



CASE NO: LC 98/2011

REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

**NAMIBIA SEAMAN AND ALLIED WORKERS UNION
APPLICANT**

and

**TUNACOR GROUP LIMITED
RESPONDENT**

CORAM: HOFF, J

Heard on: 22 August 2011

Delivered on: 19 September 2011

JUDGMENT
Urgent Application

HOFF, J: [1] This is an opposed urgent application in which the applicant sought the relief set out in the notice of motion.

[2] It is answering affidavit the respondent stated in essence that the relief has been sought against an incorrect respondent and asked that the application be dismissed on this ground alone.

[3] It is now common cause that the industrial action which forms the background of this application, is the labour dispute, between one of the respondent's subsidiary companies, Tunacor Fisheries Limited and its workers as represented by the applicant.

[4] Ms van der Westhuizen who appeared on behalf of the applicant, at the inception of this application in court, conceded that the wrong entity had been brought to Court and subsequently withdrew the urgent application against the respondent.

[5] Mr Geier who appeared on behalf of the respondent argued that a cost order should be granted in favour of the respondent since the applicant had in launching this urgent application against the respondent acted frivolously. He submitted that the respondent had been inconvenienced and prejudiced in the sense that it had to incur costs in opposing this application.

[6] Mr Paulus Shikongo Hango who deposed to the founding affidavit on behalf of the applicant, in his replying affidavit stated that citing the respondent had been a bona fide mistake and that the applicant had not been acting in a frivolous or in a vexatious manner.

[7] In order to explain this bona fide mistake Mr Hango referred this Court to various documentation attached to his founding affidavit which caused the alleged confusion.

[8] In this regard, Mr Hango, referred to the fact that some documents (correspondence between the parties) referred to "Tunacor Group Limited" whereas others referred to "Tunacor Fisheries Limited" and others only referred to "Tunacor", and stated that he was under the *bona fide* but mistaken belief that "Tunacor Group Limited" and "Tunacor Fisheries Limited" was one and the same entity.

[9] Mr Geier submitted that the applicant could not have been under the mistaken belief that Tunacor Group Limited and Tunacor Fisheries Limited was one and the same entity

He submitted that if one analyses the annexures attached to applicant's founding affidavit it is apparent that Tunacor Fisheries Limited was at all times the entity with whom the applicant had a labour dispute and that by hauling the respondent to Court the applicant acted frivolously.

Mr Geier referred to the following documents in support of his submission:

the recognition agreement between the applicant and Tunacor Fisheries Limited;

a notice of industrial action against Tunacor Fisheries Limited by the applicant;

various correspondence between Tunacor Fisheries Limited and the applicant some of which had been signed by Mr Hango himself; and

the fact that Tunacor Group Limited and Tunacor Fisheries Limited have different company registration numbers.

[10] Ms van der Westhuizen disagreed that the applicant acted frivolously submitting that Tunacor Group Limited was also blame for the *bona fide* mistake since this company corresponded with the applicant on the same subject matter, namely the intended industrial action by the applicant.

[11] I agree with the submission by Mr Geier that it is inexcusable for a union leader who over a period of time on behalf of the applicant exchanged correspondence and subsequently resorted to litigation to come to Court and say that he had made a mistake by dragging the wrong entity to Court.

[12] I am further of the view, contrary to the submission that the reference to three different names caused confusion to the extent that Mr Hango thought that Tunacor Group Limited and Tunacor Fisheries Limited was one and the same entity, that it should have alerted him to the probability that they might indeed be distinct entities and that it was necessary to ascertain against which legal person he intends to seek the relevant relief.

This he failed to do and as a result the wrong legal person was brought before Court.

[13] Section 118 of the Labour Act, Act 11 of 2007 provides as follows:

“Despite any other law in any proceedings before it, the Labour Court must not make an order for costs against any party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.”

[14] This Court was referred to the case of *National Housing Enterprise v Beukes and Others 2009 (1) NR 82* (by Mr Geier) where the head note with reference to the meaning of the words frivolously or vexatiously reads that the

“meaning given to these words is where a party acted mala fide, with ulterior motive or simply to cause annoyance to the other party”.

[15] Van Niekerk J in the Beukes matter (*supra*) referred to the case *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W)*, where Nicholas J, as he then was, in considering the meaning of vexatious proceedings, *inter alia*, referred to the meaning given to that word in the Shorter Oxford Dictionary where the following appears at 1339 E - F:

“In its legal sense, “vexatious” means “frivolous improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant.”

[16] It was submitted by Mr Geier, if I understood him correctly, that a cost order should be granted against the applicant since applicant acted frivolously in the sense that by instituting proceedings against the respondent the applicant caused annoyance to the respondent.

[17] It appears to me with reference to the aforementioned meaning of the word “vexatious” referred to by Nicholas J (as he then was) that the word vexatious encompasses the word frivolous.

[18] In my view the context in which the words (frivolous or vexatious) are used in section 118 of the Labour Act, Act 11 of 2007 is that they are used disjunctively.

[19] The Shorter English Dictionary which I consulted gives the meaning of the word vexatious as follows:

“1. Causing or tending to cause vexation.

b. *spec.* of legal actions: Instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant. 2. Full of trouble or uneasiness.”

[20] The meaning of frivolous is given as follows:

“silly, trifling 1. Of little or no weight or importance; paltry, trumpery; not worth serious attention. b. Law. In pleading: Manifestly futile 1736. 2. Characterized by lack of seriousness, sense or reverence; given to trifling, silly.”

[21] It would be apparent that having regard to the respective meanings of the words “vexatious” and “frivolous”, that “vexatious” does not mean “frivolous” or put differently the meaning of the word frivolous cannot be included in the meaning of the word vexatious and that these words have two different meanings.

[22] I shall now consider the submission with reference to aforesaid meanings whether the applicant acted frivolously and vexatiously in bringing this urgent application citing respondent as a party to the proceedings.

[23] In my view it cannot be said that the applicant instituted the proceedings without sufficient grounds *for the purpose of* causing trouble or annoyance to the respondent.

[24] I have expressed the view (*supra*) that the applicant should have been more circumspect when it decided to institute legal proceedings and that had Mr

Hango done so he would have realised that it would be “manifestly futile” to institute proceedings against the respondent and in this sense in my view applicant acted frivolously in citing the respondent as a party to the proceedings. I am consequently of the view that the applicant should be mulcted with costs in dragging the respondent (the wrong entity) to Court.

[25] In the result the following order is made:

A cost order is given against the applicant.

HOFF, J

**ON BEHALF OF THE APPLICANT:
WESTHUIIZEN**

ADV. VAN DER

**Instructed by:
ATTORNEYS**

HARMSE

ON BEHALF OF THE RESPONDENT:

ADV. GEIER

**Instructed by:
PARTNERS**

KOEP &