information to this application emerges. The position of Chief: Investigations and Prosecutions Grade 3 at the Anti-Corruption Commission (ACC) became vacant and was advertised in local newspapers like the Namibian on Friday 29 November 2019.¹ The advertisement listed the requirements that the applicants need to meet to qualify to be invited to an interview. This includes the attachment of certain documentation to the said application, with the condition that incomplete applications or applications without confirmation of satisfactory completion of the probationary period will be disqualified. The closing date for submission of the applications was 23 December 2019.

[3] The interviews were conducted on 16 June 2020. Nineteen applications were received of which only nine met the advertised requirements and were invited to the interview. It seems that four of these applications did not attach all or some of the required documents and were contacted by a Senior Human Resources Practitioner of the ACC, who asked them via email to submit outstanding or incomplete documentation.

¹ Annexure D2 of the opposing affidavit of Saara Kuugongelwa-Amadhila.

[4] The interview took place and the panel recommended the applicant, although he was not the highest scoring candidate, but second highest. Mr Hannu Shipena the then Executive Director of the ACC wrote a submission dated 24 June 2020, addressed to the Deputy Executive Director for the Department Public Service Commission Secretariat, recommending Mr Iyambo, the candidate who scored the highest for the position and therefore overriding the recommendation of the interview panel.²

[5] This recommendation was forwarded to the Public Service Commission and they concluded that Mr Iyambo did not submit all the needed documentation with his application and was asked to do so after the closing date for submitting the applications and should have been excluded from the selection process since his application was incomplete. The commission in terms of s 5(1) of the Public Service Act 13 of 1995 recommended the promotion of Mr Masule (the applicant) to the post and cautioned the Agency in the future not to deviate from their advertisement conditions as this might create a precedent.

[6] In a letter, addressed to both the Prime Minister³ and the Director General of the ACC⁴ dated 17 July 2020, Mr Iyambo complained that although he attached both his driver's license and the confirmation of probation letter to his original application, he was called at a later stage to again submit those documents. He further claimed that the security screening that should form part of the requirement process did not take place and the process proceeded without it. The recommendation of the interview panel was in favour of promoting an ACC staff member and not the best performer in the interview. He then requested an investigation into his complaint. He advised that it should be addressed to the Deputy Executive Director: Secretariat of the Public Service Commission.

[7] The Prime Minister also reacted on the complaint received by her office. She shared the complaint with the Chairperson of the Public Service Commission and requested all relevant documents from him.

² See annexure D4 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

³ See annexure SKA-OPP-1 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

⁴ See annexure PN 1 to the opposing affidavit Paulus Kalomho Noa.

[8] The Prime Minister then forwarded all the documents she received to the Secretary to Cabinet on 21 July 2020 and asked him to review the documents against Mr Iiyambo's written complaint and to advise her. She received his advice the next day. In the report⁵ it was pointed out to her that the advertisement indicated that 'incomplete applications or applications without confirmation of satisfactory completion of the probation period will be disqualified'. The ACC further received nineteen applications and only nine met the advertised requirements. Four of these candidates did adhere to the advertisement and attached their documentation required as per the advert. The report then deals with the recommendation of the Public Service Commission and then made certain observations regarding the deviation from the requirements as set out in the advertisement when allowing applicants with incomplete documentation to submit these after the closing date.

[9] The Secretary to Cabinet was of the opinion that the ACC has waived its requirement for compliance and as a result, the non-adherence to the advertisement requirement cannot be used to disadvantage candidates who submitted their documentation late. He further observed that the non-compliance principle to eliminate and disqualify candidates has therefore rendered the entire process unfair and unlawful and the recommendation of the second candidate based on personal attributes above the candidate who scored the highest marks has further rendered the process subjective, contrary to professional ethics and administrative fairness.

[10] The Secretary to Cabinet advised that the entire recruitment process was flawed and should be declared null and void in terms of the existing law and recommended that the Prime Minister approach His Excellency, the President to vary or reject the recommendation of the Public Service Commission, in terms of s 9(a) of the Public Service Act 13 of 1995. She was further advised to also discuss the matter with the Chairperson of the Public Service Commission, which she did on 24 July 2020. She was informed that the Public Service Commission had been advised previously that they could not change their recommendation once such a recommendation has been relayed to the person affected by the recommendation. She further also sought advice from the Office of the Attorney-General and was advised to write to the applicant, to communicate her decision.

⁵ See annexure SKA-OPP 4 to the opposing affidavit of Saara Kuugongelwa-Amadhila.

[11] She informed the applicant, Mr Masule in a letter dated 31 July 2020⁶ and received by Mr Masule on 3 August 2020 that she is exercising her powers in terms of s 7(2) of the Public Service Act which allows her to vary or set-aside decisions of an Executive Director.

The applicable statutory provisions

[12] The Public Service Commission is established according to Article 112 of the Constitution with Article 113 setting out its functions.

‘(1) There shall be established a Public Service Commission which shall have the function of advising the President on the matters referred to in Article 113 hereof and of reporting to the National Assembly thereon.

(2) ...

(3) ...

(4)...

Article 113 Functions

The functions of the Public Service Commission shall be defined by an Act of Parliament and shall include the power:

(a) to advise the President and the Government or:

(aa) the appointment of suitable persons to specified categories of employment in the public service, with special regard to the balanced structuring thereof;

(bb) ...

(cc) ...

(dd) ...

(b) to perform all functions assigned to it by Act of Parliament;

(c) to advise the President on the identity, availability, and suitability of persons to be appointed by the President to offices in terms of this Constitution or any other law.’

[13] The next piece of legislation important to this matter is the Public Service Act 13 of 1995. Section 5 of this Act sets out the functions of the Prime Minister in relation to the Public Service and specifically in s 5(1) refers to the appointment, promotion, transfer, or discharge of a person. It reads:

⁶ See annexure PM2 to the founding affidavit of Phelem Masule.

'(1) The appointment of any person to, or the promotion, transfer or discharge of any staff member in or to or from, the Public Service shall be made by the Prime Minister on the recommendation of the Commission in accordance with the provisions of this Act.'

[14] This section deals with the role of the first respondent. She is to receive a recommendation from the Public Service Commission and then act per that recommendation. It is contended that the Prime Minister indeed acted in terms of s 7(2)(a) although the letter written by the Prime Minister on 31 July 2020 refers to s 7(2)(b). Section 7 (1) and (2)(a) and (2)(b) of the Public Service Act says the following:

'(1) The Prime Minister may, subject to such conditions as he or she may determine, delegate any power, excluding the power to make regulations under section 34 or assign any duty entrusted to him or her by or under this Act to any staff member or staff members in any office, ministry or agency.

(2)(a) A delegation or assignment under subsection (1) shall not divest the Prime Minister of any power delegated or duty assigned, and he or she may at any time vary or set aside any decision made thereunder.

(b) If a decision so varied or set aside relates to any person, that person may, within 14 days after the variation or setting aside of the decision, make written representations to the Prime Minister in connection with such variation or setting aside.'

[15] Section 9 of the Public Service Act regulates the rejection or variation of the Commission's recommendations or advice and reads as follows:

'After consultation with the Commission-

(a) the President may vary or reject any recommendation relating to the Public Service made by the Commission in terms of this Act or any other law;

(b) the Prime Minister may vary or reject any advice relating to the Public Service given by the Commission in terms of this Act or any other law.'

[16] From the reading of this section it must be understood that only the President may vary or reject any recommendation relating to the Public Service made by the

Commission in terms of this Act or any law and the Prime Minister's role is limited to the rejection of advice provided by the Commission.

[17] In terms of legislation some regulations and staff rules were also published. These regulations and rules are the tools with which the public service is managed. In terms of Public Service Staff Rule 5.1 the Public Service Commission is the decision maker concerning complaints that may arise in terms of recruitment to and promotion in the public service. Part I of Public Service Staff rule B.II rule 5 names the stakeholders in the recruitment process and refers to the Prime Minister and the Public Service Commission as follows:

'In terms of Section 5(1) of the Public Service Act, 1995, the appointment of any person in the Public Service is made by the Prime Minister on the recommendation of the Public Service Commission. The approval and recommendation of appointments at certain levels have been delegated (See Delegations of the Prime Minister) in order to support the speedy filling of posts.

The Public Service Commission

The Public Service Commission is the arbiter of transparency and fairness of recruitment and selection in the Public Service. The Public Service Commission will continue to assess the level of transparency and fairness in the application of the process. Any part of the process, including the style used in an advertisement, medium of advertising, etc. can thus be ruled unfair by the Public Service Commission. It may as a result withdraw any delegation at any time if it is deemed appropriate.'

[18] It is clear that the Public Service Commission is the decision maker and also the body that deals with complaints. In this instance, the Public Service Commission indicated that they stand with their decision.

[19] The court found that the first respondent only plays the role of putting into effect the decisions of the fourth respondent. It was clear that the first respondent acted in circumstances where she had no power to act. The determination of complaints rests with the fourth defendant as they are the impartial, independent body created to deal with complaints. They had to arrive at a just and fair decision regarding promotions in public service. At most, the Prime Minister should have looked into the decision and advised the President as he is the next role player that can decide to either confirm or set aside the recommendation of the Public Service.

The Prime Minister's decision of 31 July 2020 is therefore reviewed and set aside as the decision ultimately rests with the President of the Republic of Namibia.

[20] It is against this finding that an appeal currently lies at the Supreme Court of Namibia.

The arguments by the parties

[21] It was argued by the applicant that it is common cause that the first respondent has no power to set aside a recommendation which directs the promotion and appointment of the applicant. The Public Service Commission did not appeal the order issued by this Court and has a binding recommendation that has not been set aside.

[22] It is further not disputed that the applicant is suitably qualified, experienced and able to occupy the position. It's further not disputed that the position is vacant and the person currently in it is acting in the position.

[23] According to the respondent's arguments, the applicant's reason for seeking to execute the judgment is that the applicant wishes to carry out the duties of Chief Investigations and prosecution as he will suffer potential harm and prejudice because the appeal will not be determined before his retirement date. But that contention, even if the facts upon which it is based are correct, it is not sufficient to justify execution of the judgment pending the outcome of the appeal principally because:

(a) First, the Applicant does not and will not suffer irreparable prejudice in the event he is not reinstated to perform functions and duties as the Chief Investigations and Prosecutions of the Anti-Corruption Commission. The Applicant will be adequately compensated for such benefits and emoluments as may be due to him in the event the appeal is dismissed. The First Respondent's answering affidavit in this application has confirmed this fact, and the Applicant has not disputed it at all.

(b) Secondly, there is at present, an acting appointee for the post of the Chief Investigations and Prosecutions of the Anti-Corruption Commission, Mr Justine Kanyengela. Again the Applicant does not dispute this fact. In the event the Applicant is reinstated then the Anti-Corruption Commission will have to relieve Mr Kanyengela from that post pending the

outcome of the appeal. What is clear though, is that the re-instatement of the Applicant, pending the determination of the appeal, will be for the short period of time, i.e to March 2024, when the Applicant will reach his retirement age. This fact too, is common cause. What these facts reveal is that the quest for re-instatement is simply for a short period of time which is likely to render the appeal moot.

(c) Thirdly, the First Respondent will or is likely to suffer irreparable prejudice because the decision of the First Respondent to set aside the appointment of the Applicant, which is the subject-matter of the appeal, will or is likely to be rendered moot, in the event the applicant is re-instated in the above circumstances, pending the outcome of the appeal.

(d) Fourthly, crucially, upon the immediate implementation of the judgment of this Court pending the determination of the appeal, the Anti-Corruption Commission will be compelled not only to re-instate the applicant in the post of the Chief Investigations and Prosecutions of the Anti-Corruption Commission but also to pay him salary for that post. The Respondent will therefore suffer the consequences of having paid the Applicant more than what he was entitled to, in the event the appeal it succeeds.

(e) Fifthly, the effect of the relief sought by the Applicant in this application is to anticipate and render moot the very issue the Supreme Court will be called upon to determine on appeal, namely - whether the Applicant was and is entitled to compensation as the Chief Investigations and Prosecutions of the Anti-Corruption Commission. This will render the appeal moot when there is no basis to do so.'

Case law applicable

[24] Rule 121 of the High Court Rules reads as follows:

(1) Notice of an appeal to the Supreme Court against a judgment or order of the court must be filed in accordance with the Rules of the Supreme Court.

(2) Where an appeal to the Supreme Court has been noted the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.

(3) If the order referred to in subrule (2) is carried into execution by order of the court the party requesting the execution must, before such execution, enter into such security de restituendo as the parties may agree or in the absence of an agreement, the registrar may

decide, for the restitution of any amount obtained on the execution, which amount includes capital and interest, if so ordered, and taxed costs and the registrar's decision is final.'

[25] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*⁷ Corbett J gave the following guidelines regarding this discretion:

'This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton*, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

[26] The underlying rationale for an order for leave to execute pending an appeal was explained as follows in *South Cape Corporation* as follows:

'... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's case supra* at p 513⁸). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet 49.7.3; *Ruby's Cash Store (Pty) Ltd. V Estate Marks and Another supra* at p 127⁹). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments'

⁷ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (2) SA 534 (A).

⁸ *Reid and Another v Godart and Another* 1938 AD 511.

⁹ *Ruby's Cash Store (Pty) Ltd v Estate Marks* 1961 (2) SA 118 (T).

[27] In *Hardap Regional Council v Sankwasa and Another*,¹⁰ Parker AJ held that:

‘It was held in *Wood NO v Edwards & Another* 1966 (3) SA 443 (R) that where no question of irreparable harm arises from execution, the question whether execution should be ordered will depend on whether there are reasonable prospects of success on appeal; but if the entire object of the appeal would be nugatory if execution were to proceed, the Court has no right to deal with the matter on the basis of whether there are reasonable prospects of success on appeal. It would then be that the question before the Court ‘must be resolved on the respective potentiality for irreparable harm or prejudice being sustained by the applicant and the respondent respectively.’ (*Tuckers Land and Development Corporation v Soja* 1980 (1) SA 691 (W) at 696E-F). This proposition is predicated on “the purpose of the (common law) rule as to the suspension of a judgment on a noting of an appeal is to prevent irreparable damage from being done to the intending appellant ...” (*Soja* supra at 696G, approving *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545B-C).’

Application of the legal principles on the facts of the matter

[28] In applying the legal principles to the current matter, the court took into account that the applicant is qualified for the job and was in fact recommended for the position by the Public Service Commission and the Interview Panel. This position has further not been filled since before 29 November 2019 when it was advertised in the newspapers. At all times there has been an acting Chief Investigator in the position and at some stage the applicant was acting in the said position.

[29] The court further took into account that the applicant will reach the age of 60 at the end of March 2024 and if relief is granted will effectively only work for one month in the position, reducing the possible harm that the respondent might suffer significantly. This harm is however not irreparable as the respondent will still have a claim against the pension money and property of the applicant, should their appeal be successful. The respondent has in any event not indicated to the court’s satisfaction what irreparable harm they might suffer if the relief is granted. On the other hand, the applicant faces a high potential of sustaining irreparable harm if the relief is not granted in that he will end his career as a civil servant in his current rank

¹⁰ *Hardap Regional Council v Sankwasa and Another* (LC 15/2009) [\[2009\] NALC 4](#) (28 May 2009) para 9.

and never have the satisfaction of achieving the top position that he was recommended for.

[30] I am further of the opinion that the respondent has slim prospects of appealing the matter successfully and for that reason I will grant the application of the applicant for the execution of the relief that he initially received from this court.

[31] I therefore make the following order:

1. The judgment dated 25 April 2023 be carried into execution pending the appeal lodged with the Supreme Court.
2. Cost of this application awarded to the applicant on party to party scale.
3. The matter is finalised and removed from the roll.

E RAKOW
Judge

APPEARANCES

APPLICANT: T Chibwana
Instructed by Shakwa Nyambe & Co Inc.
Windhoek.

RESPONDENT: R Maasdorp
Instructed by the Government Attorney
Windhoek.