



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 57/2013

In the matter between:

GODWIN P KAYA**APPELLANT**

and

SCHAMEERAH COURT BODY CORPORATE**RESPONDENT**

Neutral citation: *Kaaya v Schameerah Court Body Corporate* (A 57/2013) [2013] NAHCMD 297 (21October 2013)

Coram: DAMASEB, JP

Heard: 21 October 2013

Delivered: 21 October 2013 (*ex tempore*)

Flynote: Civil appeal against judgment of magistrate's court. Court during argument, and based on parties' concessions, amply set out its reasons for orders to made *ex tempore*. Appeal partially successful.

ORDER

I make the following order:

1. The appeal succeeds in part and the judgment and order of the court a quo are hereby set aside, and replaced by the following order:

1.1 Claim 1 succeeds and the plaintiff is awarded damages in the amount of N\$7 500.00

1.2 Claim 2 is dismissed.

1.3 The defendant is liable to pay 50% of plaintiff's taxed costs, on party and party scale.

2. The respondent shall be liable for 50% of appellant's taxed costs on appeal, on party and party scale.

JUDGMENT

Damaseb, JP:

[1] Having considered the record and the written and oral submissions of the parties' respective counsel, I am satisfied, for the reasons¹ I amply set out during argument, and based on the concessions made by counsel during such argument, that the proper order the learned magistrate should have made at the conclusion of the trial was: (i) to allow plaintiff's claim 1, and (ii) to dismiss plaintiff's claim 2, with a limited order of costs in favour of the plaintiff (appellant on appeal).

Costs

[2] Counsel for the respondent (defendant in the court below) on appeal submitted that given the conclusion to which I have now come as regards the appeal, the proper order, as regards costs, be that each party pays its own costs.

[3] The genesis of the present dispute is the respondent's admitted failure to perform its contractual obligations, which necessitated the appellant to institute proceedings to seek legal redress. The defendant's opposition of plaintiff's Claim 1 was, in my view, unmeritorious. Although I am satisfied that plaintiff's Claim 2 disclosed no cause of action recognised under our common law, the admitted embarrassment

¹ Which reasons constitute the basis for the orders I make.

caused to him by the defendant's admitted failure to comply with its contractual obligations is a weighty factor in the exercise of my discretion as far as costs go. Therefore, although plaintiff's Claim 2 was doomed to fail from the start, he was entitled to proceed to court to ventilate his legal rights in so far as the defendant failed to do that which it was contractually bound to. I am therefore satisfied that the appellant is entitled to 50% of his costs, both a quo and on appeal.

[4] I make the following order:

1. The appeal succeeds in part and the judgment and order of the court a quo are hereby set aside, and replaced by the following order:
 - 1.1 Claim 1 succeeds and the plaintiff is awarded damages in the amount of N\$7 500.00.
 - 1.2 Claim 2 is dismissed.
 - 1.3 The defendant is liable to pay 50% of plaintiff's taxed costs, on party and party scale.
2. The respondent shall be liable for 50% of appellant's taxed costs on appeal, on party and party scale.

P T Damaseb
Judge-President

APPEARANCES

PLAINTIFF: Mr Kanguuehi
Of Hengari, Kanguuehi & Kavendjii Inc.

DEFENDANT: Mr Andima
Of Van der Merwe-Greeff Andima Inc.