REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 67/2012

In the matter between:

NATIONAL HOUSING ENTERPRISES	**APPLICANT**
and	
EDWIN BEUKES	**FIRST RESPONDENT**
SIMON NUJOMA	**SECOND RESPONDENT**
GODFRIED AUENDERE	**THIRD RESPONDENT**
EVELINE UANIVI	**FOURTH RESPONDENT**
GUSTAV HANGANEE MUPURUA	**FIFTH RESPONDENT**
CATHLEEN MULLER	**SIXTH RESPONDENT**
LORETTE PHILANDER	**SEVENTH RESPONDENT**

Neutral citation: *National Housing Enterprises v Beukes* (LC 67/2012) [2013] NALCMD 07 (27 February 2013)

Coram: KAUTA AJ
Heard: **29 June 2012**
Delivered: **27 February 2013**

ORDER

In the result, I make the following order:

(a) Dispensing with the forms and service of the Rules of the Labour Court and hearing this matter as one of urgency.

(b) Dismissing the application, no order as to costs.

JUDGMENT

KAUTA AJ

[1] In this matter the Applicant launched an urgent application seeking to set aside proceedings pursued by the Respondent in the District Labour Court. In the alternative, the Applicant seeks as security, payment of the sum of N$350 000.00 jointly and severally from Edwin Beukes & 7 Others.

[2] The Applicant contends that the Respondents' complaint in the District Labour Court is frivolous, vexatious, "obviously unsustainable" and amounts to an abuse of the process of court, hence this application.

[3] The history of this matter is eloquently set out in the appeal judgment of Smuts J, between the parties delivered on the 13th of May 2011.

[4] After delivery of the appeal judgment, the Respondents on the 16th June 2011 enrolled the matter for hearing in the District Labour Court from the 7 – 18 November 2011. The Applicant reacted to this enrollment with an application to compel the Respondents to furnish particularized complaints and to discover. Orders to this effect were granted on the 17th October 2011, by the District Labour Court, in favour of the Applicant.

[5] Mr Barnard, who appeared on behalf of the Applicant contends that in response to the orders of the 17th October 2011 the Respondent served a document, styled "Complainants Requested Further Particulars" on the 15th November 2011. He further contends that no further particulars were at any stage requested by the Applicant and any response to a non-existent request is therefore a nullity.

[6] The hearing between the parties it appears did not materialize as envisaged in the District Labour Court. On the 12 December 2011, Koep & Partners, the legal practitioners of record of the Applicant wrote to Tjitemisa & Associates, the Respondent's legal practitioner, and demanded that individual particulars of complaint be filed in compliance with the District Labour Court orders of the 17th October 2011. This letter was met with silence.

[7] On the 8th February 2012, Tjitemisa & Associates withdrew as legal practitioners of record of the Respondents and GF Köpplinger replaced them as such on the 14th February 2012.

[8] By mutual agreement the legal practitioners of the parties enrolled the matter for hearing on the 29 February 2012. The hearing was set for the 31st July – 3 August 2012 and on the 7th August 2012, in the District Labour Court.

[9] After the matter was set down for hearing, Mr Vlieghe, the legal practitioner of the Applicant wrote to Mr Köpplinger, on the 1st of March 2012 with a request that the matter should not be set down before there is full and proper compliance with the District Labour Court orders of 17th October 2011.

[10] No response to the above was forthcoming and a reminder was sent on the 13th March 2012. The Applicant, dissatisfied with the lack of progress, instructed counsel to advise on best steps it should take in May 2012, hence this application.

[11] From the above facts it is common cause that the Applicant participated fully in the proceedings in the District Labour Court. As a result the Applicant is armed with court orders of the District Labour Court of 17th October 2012.

[12] The Applicant in the founding affidavit at paragraphs 52 - 57 quotes verbatim from the appeal judgment of this court and premises this application exclusively on dicta and ratio contained therein.

[13] In a nutshell, Mr Barnard raised three grounds in support of his contention that the proceedings in the District Labour Court are frivolous and vexatious and as a result amount to an abuse of the process of court. These grounds were: lack of particularity of the complaint; uncertainty about the identity of the complainants; and failure to make proper discovery. All these grounds were extensively explored in the appeal judgment of this court between the parties.

[14] Mr Barnard's further contention that the proceedings are obviously unsustainable is premised on the fact that the complainants seek re-instatement despite a long passage of time since their retrenchment well knowing that their former positions have been filled.

[15] The contentions advanced by Mr Barnard, are not novel. He advanced them to Smuts J, at the appeal hearing when he asked him to dismiss the complainants' complaint. At paragraph 25 of the appeal judgment Smuts J, said "Mr Barnard however submitted that the proceedings should be set aside and that the complaint should

further be dismissed given the fact that only reinstatement was sought and that this remedy would not be competent after the passage of time and where positions were no longer available and give the failure to comply with Rule 4(c). He accordingly invited me to dismiss the complaint in addition to setting aside the proceedings which had occurred before Ms Shaanika or to do so by merely upholding the appeal and then replacing the order of the court below with one of the dismissal of complaint"

[16] Smuts J, held that "having found that the proceedings before Ms Shaanika are to be set aside in their entirety, including the judgments and orders which she made, it would not be open to me to then dismiss the complaint on the basis of the matter which was stated in those proceedings with reference to formulation of the complaint and the relief sought in it. That would be a matter for the district labour court to consider in the context of an appropriate application or upon the evidence adduced in the complaint proceedings which should occur de novo. It would then be a matter for NHE to raise in that forum".

[17] *In LF Boshoff Investments (Pty) v Cape Town Municipality 1969 (2) SA 256 C at 275 D the court held that:*

"the power of the court to set aside a proceeding on the grounds that it is frivolous and/or vexatious and/or an abuse of the process of the Court is one which ought to be sparingly exercised and only in very exceptional cases…the proceeding must be obviously unsustainable and this must appear as a matter of certainty and not merely on a preponderance of probability".

[18] *The above approach was stated thus in Golden International Navigation SA v ZEBA Maritime Company Limited; ZEBA Maritime Company Limited v M V Visvliet 2008 (3) SA 10 (c) at [9]:*

"It is well settled at common law that '(e) very court has an inherent right to prevent an abuse of its process in the form of frivolous or vexatious litigation'. 1 An action may be held to be vexatious if it is 'obviously unsustainable', 2 or 'frivolously, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant".

[19] As laid down by the judgment in the Golden International Navigation – matter (supra) at [26], that proof of the "obviously unsustainable" nature of Plaintiff's claim by a preponderance of probabilities will suffice as yardstick with which to determine whether an applicant should be entitled to his/her relief:

"[26] I am mindful of the fact that the court's power to strike out a claim on the basis that it is vexatious or an abuse of its process is an exceptional one which must be exercised with great caution, and only in a clear case. However, I respectfully disagree with dicta that go further by requiring that this conclusion "must appear as a certainty and not merely on a preponderance of probability". This requirement appears to originate from a dictum in the minority judgment of Holmes JA in African Farms and Townships case. The two cases cited by Learned Judge of Appeal in support of this proposition do not, however, provide such support. Furthermore, the proposition flies in the face of our rules of evidence, by which a preponderance of probability in favour of a litigant is sufficient to decide any civil case in favour of such litigant. (Even the most serious criminal charge is decided beyond reasonable doubt and not with "certainty"). I accordingly respectfully decline following the authorities that appear to lay down such a requirement. [27] For the reasons furnished above, I am of the view that the Plaintiff's action is "obviously unsustainable". Coupled with the inordinate delay and the failure on the part of the Plaintiff to prosecute its claim to finality, it is clear to me that the continuation of plaintiff's action will be vexatious and hence an abuse of the process of this court, as contemplated by Rule 20(1) of the admiralty rules as well as the common law".

[20] In Namibia Financial Institutions Supervisory Authority v Christian and Another 2011 (2) NR 537 (HC) 2011 (2) NR Smuts, J held that:

"[80]…It is for this reason that both the powers of the court under the Act and the inherent power to strike out or stay vexatious proceedings under common law arise in this application. [81] As I have pointed out, Griesel J in the Cohen matter found that the court does have the inherent discretion to strike out or stay existing proceedings on the grounds of vexatiousness. I find that also to be the position in Namibia. These powers were thus described in Bisset and Others v Boland Bank Ltd and Others: 'The Court has an inherent power to strike claims which are vexatious. (Western Assurance Co v Caldwells' Trustee

1918 AD 262 at 271; African Farms and Township 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 SA Ltd v Jorgensen and Another; Fisheries Development Corporations of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W).) This power to strike out is one which must be exercised with very great cautions, 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 I 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).' [82] The inherent power of a court to stay proceedings was also dealt with by Navsa J (as he then was) in Williamson v Schoon and more recently in Absa Bank Ltd v Dlamini where this common-law principle was also applied."

[21] The above cases are distinguishable from this matter in one material respect. They deal with vexatious and frivolous proceedings raised between the same parties in the same forum in which the litigation emanate. Mr Barnard was unable to refer me to any authority in oral argument or his heads of argument in which a superior court on application stayed proceedings in the lower court on the contention he advances in this proceedings.

[22] Mr Narib, who appeared for the Respondents argued that this application was not urgent because the Applicant could have easily have applied to have the matter in the District Labour Court postponed. He further urged me to dismiss this application with costs in light of Section 20 of the Labour Act of 1992.

[23] Section 20 provided that "the Labour Court or any district labour court shall not make any order as to any costs incurred by any party in relation to any proceedings instituted in the Labour Court or any such district labour court, except against a party which in the

opinion of the Labour Court or district labour court has, in instituting, opposing or continuing any such proceedings, acted frivolously or vexatiously".

[24] Mr Narib contented that this court differently constituted considered this matter and declined to dismiss this matter on the basis contented for by Mr Barnard. The proper reading of the appeal judgment set out in detail at paragraph 15 and 16 supra support the contention of Mr Narib. I am persuaded that all the contentions advanced by the Applicant were dealt with in the appeal hearing. This is however, not the end of the matter.

[25] The Applicant seeks an alternative order for the Respondents to furnish security for costs in the sum of N$350 000.00. It is common cause that the Applicant failed to comply with the provisions of Rule 47 of the High Court Rules and further seek condonation for that failure.

[26] In their reference work: LAWSA Volume (3) 2 the authors remarked as follows: "The rules in force in the magistrate's courts, unlike those in the High Court, determine the circumstances under which a defendant may require a plaintiff to give security for the costs of an action.

The phrase "give security" means to give security to the satisfaction of the clerk of court either by payment into court of the amount determined by the clerk or by the giving of a security bond for that amount either by the party with someone else as surety or by two or more other persons.

The plaintiff must give security for costs if the defendant requires it where the plaintiff:

(a) is not resident or working within the Republic;
(b) is an unrehabilitated insolvent;
(c) is a registered or incorporated company or a close corporation;
(d) has no substantial interest in the cause of action; or
(e) is subject to an administration order.

The word "plaintiff" does not for this purpose include a plaintiff in reconvention, nor does an "action" include a claim in reconvention.

The onus is on the defendant who is requesting security to satisfy the court on a preponderance of probabilities that the plaintiff falls within one of these five categories. Thus it is not correct for the court to decide the matter on the basis that there are grave doubts whether the plaintiff is resident within the Republic."

[27] The District Labour Court is a Magistrates Court and the Rules of the Magistrates Court are applicable. The one difference between the High Court and the District Labour Court, which is a Magistrates Court, is that the former may order for payment of security, inter alia, against vexatious litigants. The Magistrates Court is precluded by Rule 62 of the Magistrates Court. The provisions of Rule 62 apply mutatis mutandis to proceedings instituted by way of application.

[28] I have no hesitation to find that Mr Barnard must have been aware that this application had no merit on his contentions in the Magistrates Court; that is why it was launched urgently in this court. This inevitably leads to the second inquiry whether this application constitutes vexatious or frivolous proceedings. Mr Narib argued that it does because the Applicant was forum shopping and secondly it had advanced the same arguments at the appeal which were not needed. The Applicant, I have no doubt, was ill-advised but I am unable to hold that this application was frivolous and vexatious.

[29] In the result, I make the following order:

(c) Dispensing with the forms and service of the Rules of the Labour Court and hearing this matter as one of urgency.

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(d) Dismissing the application, no order as to costs.

P Kauta

Acting Judge

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APPEARANCES

APPLICANT : P Barnard

Instructed by Koep & Partners, Windhoek.

FIRST - SEVENTH RESPONDENT: G Narib

Instructed by GF Kopplinger, Windhoek.