REPORTABLE **CASE NO. LC 04/2007**

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

FESTUS NAKANYALA **APPLICANT**

and

OLD MUTUAL NAMIBIA LIMITED **RESPONDENT**

CORAM: HOFF, P

Heard on: 2007.11.23

Delivered on 2006.11.30

JUDGMENT:

HOFF, P: [1] The applicant approached this Court for an order in the following terms:

"1. Declaring that respondent is in breach of her code of disciplinary and grievances procedure (hereinafter "the Industrial Relation handbook").

2. *Declaring that Respondent acted in bad faith and highly prejudiced the applicant by refusing to conduct the appeal hearing in order to cure the irregularities of the initial hearing.*

3. *Declaring that circumstances and rules exist entitling applicant to be heard through the appeal hearing as applied for by the applicant on the 1st March 2007 and declaring that Respondent acted in conflict of her own internal IR procedure in denying the applicant an opportunity to be heard in accordance with the provisions as attached hereto annexure "A".*

4. *Declaring the respondent acted unlawful and prejudiced the applicant by convicting him on allegations that were never substantiated by a VIVA voce evidence. More particularly that; the source of the allegations (a certain Fennie Nanyeni) was not summoned to the hearing to back-up her allegations as stipulated under Respondent IR procedures i.e. section 4, paragraph 17 attached hereto as annexure "B".*

5. *Ordering that the dismissal of the applicant be annulled and held in abeyance pending a re-hearing chaired by a new chairman in accordance with section 5.2.2.2(b).*

5.1 Further ordering that Respondent to re-instate the applicant with all benefits pending a re-hearing in which the applicant should be accorded the right to be represented by his union representative as stipulated under section 4 paragraphs 18 attached hereto as annexure "C".

5.2 Further ordering Respondent to comply with the IR provisions which read as follows: Old Mutual Namibia's procedures reflect the legal position in that minor irregularities may be dealt with at the appeal stage but gross irregularities (as alluded to by applicant and noted to Respondent on the 1st March 2007) require that both the finding and the penalty of the original hearing must be set aside. Kindly find the IR provision supra attached as annexure "D".

6. Declaring that the conduct of the Respondent illegal and unacceptable by presenting an unsigned notice of summary dismissal on the 12 December 2006.

7. Ordering Respondent to pay cost of this application."

[2] Mr Ipumbu who appeared on behalf of the applicant submitted that this application is primarily an application for a declaratory order that respondent has breached it's own internal rules and that the other relief sought e.g. the re-instatement of applicant are incidental to the primary relief.

[3] The respondent, who was represented by Mr Philander, raised three points *in limine* and applied to strike out certain passages from affidavits filed in support of the main application.

[4] I shall first deal with the application to strike out.

The following passage appears in the founding affidavit:

> *"… yet daylight robbery by low and middle management is causing havoc on the poor workers who are not well acquainted with the internal IR provisions."*

[5] It was submitted on behalf of respondent that this passage must be struck on the basis that it is scandalous, vexatious or irrelevant.

The submission by Mr Ipumbu that the passage was not specifically directed at the management of the respondent carries no water. Read in context this passage is a clear reference to the management of the respondent. It was

subsequently conceded on behalf of applicant that the afore-mentioned passage should not have been included in the founding affidavit. This passage thus stands to be struck from the founding affidavit on the basis that it is scandalous and vexatious.

[6] This passage is worded in an abusive and defamatory manner. It is prejudicial to the respondent in the sense that if respondent is required to deal with scandalous matter, the main issue could be side-tracked but if left unanswered, the innocent party may well be defamed.
(See *Vaatz v Law Society of Namibia 1990 NR 332 at 335 G*)
The passage objected to is accordingly struck from the founding affidavit.

[7] It was further submitted that the affidavit of Festus Nakanyala be struck *in toto* on the basis that the affidavit has not been properly commissioned, that paragraphs 4 until 12 stand to be struck on the basis that they introduce new evidence, and that paragraphs 13 until 15 and 17 stand to be struck on the basis that they constitute inadmissible hearsay evidence.

[8] It is common cause that the deponent, Festus Nakanyala, signed the last page and initialed all other three pages of the affidavit. The commissioner of oaths only signed the last page but did not put her initials on the other pages of the affidavit.

[9] It was submitted on behalf of the applicant that the provisions of the regulations governing the administration of an oath are directory and not peremptory and that applicant has substantially complied with the provisions of the regulation.

This Court was referred to *Cape Sheet Metal Works v J J Calitz Builders (Pty) Ltd 1981 (1) SA 697 (O)* where it was held that non compliance with the provisions in the regulations framed under Act 16 of 1963 does not result in an affidavit becoming worthless since a Court has a discretion to recognize such an affidavit or to regard it as worthless.

It is not the respondent's objection that there was some form of dishonesty involved in the drafting of the affidavit but that a prescribed provision (regulation 5) has not been complied with. I am of the view that there has been substantial compliance with the prescribed provision and exercise my discretion in favour of recognizing the papers filed by Festus Nakanyala as an affidavit.

[10] Regarding the paragraphs submitted to be struck on the basis that they introduced new evidence the applicant submitted that respondent failed to indicate how respondent was prejudiced by the introduction of new evidence.

My understanding of this argument is that applicant does not dispute that the paragraphs referred to amount to new evidence but that the relevant

paragraphs could only be struck once it has been shown that the introduction of such new evidence resulted in prejudice.

[11] In my view the prejudice to respondent consists in the fact that respondent is precluded from responding to material contained in the replying affidavit.

It was in addition submitted on behalf of the applicant that the respondent was not obliged to respond to new evidence and could have ignored such new evidence.

If this is correct, then, firstly, the question which begs to be answered is why then was such new evidence introduced ?

Secondly, if the respondent may ignore the new evidence why should this court be required to take notice of such new evidence ? Should the court not also ignore such new evidence ?

[12] In my view the submissions raised (*supra*) in support of the introduction of new evidence is no answer at all to the application to strike out.

[13] The application to strike paragraphs 13 to 15 and 17 on the basis that those paragraphs constitute inadmissible hearsay was not dealt with on behalf of applicant and I shall accept that applicant does not oppose the striking of those paragraphs.

[14] In respect of the affidavit of David Shikulo respondent applied to strike out paragraphs 4, 5, 6, 7 and 8 on the basis that those paragraphs contain new evidence and to strike out paragraphs 8 on the basis that it contains inadmissible hearsay evidence.

What has been said (*supra*) in respect of the response to the application to strike out in respect of the affidavit of Festus Nakanyala applies equally to the affidavit of David Shikulo.

[15] In my view the application to strike out the paragraphs referred to in the founding affidavit and the affidavits of Messers Festus Nakanyala and David Shikulo should succeed.

[16] The following paragraphs are accordingly struck out:

in respect of the affidavit deposed to by Festus Nakanyala, paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 as well as 13, 14, 15 and 17;

in respect of the affidavit deposed to by David Shikulo, paragraphs 4, 5, 6, 7 and 8.

[17] I shall now deal with the points raised *in limine*.

[18] The first point raised *in limine* was that the applicant lacks *locus standi*.

[19] It was submitted that where a deponent to a founding affidavit acted in a representative capacity he must expressly state that he has the necessary authority to bring the application on behalf of the applicant and the reason why the applicant cannot depose to the founding affidavit himself.

[20] *In casu* Mr Simon Ekandjo deposed to the founding affidavit in a representative capacity. The applicant Mr Festus Nakanyala did not depose to the founding affidavit.

[21] The founding affidavit, deposed to by Mr Simon Ekanjo, contains no averment that he was authorized by applicant to depose to the founding affidavit and no averment that he has the necessary authority to bring this application on behalf of the applicant

[22] The lack of *locus standi* of Mr Simon Ekandjo was raised by the respondent in its answering affidavit.

In the founding affidavit Mr Ekandjo states that he was "obligated" by the executive committee of the Namibia Financial Institutions Union (hereinafter referred to as Nafinu) to depose to the affidavit.

It is common cause that Nafinu is not a party to these proceedings neither has a resolution from Nafinu been filed authorising the deponent to bring this application.

[23] In response to the lack of *locus standi* raised by the respondent in its answering affidavit, Mr Ekandjo stated the following in his replying affidavit.

> *"Applicant avers that the matter has been brought to this honourable court by the union in terms of section 57 (a) of the Labour Act 1992 …It is, therefore, vehemently amplified that Respondent argument (sic) on the locus standi is baseless and has no legal basis."*

It was further submitted by Mr Ipumbu with reference to a confirmatory affidavit by Mr Festus Nakanyala that he (i.e. Nakanyala) conferred a mandate on Mr Ekandjo to bring this application and this Court was specifically referred to paragraphs 17 of the confirmatory affidavit which reads as follows:

> *"Lastly, I was advised by the union, which advice I wholeheartedly belief that interpretation / misinterpretations of rules and subsequent violations and non compliance thereof can be dealt with solely at the labour court in accordance with Section 18 (1) (e) of the Labour Act 1992 and I am advised that the union as my representative will invoke this provision accordingly."*
> (Emphasis provided)

[24] Reference to a union as his representative is in my view a far cry from authorizing the deponent to bring this application. There is no authority (in

terms of paragraph 17) conferred on deponent to depose to the founding affidavit and no authority to bring this application on behalf of the applicant. The confirmatory affidavit by Mr David Shikolu, President of Nafinu, is silent on whether the deponent, Mr Ekandjo, was duly authorized to deposed to the founding affidavit on behalf of Nafinu. If Mr Ekandlo was authorised by the union to bring this application in the name of the union then the union should have been one of the applicants.

[25] Rule 4 (2) of the Labour Court Rules provides as follows:

> *"Where the party is a company, or trade union or employers' organisation it may be represented by one of its directors or other officers or office bearers or officials, as the case may be, provided that a resolution of the company, trade union or employers' organisation authorizing such person to represent it is filed with the registrar before hearing."*

[26] No resolution was filed that Nafinu authorized Mr Ekandjo to represent it. Furthermore if one has regard to the title of Mr Ekandjo viz. "consulting labour relations practitioner" he is most probably not an office bearer or official of Nafinu. The fact that paragraph 17 of the affidavit deposed to by Festus Nakanyala has been struck out has the consequence that this Court must regard that paragraph as *pro non scripto*.

It should be clear from the documents filed that the union (Nafinu) is not a party to these proceedings.

[27] The deponent also referred to the provisions of section 57 (a) of the Labour Act 6 of 1992 as authority to bring this application and in support of the submission that he has *locus standi*.

[28] Section 57 of the Labour Act 6 of 1992 reads as follows:

> *"Subject to the provisions of this Act, a registered union shall have the right –*
>
> *(a) to bring any application or to lodge any complaint which may in terms of any provision of this Act be brought to, or lodged with, the Labour Court or any district Labour court by any of its members."*

[29] The provisions of section 57 (1) of the Labour Act 6 of 1992 thus in my view cannot be used to remedy the lack of authorization of the deponent to bring this application on behalf of the applicant. Section 57 (a) would be applicable in those instances where the union brings an application in its own name or is party to the proceedings. If the provisions of section 57 (a) should be interpreted to do away with the rules and practices regarding the *locus standi* of legal *persona*, then the provisions of Rule 4 (2) would be superfluous.

[30] I am satisfied that the deponent did not have the requisite authority to bring this application or to depose to the founding affidavit and in the result the first point *in limine* is upheld.

[31] For the reasons provided (*supra*) I deem it unnecessary to deal with the other two points raised *in limine.*

[32] It was submitted on behalf of respondent that a cost order should be given against the deponent of the founding affidavit because he lacked authority to bring the application on behalf of applicant neither did he have any authority to bring this application on behalf of the union (Nafinu).

[33] In the matter of *Pinkster Gemeente van Namibia v Navolgers van Christus, 1998 NR 50 (HC) at 54 (H)* (a full bench decision, Mtambanengwe J and Gibson J concurring) Hannah AJP stated the following"

> *"Quite apart from legal principle, the question of authority to bring an application concerns, ultimately, the question of costs. Once it is shown that a person who brings an application on behalf of another has the authority to do so, then the other will be bound by an order for costs against him. If he had no authority at the outset, then ratification of the*

steps he has taken must be obtained in order to bind the other party who at least in name, is the applicant."

[34] In an unreported judgment of this Court in the matter of *Natioinal Union of Namibia Workers v Peter Naholo (Case A 16/2006 delivered on 7 April 2006*) Tötemeyer AJ referred to the passage in *Pinkster Gemeente* (*supra*) and proceeded as follows on p. 31 of the judgment.

"The other side of the same proverbial coin is that, once an application is launched by a deponent without authority of the applicant, it should follow that the applicant cannot be liable for costs thereby occasioned. The deponent who has launched these abortive and unauthorized proceedings, should therefore bear the costs thereof."

[35] In the matter of Peter Naholo (*supra*) the forum was the High Court of Namibia.

[36] In terms of the provisions of section 20 of the Labour Act 6 of 1992 the Labour Court or a district labour court may not make a cost order unless a party by instituting or by defending proceedings acted vexatiously or frivolously.

[37] If any cost order were to be issued it should be in my view be issued against the deponent of the founding affidavit, Mr Simon Ekandjo, since he approached this Court with these abortive and unauthorised proceedings.

[38] The deponent to the founding affidavit by approaching this Court in an unauthorized manner in my view acted vexatiously and this warrants a cost order against him.

[39] In the result the following orders are made:

1. The application to strike out succeeds with costs.

2. The main application is dismissed with costs.

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HOFF, P

ON BEHALF OF THE APPLICANT: MR TITUS IPUMBU

Instructed by: IPUMBU LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT: MR S R PHILANDER

Instructed by: LORENTZANGULA INC.