REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGMENT**

 **Case No.: LCA 04/2016**

In the matter between:

**TAMBAOGA SHIRICHENA APPLICANT**

and

**NAMIBIA TRAINING AUTHORITY 1ST RESPONDENT**

**MS. MAANO KALOMO 2ND RESPONDENT**

**LABOUR COMMISSIONER 3RD RESPONDENT**

**Neutral citation**:  *Tambaoga Shirichena* v *Namibia Training Authority* (LCA 04/2016) [2016] NAHCNLD 81 (23 September 2016)

**Coram**: CHEDA, J

**Heard: 23 September 2016**

**Delivered:** **23 September 2016**

**Flynote:** This Court has an inherent duty to protect both itself and members of the public against abuse of a legal process.

**Summary:** Applicant had been allowed to remain in the country for the purposes of attending the hearing of his appeal before the Labour Commissioner. The appeal was heard and he lost it. He, however, remained in the country and started filing endless applications against various people and an educational Institution which had attempted to remove him from its premises where he was previously employed. These various applications were found to be vexatious and frivolous which was tantamount to an abuse of court process. This type of conduct was not allowed.

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**ORDER**

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In the result, the following is the order of court:

(1) All applicant’s matters including, but, not limited to the following, are transferred to the Main Division, Windhoek:

1.1 Tambaoga Shirichena // Labour Commissioner, Maano Kalomo, and Namibia Training Authority LCA 02/2014

 Ruling:

 Matter is removed from the roll. Tommasi J (17/11/2014)

 1.2 Tambaoga Shirichena // Namibia Training Authority A 16/2014

 Ruling:

Matter is dismissed for lack of merit. Cheda J (17/07/2014)

1.3 Tambaoga Shirichena // Namibia Training Autority A 17/2014

Ruling:

The application is dismissed. Cheda J (6/07/2014)

1.4Tambaoga Shirichena // Namibia Training Authority and Labour Commissioner A 29/2014

1.5 Tambaoga Shirichena // Namibia Training Authority and Labour Commissioner A 30/2014

In-active

1.6 Tambaoga Shirichena // Labour Commissioner, Maano Kalomo, and Namibia Training Authority A 31/2014

Ruling:

Pending

1.7 Tambaoga Shirichena // Labour Commissioner, Maano Kalomo, and Namibia Training Authority A 05/2015

Matter is struck from the roll. Tommasi J (11 May 2015)

1.8 Tambaoga Shirichena // Labour Commissioner, Maano Kalomo, and Namibia Training Authority CA 15/2015

Ruling:

Transferred to Main Division.

1.9 Tambaoga Shirichena // Namibia Training Autority A 18/2015

Ruling:

Transferred to the Main Division of Windhoek. Cheda J (17 July 2015)

1.10 Tambaoga Shirichena // Bank Windhoek Ltd Oshakati A 06/2016

Matter is struck from the roll for lack of urgency. Tommasi J (07 July 2016)

1.11 Tambaoga Shirichena // The Senior Immigration Officer, National Immigration Control Officer, Permanent Secretary, Chairperson for Immigration Selection Board, Minister for Home Affairs and Immigration A 07/2016

Ruling:

Matter is struck from the roll. January J (02 August 2016)

1.12 Tambaoga Shirichena // A 139/2016

Ruling:

Transferred to Windhoek

1.13 Tambaoga Shirichena // I 180/2016

Filed on the 14 September 2016

Pending (transferred to Main Division Windhoek)

(2) The Registrar’s Office, Northern Local Division, Oshakati, is directed not to accept any matter filed by Mr Shirichena without the authority of the Judge President.

(3) The Department of Immigration is directed to investigate Mr Tambaoga Shirichena’s residential status and act in accordance with the requirements of the Immigration Act.

(4) There shall be no order as to costs.

**JUDGMENT**

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**CHEDA, J**

[1] This is a matter which was set down before me as an urgent application. For the reasons that I intend to allude to, hereinunder, I transferred it to the Main Division of the High Court in Windhoek.

[2] Applicant has a total of 13 matters which were filed at this court, in the Northern Local Division, Oshakati. I have decided to deal with all of them together as there is a common thread that runs through them. The following is the historical background and all the relevant rulings in the said matters.

[3] All people are equal before the law and as such their rights are protected by constitutional law. Namibia, like all modern day democracies religiously observe and enforce basic human rights, one of which is the right to approach any court of competent jurisdiction to enforce one’s rights which have been violated and that right extends to foreigners.

[4] The applicant [hereinafter referred to as “Shirichena”] is a Zimbabwean national. He has been filing application after application, wherein, he has been suing different parties for various alleged breaches.

[5] Applicant came to Namibia as a result of a bilateral agreement between the two countries on a technical assistance scheme. He was supposed to be in the country for two years, but, upon the expiry of that contract he refused to leave while his colleagues honoured the terms and conditions of their contracts and left peacefully. It is this refusal which has led to numerous court applications which are subject of this judgment. His first application was in Case No. A 16/2014, wherein he claimed certain amounts of money from his previous employer and challenged his dismissal from Valombola Vocational Training Centre [hereinafter referred to as “the Institution”] Ongwediva. Having lost this legal suit he appealed to the Labour Commissioner and it was on that basis that he holds the view that he was allowed to remain in the country in order to prosecute his appeal to finality.

[6] In my judgment No.: A16/2014, I reasoned that the Department of Immigration, would not refuse him entry for the purposes of prosecuting his appeal as long as he had proof that the hearing was set down for a particular date.

[7] For the avoidance of doubt, the said judgment did not allow him to remain in the country after the Labour Commissioner’s hearing. In fact, he is supposed to have left Namibia immediately on the day the matter was finalised. Therefore, he was not entitled to remain in the country as he pleased, as his contract with the Institution had expired and he had lost his appeal which was his reason for remaining in Namibia.

[8] It seems to me that my judgment of the 17 July 2014 opened floodgates for Shirichena to sue his real or imagined adversaries. Litigation has been coming in thick and fast. All the three Honourable Judges in this jurisdiction have dealt with Shirichena as well as some members of staff. It has been brought to my attention that throughout his attendances at the Registrar’s Office, he has been very abusive to the Registrar’s Office Staff. It is for that reason that I again transferred his matters to the Main Division.

 [9] In my view, applicant’s litigation history is cause for concern. It is clear that after my judgment of the 17 July 2014, he found his way back into the country and that arrival led to a plethora of applications against people and/or organisations. A perusal of some of these applications are confused and confusing and they bring into question his *bona fides*.

[10] In as much as all human beings are entitled to constitutional protection of their rights, litigation not excepted, those who are sued also have reciprocal rights to defend themselves where litigation mounted against them is frivolous, vexatious, spurious, malicious, or where such suits are lodged with a desire to achieve a certain objective which is surreptitiously hidden as a constitutional right. This, in my view, is an abuse of a court process.

[11] This court has a duty to protect itself and society against abuses of its process. Such abuse is frowned upon by these courts and is strongly discouraged. In this jurisdiction, the Supreme Court expressed itself very clearly in Aussenkehr Forms (Pty) LTD v Namibia Development Corporation LTD SA 23/2010 [28/03/2012] (Delivered 13/08/2012) para 18 where Ngcobo AJA stated:

“The Court has an inherent power to protect itself and others against an abuse of its process.[[1]](#footnote-1) As was said in *Hudson v Hudson and Another*, “When the court finds an attempt to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse”.[[2]](#footnote-2) The power to prevent the abuse of the process of the court is an important tool in the hands of courts to protect the proper functioning of the courts and to prevent the judicial process from being abused by litigants who instituted proceedings to harass their adversaries with vexatious litigation. It prevents the court process from being turned into an instrument to perpetuate unfairness and injustice, and the administration of justice from being brought into disrepute”.[[3]](#footnote-3) (My Emphasis)

[12] In *Aussenkehr Forms (Pty) LTD v Namibia Development Corporation LTD SA 23/2010*, reliance was placed on the authorities cited therein, and the said principle was unanimously adopted and effectively applied, thus laying down the correct and binding legal decisions for this jurisdiction.

[13] This Supreme Court judgment makes it clear that these courts will not accommodate, promote or protect vexatious litigation. The same court went further in para 20 and stated:

“The primary function of a court of law is to dispense justice with impartially and fairness both to the parties and to the community that it serves. Public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly to facilitate the resolution of genuine disputes. Unless the court protects its ability to function in that way, public confidence in the administration of justice may be eroded by a concern that the courts’ processes may be used to perpetrate unfairness and injustice, and ultimately, this may undermine the rule of law. And public confidence in the courts is vital to the judicial function because as, Justice Felix Frankfurter once reminded us, “[t]he Court’s authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction”.[[4]](#footnote-4) (my emphasis)

[14] Lucidly put, abuse of a judicial process arises from a party making a deliberate and malicious misuse or a perversion of a regularly issued process, which lacks acceptable and common legal action. From the authorities, if appears that the essential elements are that;

a) there should exist an intentional and malicious instituting and processing of a legal action;

b) which action is brought without probable cause; and

c) dismissed in favour of the victim.

[15] All in all, it has as its integral part an ulterior motive or purpose underlying the use of the process. A party who embarks on this approach is interested in the collateral purpose of this litigation only and will therefore not be genuine in the process. This, of course goes against all the grains of the object of fairness and indeed offends the dictates of justice and should not be allowed.

[16] Shirichena’s applications before this court calls for an interrogation into his *bona fides* in these matters. It appears to me that he justifies his residence in Namibia, on my judgment (supra) 17 July 2014. With the greatest respect to him, in that case, I stated in para 10 – 13, to him that:

“[10] Respondent has done its best by acceding to his request by accommodating him up to the 27 July 2014 which is the expiry of his visa pending the Labour Commissioner’s determination of the dispute at hand.

[11] I may go further and state that the immigration officials will, in my opinion ensure that he attends court hearings by granting him an adequate visa to accomplish the same.

[12] “I must add that applicant is in fact abusing the legal system by persisting with such a frivolous and unmeritorious applications. In fact he is extremely lucky that there was no legal practitioner representing respondent as I could foresee applicant being saddled with punitive costs in the circumstances. However, there are no costs asked for and none are awarded.

[13] In the result this application is dismissed for lack of merit”. (emphasis added).”

[17] This cannot be understood to mean that this court authorised him to indefinitely remain in the country and be abusive. What led to my reference to the above paragraphs is because despite the expiry of his work permit and visa to remain in the country he had argued that he wanted to remain in the country in order to prosecute his labour matter before the Labour Commissioner.

[18] This appeal, I am advised, has since been finalised. I, therefore, had found it improper for him to remain in the country while waiting a date which could not be immediately ascertained. It is for that reason that I remarked that he could re-enter the country only when the Labour Commissioner had allocated him a date for hearing. That is the most reasonable step to take and my reasoning in that judgment should be understood from that point and there is no room for interpreting it otherwise.

[19] Shirichena has, therefore, misinterpreted and misconstrued that judgment for his selfish benefits thereby indefinitely remaining in the country and consequently continuing to mount frivolous and vexatious applications against other people and organisations. It is my considered, view, that he has and continues to abuse the court process as his use of the court process is for ulterior motives. The Supreme Court lucidly stated in the *Aussenkehr* *(supra*) at Para 22 when it remarked:

“While there can be no all-encompassing definition of the concept of “abuse of process”, that is not to say that the concept of abuse is without meaning. It has been said that ‘an attempt made to use for ulterior purposes machinery devised for the better administration of justice’ would constitute an abuse of the process.[[5]](#footnote-5) In *Beinash v Wixley*, the Supreme Court of Appeal in South Africa held that “an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”[[6]](#footnote-6). *In Price Waterhouse Coopers and Others v National Potato Co-operative Ltd*, it was held the “[i] general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end.”[[7]](#footnote-7) (my emphasis)

[20] The majority of his cases (supra) were not followed up to their logical conclusions. A litigant has a duty to ensure that its legal process is prosecuted to finality. It is not fair and is indeed unacceptable that a litigant institutes legal process, serves it on another party and thereafter abandons it midstream.

[21] This type of conduct is unacceptable. It would appear that applicant’s residence is hinged on the benevolence of the Immigration Department. To my mind, no one ever intended to give him a *carte blanche* authority to institute malicious proceedings against others willy-nilly. This, therefore, casts doubt as to his *bona fides.* I am of the opinion that, his stay albeit illegally has given him an opportunity to continuously provoke other people.

 [22] In my judgment referred to *supra* I recognised the right for him to attend the Labour Commissioner’s hearing, which was held on the 14 October 2014 under case MROS69/2014 and he lost the case. It was, therefore, finalised. Therefore, from the 14 October 2014, there was no basis for him to have remained in the country at all. The Immigration Department should not have permitted him to do so in my opinion. This, however remains, their domain. His fate was sealed on the day of the Labour hearing. suffice to say that there was no justification for him to have remained in the country to date.

 [23] In as much as Shirichena is within his rights to sue, he cannot do so, under the guise of having been permitted to remain in the country as the reason for that had since expired when the Labour Commissioner made a determination. His right of stay on the basis of judgment No.: A 17/2014, misconstrued as it may be, is no longer valid. For the avoidance of doubt, the Department of Immigration is entitled to deal with him as it deems fit.

[24] These courts are of the settled view, which view, was adopted in the matter of *Beinash & Another v Ernst and Young & Others 1999* (2) SA 116 (cc), being the need to protect an innocent litigant from vexatious, harassment, embarrassment of unmeritorious litigation and unending costs. The functioning of the courts and the proper administration of justice should proceed without hindrances by the clog of groundless proceedings. In this jurisdiction, in the matter of *Namibian Financial Institutions Supervisory Authority v Hendrik Christian & Hewat Samuel Jacobus Beukes*, No.: A 244/2010 *Smuts J* (as he then was) clearly laid down the correct legal position and with approval, the correct legal position formulated in *Cohen v Cohen and Another 2003* (i) SA 103 (c) and in particular in Bisset *& Others v Boland Bank Ltd & Others 1991* (4) SA 603 (D) at 608 D – H where *Booysen J* remarked:

“The Court has an inherent power to strike out claims which are vexatious. *(Western Assurance Co v Caldwells’ Trustee* 1981 AD 262 at 271*; African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D)

Vexatious in this context means ‘frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant’.

*Fisheries Development Corporation of SA Ltd v AWF Investments (Pty) Ltd and Others* 1979 (3)SA 1331 (W.)

This power to strike out is one which must be exercised with very great caution, and only in a clear case. The reason is that the courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action. (*Western Assurance Co* case *supra* at 273; Fisheries *Development* case (*supra)* at 1338G.)

Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty and not merely on a preponderance of probability. (*Ravden v Beeten* 1935 CPD 269 at 276; *Burnham v Fakheer* 1938 NPD 63; *African Farms* case *Supra* at 565D-E.)” (my emphasis)

[25] The common thread which runs through all these matters is lack of *bona fides* and malice on the part of the applicant. It is clear, therefore, that this court has an inherent discretion to strike out or stay existing proceedings on the grounds of vexatiousness, as per *Smuts J* *in Namibia Financial Institutions Supervisory Authority v Hendrik Christian & Hewat Samuel Jacobus Beudes, No. A 244/2010* (supra). The same approach was adopted in *Schroeder v The Republikein Newspaper & 4 Others*. (I 177/2010)[2012] NAHC 202 (23 July 2012). Therefore, it, is now our settled legal position that a litigant who abuses a court process will not be tolerated and applicant is of the said conduct. I totally subscribe to this position.

[26] In the result, the following is the order of court:

(1) All applicant’s matters including, but, not limited to the following, are transferred to the Main Division, Windhoek:

1.1 Tambaoga Shirichena // Labour Commissioner, Maano Kalomo, and Namibia Training Authority LCA 02/2014

 Ruling:

 Matter is removed from the roll. Tommasi J (17/11/2014)

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Ruling:

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1.11 Tambaoga Shirichena // The Senior Immigration Officer, National Immigration Control Officer, Permanent Secretary, Chairperson for Immigration Selection Board, Minister for Home Affairs and Immigration A 07/2016

Ruling:

Matter is struck from the roll. January J (02 August 2016)

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Ruling:

Transferred to Windhoek

1.13 Tambaoga Shirichena // I 180/2016

Filed on the 14 September 2016

Pending (transferred to Main Division Windhoek)

(2) The Registrar’s Office, Northern Local Division, Oshakati, is directed not to accept any matter filed by Mr Shirichena without the authority of the Judge President.

(3) The Department of Immigration is directed to investigate Mr Tambaoga Shirichena’s residential status and act in accordance with the requirements of the Immigration Act.

(4) There shall be no order as to costs.

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M Cheda

Judge

APPEARANCES

APPLICANT: T. Shirichena

 c/o Namibia Training Authority

 Valombola Vocational Training Center

1st RESPONDENT: Namibia Training Authority

2ND RESPONDENT: Ms. Maano Kalomo

 Of Office of the Labour Commissioner, Oshakati

3rd RESPONDENT: Labour Commissioner

 Office of the Labour Commissioner, Oshakati

1. Western Assurance Co v Caldwell’s Trustees 1981 AD 262 at 272; African Farms Township v Cape Town Municipality 1963(2) SA 555 (A) at 565D-E; Corderoy v Union Government 1918 AD 512 at 517; Hudson v Hudson and Another 1927 AD 259 at 268; Beinash v Wixley 1997 (3) SA 721 (SCA) at 734C-G. [↑](#footnote-ref-1)
2. At 268. [↑](#footnote-ref-2)
3. Hunter v Chief Constable of the West Midlands Police [1981]UKHL 13(1982) AC 529 at 536. [↑](#footnote-ref-3)
4. Baker v Carr 369 US 186, 267 (1962). [↑](#footnote-ref-4)
5. Hudson v Hudson and another Supra at 268 [↑](#footnote-ref-5)
6. Beinash v Wixley, supra, at 734C-G [↑](#footnote-ref-6)
7. [2004] ZASCA 64; 3All SA 20 (SCA) (1June 2004) SAFLII at para 50 [↑](#footnote-ref-7)