IN THE LABOUR COURT OF NAMIBIA

CASE NO.: LC 20/2006

In the matter between:

CYMOT (PROPRIETARY) LIMITED Applicant

And

ALBERTUS CLOETE First Respondent

CHAIRPERSON OF THE DISTRICT LABOUR COURT, WINDHOEK Second Respondent

Heard on: 2007.05.18

Delivered on: 2007.05.22

JUDGMENT:

ANGULA, P.:

[1] This is an application for the stay of execution of judgment in terms of section 21(2) of the Labour Act, 1992, granted by the Windhoek District Labour Court on 21st July 2006, pending the appeal. The application is opposed by the first respondent.

[2] It is common cause that the appeal was duly filed on 9th August 2006. It is also common cause that the record and the written judgment of the District Labour Court have to date not been made available.

[3] The second respondent delivered judgment *ex tempore* on 21st August 2006 in which he upheld the first respondent's complaint that he was unfairly dismissed. The second respondent ordered that the first respondent be reinstated and further ordered the applicant to pay the first respondent nine months' salary, amounting to the sum of N$17 846,11.

[4] Mr Alex Theissen who deposed to the main affidavit filed in support of the application, stated that there was no prejudice to the first respondent because the applicant had caused payment of the amount of N$17 846,11 to be made into the trust account of its legal practitioner. He stated further that in the event of the applicant being unsuccessful with its appeal, the applicant is financially sound and would be able to pay such amount to the first respondent as may be found due. He went on to say that in the event of the applicant being successful and the applicant having already paid the amount to the first respondent, there is no guarantee that the first respondent would be able to repay the applicant. He further

stated that in the event of the applicant being unsuccessful, the applicant would rather pay compensation to the first respondent than to reinstate him because the relationship of trust which existed between the parties has totally disintegrated; furthermore, reinstatement of the first respondent would have a negative effect on the applicant's operations and productivity and would compromise the applicant's interests. According to him, the applicant enjoys reasonable prospects of success in its appeal.

[5] The first respondent filed an opposing affidavit in which he denied that the trust relationship had disintegrated. According to him he would have no problem if he were to be reinstated in his former position. He stated that he is in a precarious situation because he is unemployed despite various efforts to find a job. He has two children to feed, school and medical bills and various other debts to pay. He stated that his wife was the sole breadwinner. He denied that the applicant has reasonable prospects of success on appeal. He pointed out that the second respondent carefully considered all the evidence before him and came to various factual conclusions. He stated that he had been advised by his legal practitioner, who made notes when the judgment was handed down orally, that the second respondent found *inter alia*:

"**10.2.1 That the Applicant was guided by emotions and ignored the findings of an external and independent Chairperson;**

10.2.2 **That the sanctions fall outside of the parameters of the Applicant's own disciplinary code;**

10.2.3 **That the words forming the basis of the charge of insubordination, to wit "*do not start with me*" as translated from the Afrikaans "*moenie met my begin nie*", do not necessarily carry the meaning as ascribed thereto by the Applicant and its witnesses and that my version and interpretation was reasonably possible;**

10.2.4 **That the manager who I was speaking to at the relevant period, Mr Bretttschneider (referred to by the court as "RW2") should not be allowed to address insubordinates in any manner in which he pleases as this will not be good for harmonious working relations;**

10.2.5 **That I did not refuse to carry out legitimate instructions;**

10.2.6 **That there was no evidence to support the charge of insubordination or the 3rd charge, i.e. refusing to carry out legitimate instructions;**

10.2.7 **That it appears that the managers were irritated by my submissions at prior meetings with Applicant's management and Board;**

10.2.8 **That I had already received a verbal warning in respect of the meeting of 28 February 2005 and that the charge could not be revived;**"

[6] I may pause here to point out that Mr Maasdorp who appeared for the first respondent and made notes when the *ex tempore* judgment was handed down filed a confirmatory affidavit. The first respondent continued and submitted that the second respondent's conclusion that the first respondent was unfairly dismissed was correct. The first respondent furthermore denied that he would not suffer prejudice if the application is granted, because he was aware that labour appeals take long before they are finalised. In this respect he stated that he was aware of a labour appeal that has been pending since April 2005 and has still not come before court.

[7] He pointed out that the money paid in trust was of no assistance to him. He submitted that he should be reinstated so that he could earn a salary; that the reinstatement would reduce the prejudice which he was suffering as a result of the unlawful dismissal. He pointed out that he would be working

for his salary and that would take care of the applicant's concern that he would not be able to repay the money in the event of the appeal succeeding.

[8] A replying affidavit was filed on behalf of the applicant. It reiterated some of the earlier points and submissions.

[9] In order to succeed, the applicant has to show that it has a reasonable prospect of success on appeal and that the balance of convenience or potential prejudice favours it.[1] Ms Schimming-Chase correctly acknowledged that the applicant bears the onus of satisfying the Court that it has reasonable prospects of success on appeal. If the applicant fails to discharge that onus then it would follow that there is no prejudice if the application is refused.

[10] I proceed to consider the first requirement which needs to be satisfied by the applicant in order to succeed. The approach to be adopted in motion proceedings was laid down in Stellenbosch Farmers Winery Limited v Stellenbosch Winery (Pty) Ltd[2] namely:

"**. . . the facts as stated by the respondent together with**

[1] Namibian Broadcasting Corporation v Mubita NLLP 2004 (4) 114 (NLC) at 115; TransNamib Holdings Ltd v Carstens NLLP 2004 (4) 209 (NLC); Rössing Uranium Ltd v Cloete & Another NLLP 2002 (2) 3 (NLC)

[2] 1957 (4) SA 234 at 235 E – G

the admitted facts in the applicant's affidavit."

[11] Before I consider the facts placed before court by the parties, I need to point out that the record of the proceedings in the District Labour Court is not yet available. In terms of the Rules of the District Labour Court, once the notice of appeal has been filed it is the duty of the clerk of the court to prepare the record and forward it to the Registrar. I have therefore taken the view that the absence of the record cannot be blamed on the applicant or its legal practitioner of record.

[10] Ms Schimming-Chase submitted in the heads of argument filed on behalf of the applicant that the applicant enjoys reasonable prospects for the following reasons:

> "**17.1 The first respondent was found guilty of, *inter alia*, gross insubordination in his initial disciplinary hearing;**
>
> **17.2 The chairperson further found that the relationship between the first respondent and the applicant had been severely damaged;**
>
> **17.3 The chairperson also found that the first respondent had committed serious misconduct and that his reaction towards a superior had been inexcusably subordinate;**
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> **17.4 The chairperson at the disciplinary hearing only recommended that Mr Cloete receive a final warning. It is respectfully submitted that this recommendation was not cast in stone and that first respondent is**

entitled not to follow the recommendation should it so choose for properly motivated reasons."

[12] These submissions are based on what transpired at the internal disciplinary hearing and on the heads of argument submitted by the applicant's representative at the proceedings in the District Labour Court. Mr Maasdorp, who appeared for the respondent, submitted that when considering whether the prospects of success exist, the court cannot do so on the basis of the same information put before the District Labour Court augmented by oral evidence and in respect of which the second respondent made substantial factual findings. There is a fallacy in this submission; it loses sight of the fact that, had the record been available, it would have consisted of the information placed before the District Labour Court as augmented by oral evidence.

[13] It is settled law that the appeal is confined to the four corners of the record of the proceedings in the court *a quo*. It is further settled law that the appeal lies against the order or judgment of the court from which the appeal is being made. It does not assist the applicant to refer to the findings of the internal disciplinary hearing in support of its submission that it enjoys reasonable prospects of success. One of the requirements of Rule 51(7) of the Magistrates Courts Rules,

which is the same as the Rules of the District Labour Court, is that the notice of appeal must state the grounds of appeal, specifying the findings of facts or the ruling of law appealed against. The fact that a written judgment or record is not available does not absolve the applicant from specifying the findings of facts or the ruling of law which are being appealed against.

[14] In my preparation for this judgment I came upon a passage in the judgment by Davis AJA in the matter of Rex v Ngubane & Others 1945 AD 185 at 187, dealing with almost the same situation as the one at hand. The learned Judge of Appeal expressed himself as follows:

> "**I am aware that when the petition was filed, the judgment was not yet available; but no reason existed why the petition should not have been supplemented subsequently, when judgment was obtained. If it was desired to attack the judgment as not correctly or adequately reflecting any facts of importance, sufficient reference should have been made in a supplementary affidavit to the evidence given at the trial to enable the Court to judge whether this may have been the case.**" (My emphasis).

In my view those observations are applicable in the instant matter. The applicant did not refer to any evidence or

findings of facts made by the second respondent for the contention that the second respondent erred in finding that the first respondent was unfairly dismissed.

[15] Mr Maasdorp correctly submitted that the only evidence before this court on the findings and reasons for the decision of the District Labour Court, is contained in paragraph 10.2.1 of the first respondent's opposing affidavit. The content of that paragraph is undisputed by the applicant and on the principle laid down in the Stellenbosch Farmers Winery Limited case *supra*. I am entitled to accept the first respondent's version, on that point, as correct.

[16] The submission for reasonable prospects of success on appeal was raised in the applicant's founding affidavit as follows:

> "**It is respectfully submitted that the applicant enjoys reasonable prospects of success in its appeal to the Labour Court. I refer, in this regard, to the written submissions presented during argument in the Windhoek District Labour Court, the content whereof is reiterated for the purpose hereof. The written submission form annex** (sic) **"A8" hereto. It is submitted further that respondent was ultimately dismissed for a valid and fair reason, and after compliance with fair procedure.**"

[17] The statement fails to state the fact(s) upon which the

submission is being made that the applicant enjoys reasonable prospects of success on appeal. The written submissions were considered by the second respondent, whereupon he made specific factual findings set out in paragraph 10.2.1 of the first respondent's opposing affidavit. Those findings are undisputed. The second respondent made specific findings pertaining to the charge of insubordination. He found that the first respondent did not refuse to carry out legitimate instructions. He found that there was no evidence to support the charge of insubordination or the third charge, i.e. refusing to carry out legitimate instructions. He further found that the managers were irritated by the first respondent's submissions he had made at the prior meeting with the applicant's management and board. The applicant failed to point out or to specify which of those findings are incorrect and/or to furnish the reasons for its assertion that the second respondent erred. The second respondent made direct undisputed findings in respect of the charges with which the first respondent was charged.

[18] It would appear that the applicant misconceived the status of the proceedings or findings of the internal disciplinary hearing by according to it more weight than the findings of the District Labour Court. My view in this respect is based on the following statements in the applicant's founding affidavit:

> "**First Respondent was found guilty on all three charges against him in the disciplinary hearing. A copy of the findings** (sic) **of such disciplinary hearing is annexed hereto as Annex "A9". An impartial person chaired the disciplinary hearing and the proceedings were conducted in compliance with applicable labour law.**"
>
> "**I respectfully submit that the charges in respect where First Respondent was found guilty in the internal disciplinary hearing merit the sanction of dismissal. <u>Any finding to the contrary made by the District Labour Court is, with respect, an error</u>."** (My underlining).

[19] This approach is clearly wrong and cannot be supported. Even if one is entitled to have regard to what transpired at the internal disciplinary hearing, its result cannot and should not override the proceedings and findings of the District Labour Court. In my view the record of the internal disciplinary hearing should be limited to providing background information and being utilised in the assessment of credibility of the witnesses, for example, if there is a difference between the testimony of a witness had testified in the disciplinary hearing and the testimony of the same witness in the District Labour Court. It cannot be elevated to the status of a record of a court of first instance.

[20] It is not clear from the papers before me whether the record of the internal disciplinary hearing was also made available to the second respondent. If it was, I would consider it most unusual and possibly an irregularity. On the assumption that the record of the internal disciplinary hearing had not been made available to the second respondent, as I would have expected, it would be inappropriate for me to take into account the findings of the Chairperson of the internal disciplinary hearing in assessing and considering the findings of the second respondent because the second respondent did not have an opportunity to consider the record of the internal disciplinary hearing. For those reasons I am not inclined to take into account the record of the internal disciplinary hearing.

[21] With regard to the written submissions handed in at the hearing in the District Labour Court, I have considered them. Paragraphs 8 to 11 of the submissions dealt with the charges. It stands to reason that the second respondent considered the submissions before he arrived at his finding as set out in paragraphs 10.2.3 to 10.2.8 of the first respondent's affidavit. Having considered the issues before him, he came to the conclusion that the first respondent was unfairly dismissed. In the light of the aforegoing I do not consider that the applicant has a reasonable prospect of success of appeal

against those findings.

[22] I now deal with the order of reinstatement. According to the applicant the Chairperson of the internal disciplinary hearing found that the relationship between the applicant and the first respondent had been severely damaged. However he recommended that the first respondent be issued with a written warning valid for twelve months; yet, the applicant ignored the recommendation of its self-appointed and independent Chairperson and decided to impose a sanction of dismissal. The second respondent was of the view that the applicant was being guided by emotion and further found that the sanction fell outside the parameters of the applicant's written Disciplinary Code. I got the impression that the applicant had already committed itself to dismissing the first respondent whatever the recommendation of the Chairperson of the internal disciplinary hearing. It continued to maintain the same attitude in these proceedings with regard to the intended outcome of the appeal. In paragraph 24 of the applicant's affidavit, the following is stated:

> "**In any event, the Applicant would rather choose to pay compensation to First Respondent in the event of Applicant being unsuccessful, than to reinstate him.**"

[23] It is clear from the above that the applicant deliberately

ignored the recommendation of its own self-appointed independent Chairperson. The statement by the President of the District Labour Court in the matter of Namibia Broadcasting Corporation v Mubita *supra* became apposite.

> "What then, was the purpose of appointing a disciplinary committee if its decision or recommendations are to be ignored, disregarded or overridden**".**

[24] The Chairperson of the District Labour Court found that the applicant's Disciplinary Code did not make provision for dismissal, yet it decided to dismiss the first respondent. It has stated unequivocally that if it were to be unsuccessful with its appeal, it would not reinstate the first respondent but rather pay compensation to the first respondent.

[25] From this, I am inclined to infer that the applicant's appeal is not *bona fide*; it is aimed at making the life of the first respondent as difficult as possible. In my view the facts upon which the charges of misconduct were founded, even if they were found to have been proven by the District Labour Court, would not and should not have attracted a sanction of dismissal. I get the impression that the alleged damaged relationship is exaggerated. I further sense an element of vindictiveness in the applicant's approach to the whole matter.

[26] I have formed the view that the second respondent was justified in ordering the reinstatement of the first respondent.

[27] In the result I have come to the conclusion that the applicant has failed to make out a case that it has reasonable prospects of success on appeal. I have also considered all the facts placed before me and have not been persuaded that the applicant enjoys reasonable prospects of success on appeal. It follows that the question of prejudice must be determined in favour of the first respondent.

The application is accordingly dismissed.

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ANGULA, P.