

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-MOT-REV-2017/00020

In the matter between:

ANDREAS MWOOMBOLA

APPLICANT

and

GEORGE SIMAATA

1ST RESPONDENT

SHIVUTE INDONGO

2ND RESPONDENT

ONO NANGOLO

3RD RESPONDENT

RECTOR FINYEHO

4TH RESPONDENT

BERNARD HAUFIKU

5TH RESPONDENT

SAARA KUUGONGELWA

6^H RESPONDENT

CHAIPERSON OF THE LABOUR COURT

7TH RESPONDENT

THE JUDGE PRESIDENT

8TH RESPONDENT

THE ATTORNEY-GENERAL

9TH RESPONDENT

Neutral Citation: *Mwoombola v Simaata* (HC-MD-LAB-MOT-REV-2017/00020) [2020] NALCMD 2 (23 January 2020)

CORAM: MASUKU J

Heard: 18 June 2019

Delivered: 23 January 2020

Flynote: Labour Law - review of decision to appoint certain individuals to conduct disciplinary proceedings and the setting aside of decision to set up a disciplinary committee – Civil Procedure – amendment of case management report in cases where new points of law have arisen - Legislation – provisions taking up new employment during a suspension or in the course on-going disciplinary proceedings – Mootness – when the principle applies.

Summary: The applicant, who was a Permanent Secretary, was hauled by the Secretary to Cabinet on allegations of impropriety before a disciplinary committee. The applicant questioned the appointment of the said disciplinary committee and the suitability and fitness of the members of the committee. He launched proceedings before court challenging the said issues. During the pendency of the matter, and the disciplinary proceedings, the applicant resigned from the Government service. Before the hearing of the matter, the respondents sought to raise the issue of mootness of the proceedings on account of the applicant having resigned from the Government service. In particular, the respondents relied on s 27(19), which deems an employee who resigns or takes up new employment while under suspension or in the course of disciplinary proceedings, to have been discharged on account of the misconduct.

Held: that the case management order issued by the court in terms of rule 71, is binding on the court and the parties and that where a new issue surfaces which was not included in the case management order, the party raising it must approach the court and apply for the issue to be included.

Held that: parties may not, in the era of judicial case management, willy-nilly raise new issues not sanctioned by the court as that has the potential to affect the proper management and finalisation of proceedings.

Held further that: in general, the court should use its time and resources on both points of law in limine and the merits in one sitting to avoid a multiplicity of hearings and running up costs and inefficient use of the judicial time and resources.

Held that: the issues raised by the applicant in his notice of motion had been rendered moot by the fact that he had resigned from the public service. This was because of the provisions of s 27(19) of the Public Service Act, 1995, which deem a person who resigns in the course of disciplinary proceedings, to have been discharged on account of misconduct.

Held further that: the reason for the enactment in question, is to prevent an employee facing charges of misconduct from escaping the possible guilt by tendering a resignation during the disciplinary process, thus attracting the advantages of a resignation. The resignation, which is a tactical ploy, to avoid charges and a finding of misconduct must not be allowed to be an avenue of escape from guilt.

Held: that to escape the consequences of the deeming provision, the onus would be on the employee who wishes to resign or to take up new employment in the course of a suspension or disciplinary proceedings, to demonstrate to the satisfaction of the employer instituting disciplinary charges that he or she will avail himself for the disciplinary proceedings until completion of same and it is only in those circumstances that the deeming provision can be prevented from operating as a matter of law.

Held that: mootness applies in circumstances where the dispute initially submitted for resolution has, in the interregnum become an abstract question of law and no longer a live controversy amenable to determination by the court.

The application was accordingly regarded as moot and dismissed accordingly.

ORDER

1. The applicant's application for review is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The nature of the question for determination seems to have mutated somewhat as the matter progressed and reached maturity for hearing.

[2] In the main, the applicant approached this court seeking an order from this court in terms of which a decision by the 1st respondent, the Secretary to Cabinet, to establish a disciplinary committee to preside over a disciplinary case against him, is set aside and also setting aside the appointment of the individuals mentioned as the 2nd, 3rd and 4th respondents in the above citation, as members of the disciplinary committee.

[3] It is not necessary, at this juncture to traverse the bases upon which the applicant predicated the prayers sought, as captured above. As the matter proceeded towards hearing, after the case management order had been issued by the court, the 1st respondent sought to introduce a new point of law *in limine*, that he prayed be dispensed with before the other issues on the merits are decided by the court.

[4] That question of law, relates to the effect of the applicant's decision to resign from the employ of the Government of the Republic of Namibia, particularly viewed from the prism of the provisions of s 27(5) of the Public Service Act, as read with s 27(19) of the said Act.¹ The contents of the said provisions will be reproduced in due course.

¹ Act No. 13 of 1995.

[5] In response to Mr. Marcus' application that the court deals solely with the point of law *in limine*, the court refused to allow that application. This was to avoid a situation where if the court was, on the issues advanced, minded to dismiss the point *in limine*, then the parties would have been required to obtain a fresh date of hearing to deal with the merits of the application, which is a costly and time-consuming enterprise, that should ideally be avoided.

Procedural issue

[6] I find it imperative, at this juncture, to mention that the provisions of the rules relating to the identification of issues in dispute for the court to determine at the hearing in terms of rule 63 of the High Court Rules, (which apply *mutatis mutandis* to proceedings before this court, are not idle additions to the text.

[7] In terms of rule 71 (2) and (4) of this court's rules, the parties should identify the issues for determination by the court and if satisfied thereby, the court endorses the joint case management report by the parties and makes it an order of court in terms of rule 71(8). In that sense, it becomes binding both to the court and to the parties in relation to what matters are not in dispute, but more importantly, as to what matters are in dispute. It is for that reason, in a sense, cast in stone.

[8] Where either party belatedly adopts the view that it does not fully or accurately reflect the true issues in dispute, especially where after reflection, and due to a recent epiphanous moment, a new legal issue for determination comes to light, a party may not then seek to introduce that new issue *mero motu* or even with the concurrence of the other side.

[9] The court must be timeously approached with a view to, on good cause shown, amending the case management order, it standing to reason that good reasons must be advanced to the satisfaction of the court as to why this new legal issue must be added at that late juncture. That is especially the case where the new issue raised has the potential to upset the applecart, as it were.

[10] It is clear that before the judicial case management era, the approach was that points of law *in limine* could be raised at any time, even at the hearing of the matter. Judicial case management has altered that landscape considerably and parties may not, willy-nilly add new issues for determination in oblivion to what they committed themselves to in the case management report, which was made an order of court. See *Van Zyl v Welwitchia Private School*.²

[11] I allowed the parties in the instant case, to argue the new issue, as there was some notice and any prejudice by the applicant and the court, was minimised. This must not, however, be regarded as a licence to a party to merely pay lip service to the provisions of rule 71. To do so at this day and age, may usher a rude awakening for the errant party. It is in that context that the court ended up entertaining the new question introduced by the respondents belatedly.

Background

[12] The matter appears to have a convoluted and chequered history. I will not, in the circumstances, burden this judgment with unnecessary trivia, but will attempt to refer only to those issues that are germane to the present enquiry or which conduce to an understanding of how the present litigation came about.

[13] The applicant was appointed as the Permanent Secretary for the Ministry of Health and Social Welfare. He was working under the supervision of the Minister of Health, cited in these proceedings, as the 5th respondent. It would appear that after a brief blissful honeymoon period following his appointment, things came to a head when there appeared to be some misunderstanding between the applicant and his Minister.

² (Case No: HC-MD-CIV-MOT-GEN-2018/00196) [2019] NAHCMD 486 (15 November 2019) from para 23 to 32.

[14] This eventually culminated in allegations of corruption being levelled against the applicant by the Anti Corruption Commission. In the wake of those allegations, the applicant was suspended, an issue that he did not take lying down. It would appear though that the suspension was later lifted. Disciplinary proceedings in due course commenced after the 1st respondent appointed the members of same.

[15] As the disciplinary proceedings were in motion, the applicant approached this court essentially attacking the decision to appoint the individuals mentioned earlier to conduct the proceedings against the applicant. He takes the view that the members of the said committee are public officials and are therefor junior to him in rank. As a result, he contends, their independence and impartiality is compromised, contrary to Art 12(1) of the Constitution of Namibia. It is for that reason that he seeks an order setting aside their appointment.

[16] The applicant further cries foul regarding the manner in which the members of the disciplinary committee are conducting the proceedings against him. First is the allegation that they are not suitable to preside over disciplinary proceedings against him for the reasons mentioned in the immediately preceding paragraph. The applicant further alleges that the committee appears to not apply its mind properly in dealing with the proceedings and that they do not understand the applicable legal principles in such cases.

[17] Lastly, the applicant claims that the members of the committee appear to be acting on instructions, ostensibly, to give him a hell ride during the proceedings and further lack the competence to act fairly and justly towards him in the matter. It is for the above reasons that this court is in broad strokes, moved to set aside the decisions referred to above.

[18] Naturally, the 1st respondent denies these allegations and has put up a version materially opposed to that of the applicant. I will not deal in any length with the assertions of the respondents, in the light of the point of law that the

respondents raised as intimated earlier in the judgment. I proceed to deal with that issue below.

Mootness

[19] The issue of mootness has been dealt with in a number of cases in the region. In *National Coalition for Gay and Lesbian Equality And Others v Minister of Home Affairs*³ the South African Constitutional Court reasoned as follows on the issue:

‘A case is moot and therefore not justiciable if it no longer presents an existing and live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

[20] In dealing with the same issue, Plewman JA, in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers*,⁴ cited with approval, the words that fell from the lips of Lord Bridge of Harwich in *Ainsbury v Millington*,⁵ where the following was stated:

‘It has always been a fundamental feature of our judicial system that the Courts decide disputes between parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.’

[21] The question to be investigated, is whether the respondents are correct in submitting that the instant case falls within the full realms of matters that can be properly described as moot, in the manner described in the immediately preceding judgments. The correctness of the submission by Mr. Marcus will be investigated presently.

[22] It is common cause between the parties that the applicant, after launching these proceedings, resigned from his position during February 2019. This, it must be mentioned, was during the pendency of the proceedings. It is the respondents’ position that in light of the resignation, a

³ 2000 (2) SA 1 (CC).

⁴ 2001 (2) SA 872 (SCA), para 9.

⁵ [1987] 1 All ER 929 (HL) 930 (g).

deeming provision in the Act comes into force and thus renders the application moot or academic, in the circumstances. This position, the respondents further argue, is based on the provisions of s 26(19) of the Act.

[23] It is the respondents' position that the effect of the invocation of the provision in question, is to deem the applicant discharged from the Government's service and that in the circumstances, it would make little or no sense at all for the court to proceed and determine the application for review. According to the respondents, the applicant's disciplinary action was put to an end by operation of the law, thus rendering the application before court clearly academic. The applicant, for his part, takes a different stance on this issue, arguing that when the applicant was deemed discharged, there was no lawful process that was in place.

[24] In order to decide this issue, it important to cite the relevant provisions of the Act. Section 26 (19) of the Act provides the following:

'Any staff member, who while suspended under subsection 2(a) or while a charge brought against him or her under this section has not been finally dealt with in accordance with the provisions of this section, resigns from the Public Service or assumes duty in other employment, shall be deemed to have been discharged on account of the misconduct with effect from the date on which he or she resigned or assumed duty in other employment.'

[25] Before dealing with the implications of this provision, it is important to point out that notwithstanding the use of the words 'staff member' at the commencement of the section quoted above, there is no doubt that the provision also applies to persons in the position of the applicant. That this is so can be seen from the provisions of s 27(5) of the Act.

[26] The said provision provides the following:

'The provisions of subsections (6) to (19) inclusive, of section 26, shall, subject to necessary changes, apply to an enquiry contemplated in subsection (4), and for that purpose any reference in subsections (12)(a), (13), (15)(a)(iii) and (iv),

and (17)(a), of that section to the permanent secretary shall be construed as a reference to the Secretary to Cabinet.'

[27] It is accordingly clear that the deeming provision in question beyond applying to staff members in the Public Service, also applies to Permanent Secretaries, of whom the applicant was one at the time he launched the application in question.

[28] Reverting to the earlier provision, it becomes clear that for it to be deemed to have come into operation, the following jurisdictional facts must be proved:

- (a) a staff member, including, in our case, a Permanent Secretary (now Executive Director), must have, in the course of employment with the Government, been suspended or have disciplinary proceedings instituted against him or her;
- (b) during the course of such suspension or disciplinary proceedings, before completion of the proceedings or the setting aside or withdrawal of the suspension, the said employee must either resign or assume duty in other employment.

[29] If the above jurisdictional facts are proven and the employee either resigns or assumes duty elsewhere, then the said employee is deemed to have been discharged from the Public Service on account of misconduct. This is deemed with effect from the date of assumption of duty or date of resignation by the said employee, as the case may be.

[30] It was Mr. Marcus' argument that the applicant's case fits hand in glove with the requirements of s 27(19) in the sense that all the jurisdictional requirements have been met. As such, he further argued, the applicant must be deemed to have been discharged from employment from the date of his resignation, meaning that the disciplinary proceedings that had been instituted against him became terminated as a result of this provision. Is he correct in this argument?

[31] I am of the considered view that considered very closely, the applicant's circumstances answer to all the jurisdictional facts contemplated in the s 26(19). In this regard, there is no doubt that he was first suspended from employment, although this suspension was subsequently lifted. Thereafter, he was charged with disciplinary offences to which he submitted himself to an official enquiry.

[32] It was in the course of these proceedings that he launched the instant application, seeking to set aside the proceedings and rendering the disciplinary committee unsuitable in terms of the law. During the pendency of these proceedings, the applicant then decided to resign from the employment in question. It is thus clear that he meets all the requirements for the operation of the provision in question.

[33] The words 'deemed', as used in the above provisions have been the subject of judicial interpretation in *R v Rosenthal*.⁶ In interpreting these words the Appellate Division of South Africa, expressed itself as follows:

'The words "shall be deemed" are a familiar and useful expression often used in legislation in order to predicate that a certain subject matter, e.g. a person, thing, situation or matter, shall be regarded or accepted for the purpose of the statute as being of a particular, specified kind whether or not the subject matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following: That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrary thereto, as being merely prima facie or rebuttable is likely to be supplementary and not exhaustive.'

[34] In the sense employed by the Legislature in this context, it would appear that the intention was to regard or consider a person who either

⁶ 1980 (1) SA 65 (A) p 75-76.

resigns or takes up alternative employment whilst a suspension obtains or disciplinary proceedings are pending, to have been discharged on account of misconduct. In this regard, it would appear to me, the onus is on the person taking the positive action contemplated, to take legal steps that would prevent the deeming provision from taking place.

[35] I am not required to state when such action should be taken, namely whether before or after the action deemed to have the consequence contemplated by Parliament in the provision. If no steps are taken, and the jurisdictional requirements are all met, as in this case, then, the person, in this case the applicant, is deemed to have been discharged for misconduct and that is exhaustive of the subject matter in the present circumstances.

[36] The next question to consider, is this – what is the purpose of a provision such as the one under consideration in this case? I do not need to move the heavens and try and reinvent the wheel in this regard. The Appellate Division, in South Africa, dealt with the *raison' detre* of a similar provision in that country's statute books in the following language:⁷

'It is to prevent someone who is facing charges of misconduct from ducking these charges by resigning and attracting the advantages of a resignation in good standing. It is to ensure that, if anybody resigns while he is facing charges, he will be in as bad a position as he would have been if the charges had been found proved and he had been dismissed on account of them. So what is prevented is, as I say, a resignation attempt to avoid the charges and to prevent the misconduct from being investigated and its presence or otherwise determined.'

[37] Coming back home, this court commented as follows on the issue:⁸

'An officer who resigns while under suspension shall be deemed to be discharged on account of misconduct. In effect, it means that his resignation is deemed to be an admission of misconduct justifying a discharge from a date specified by the Minister. So too, if the officer, without formally resigning, assumes other employment.'

⁷ *Masinga v Minister of Justice, Kwazulu Natal Government* 1995 (3) SA 214 (A) p 217 to 218.

⁸ *Njathi v Permanent Secretary, Ministry of Home Affairs* 1998 NR 167 (LC).

[38] I am in full agreement with the reasoning of the courts referred to above. For that reason, an employee, who has either been suspended or undergoing disciplinary charges, should ideally not resign during the pendency of either proceeding as the perilous effects of the provision will kick in by operation of law. There is no other reasonable inference to be drawn from a resignation or taking up new employment than that the employee seeks to avoid the possibly debilitating guilt on the charges and the blot that may bring to bear on the name and reputation of the said employee.

[39] It is for that reason that I opine that the onus is on the employee to avoid the deeming provision by taking action that can, if possible, satisfy the employer before the step is taken that the intended resignation or taking up new employment is not a stratagem to avoid the consequences of a discharge.

[40] In this regard, it would seem to me, the employee would have to give undertakings to attend the proceedings even after the resignation or taking up new employment. In the absence of such or other acceptable undertaking to the employer, then the deeming provision should, as Parliament intended, take immediate effect on the happening of either of the events mentioned in the provision.

[41] The effect either of a resignation or taking new employment is, in the face of pending disciplinary proceedings, plain to see. The employer loses authority and a measure of control over the employee's movements and availability, in terms of ensuring that the employee attends the disciplinary proceedings after the resignation or taking new employment. It is possibly if the employee expressly excludes his non-participation in the disciplinary proceedings, post-resignation, that the employer may accept an undertaking and the employee thus avoiding the deeming effect of the provision in question.

[42] In the circumstances, I am of the considered view that there is merit in the respondents' contention that the court is not, in the face of the deeming

provision, entitled to continue hearing the application as he is deemed by law to have been discharged on account of misconduct. It would be going against the manifest intention of Parliament, in the absence of concrete efforts by the applicant to have avoided the deeming effect of the provision, for the court to turn its face away from live provision of the Act.

[43] The applicant cannot both be discharged on misconduct by operation of the law, in terms of the Act and remain employed by the Government at the same time, and thus entitled to attack the setting up of the tribunal and its composition. The law declares the former and it is to that conclusion that this court has to lean in the absence of lawful action by the applicant to circumvent or avoid the deeming provision as discussed above taking effect.

[44] Ms. Angula argued at length about the unfairness of the provision in question but that is all it was, an attack in argument. There is no application before court challenging the constitutionality of the provision in question and the court is not, in the circumstances, entitled to entertain issues of unfairness of the provisions, as there are no proceedings before court to set the said provision aside. The procedural requirements for bringing such an application are well articulated in *Kavendjaa v Kaunozondunge*⁹ by the learned Judge President and they have not been met in the instant case.

Conclusion

[45] I accordingly come to the conclusion that the applicant's case is, in view of what is discussed above, indeed rendered moot, as submitted by the respondents. The applicant, having been deemed to have been dismissed on the basis of misconduct, with him not having taken any action to avoid the effects of the deeming provision, is not entitled to proceed with these proceedings at this stage as his case.

[46] In the light of the deeming provision, the current application has been reduced to an abstract or hypothetical question of law. The applicant, is accordingly deemed to have been dismissed from the date of his resignation

⁹ 2005 NR 450 (HC) at 465 G-H.

and is no longer an employee amenable to being subjected to disciplinary proceedings by the respondents.

[47] In view of the conclusion to which the court has arrived, it is rendered unnecessary for the court to consider the merits of the application. The conclusion reached above, renders the matter *cadit quaestio* and thus finally settled on the issues between the parties.

Costs

[48] This being a labour matter, it is trite law that it is in very circumscribed circumstances that this court would be entitled, in its discretion, to award costs to any party to the proceedings. Section 118 of the Labour Act,¹⁰ allows the court issue a costs order in circumstances where the institution, defence or continuation with the proceedings amounts to frivolous or vexatious proceedings, which is abusive in nature and character.

[49] There is no allegation that this is a proper case to mulct the applicant, being on the losing side, with costs. I am also not persuaded that there are any sound reasons in law for issuing a costs order in the circumstances. There shall, for that reason, be no order as to costs in this matter.

Order

[50] Having due regard to all the issues discussed above, the proper order to issue in the circumstances, is the following:

1. The applicant's application for review is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku

¹⁰ Act No. of 2007.

APPEARANCES:

APPLICANT: E. Angula
Of AngulaCo, Windhoek.

RESPONDENTS: N. Marcus
Instructed by: Office of the Government Attorney.