



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 160/2015

In the matter between:

AUGUST MALETZKY
WILLEM JOHANNES COETZEE

FIRST APPLICANT
SECOND APPLICANT

and

NAMIBIA AIRPORTS COMPANY
THE MESSENGER OF THE COURT
FIRST NATIONAL BANK OF NAMIBIA LIMITED
MR J. SHUUVENI – CHAIRPERSON OF THE
DISTRICT LABOUR COURT

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT

Neutral citation: *Maletzky v Namibia Airports Company* (LC 160/2015) [2017]
NAHCMD 30 (03 October 2017)

Coram: USIKU, J

Heard on: 05 May 2017

Delivered: 03 October 2017

Flynote: Practice – Applications and motions – Application for a declaratory order that the proceedings in a District Labour Court in terms whereof the Respondent had obtained the order to stay execution was irregular and null and void – court finding that the Applicants' remedy lies in instituting appeal or review proceedings against the decision of the District Labour Court – Application dismissed with costs.

Summary: Applicants brought an application for a declaratory order that the proceedings in a District Labour Court, in terms whereof the Respondent had obtained the order to stay execution, was irregular and null and void – Court finding that the Applicants' remedy lies in instituting appeal or review proceedings against the decision of the District Labour Court – Application dismissed with costs.

ORDER

1. The application is dismissed.
2. The Applicants are ordered to pay, jointly and severally, the costs of the First Respondent; such costs to include the costs consequent upon the employment of one instructed and one instructing counsel.

JUDGMENT

USIKU, J:

Introduction

[1] On the 12th November 2015, the Applicants brought an application to this court for an order in the following terms:

- ‘1. Dispensing with the forms and service provided for in the Rules of this Honourable Court insofar as it may be necessary;
2. Setting aside the proceedings in terms of which the First Respondent obtained the following orders in the District Labour Court in Case No. DLC 61/2007, 1 to 5;

“1. *That the applicant’s non-compliance with the forms and service provided for in the Rules of this Honourable Court is condoned and that this application is heard as an urgent matter as envisaged by Rule 55 of the Rules of this Honourable Court,*

2. *That the Warrant of Execution issued by the District Labour Court for the District of Windhoek, in favour of the First and Second Respondents on 24th September 2013 in the amount of N\$ 870,789.96 is hereby stayed pending the outcome of the application for the rescission of the judgment granted by this court;*

3. *That the Garnishee order granted by the District Labour Court for the District of Windhoek in favour of the First and Second Respondents on 13th October 2015 is hereby stayed pending the outcome of the rescission application referred in paragraph 2 supra;*

4. *That the Third Respondent is hereby ordered not to execute the said warrant of execution pending the outcome of the application for rescission application and/or finalization of the matter; and*

5. *That the Fourth Respondent is hereby ordered not to pay any amount to the First, Second and Third Respondents in terms of the warrant of execution pending the outcome of the application for rescission and/or the finalization of this matter”*

3. Directing the Respondent to enforce the Orders of the District Labour Court for the District of Windhoek of 10 July 2015;
4. Directing and setting aside the application dated 21 October 2015, under Case No: DLC 61/2007 as a nullity in law; and
5. Further and/or alternative relief.’

[2] The First Respondent opposed the application. There was no opposition on the part of the other Respondents. For the sake of convenience I shall, therefore, make reference to the First Respondent as “the Respondent” except where the context indicates otherwise.

Background

[3] On the 8th February 2007, the Second Applicant, who was then employed by the Respondent, instituted a complaint in the Windhoek District Labour Court under case No. DLC61/2007. In that complaint the Second Applicant alleged that the Respondent unilaterally and unlawfully altered his conditions of employment, in that he was prevented from working shifts on Sundays and Public Holidays. As a consequence thereof, the Second Applicant alleged, he suffered loss in the amount of N\$ 43 813.52.

[4] The aforesaid complaint was heard by the District Labour Court on the 21 and 22 February 2013, and after such hearing, the complaint was dismissed by the court on 22 February 2013.

[5] On the 5 July 2015, the Second Applicant represented by the First Applicant, filed a "Notice of application" in the District Labour Court, in which it was indicated that an application would be made on Friday 10 July 2015. In that notice, it was alleged that the Second Applicant and the Respondent had entered into a Deed of Settlement in terms of which the Respondent agreed, inter alia, to pay the Second Applicant an amount of N\$ 870 789.96.

[6] On the 10th July 2015, the Second Applicant, represented by the First Applicant, appeared before the District Labour Court. There was no appearance for the Respondent. After hearing the Second Respondent (represented as aforesaid) the District Labour Court made the following order, which I set out hereunder in full; namely:

'IN THE DISTRICT LABOUR COURT FOR THE DISTRICT OF WINDHOEK

AND HELD AT WINDHOEK

IN THE MATTER BETWEEN

CASE NO. DLC 61/2007

WILLEM J. COETZEE

APPLICANT

AND

NAMIBIA AIRPORTS COMPANY

RESPONDENT

HEARD ON: 10/07/2015

ORDER

Having heard Mr. August Maletzky on behalf of the Applicant, and Respondent having failed to attend the proceedings after having been properly served with a notice on 03/07/2015, I order:

That prayers, 1, 2, 2.1, 2.2, 2.3 and 2.4 of the notice of application as set out below are granted.

1. Condone non-compliance with the rules of this Honourable Court insofar as it may be necessary;
2. That the Proposed Deed of settlement between the complainant and the respondent, filed of record of clerk of this Honourable Court on 8 February 2013, and a copy of which is attached to the supporting affidavit of the applicants as annexure 'A1' hereof and constituted in the following terms, be made an order of this Honourable court:
 - 2.1 An order that the Respondent **reinstates the medical aid benefits** of the Complainant from date hereof;
 - 2.2 An order that the Government Institutions Pension Fund to be advised and informed of final salary and the difference to paid over to Government Institutions Pension Fund by the Respondent;
 - 2.3 That the amount of N\$ 870 789. 96, set out in annexure "A1", be paid with interest at a rate of 20% calculated from 7 February 2013 to date of payment; and
 - 2.4 Cost of suit limited to disbursements.

By order of Court

J.Shuiveni
Chairperson of the DLC
Windhoek'

[7] Subsequent to the above default judgment, the Second Applicant obtained a Warrant of Execution issued on 24 September 2015 as well as a Garnishee Order, issued on the 13 October 2015.

[8] On the 21 October 2015 the Respondent filed an urgent application in the District Labour Court, seeking an order to stay the Warrant of Execution and the Garnishee Order. The aforesaid stay was sought, pending an application for rescission of the default judgment granted by the District Labour Court on the 10 July 2015.

[9] The urgent application was heard on 23 October 2015 and on the same day, the Respondent was granted an order staying the execution aforesaid. For the sake of clarity, I set out the order of the court in full, hereunder, namely:

‘CASE NUMBER: DLC 61/2007

IN THE DISTRICT LABOUR COURT OF NAMIBIA
HELD AT WINDHOEK
BEFORE CHAIRPERSON MR.SHUUVENI
In the matter between:

NAMIBIA AIRPORTS COMPANY LIMITED

APPLICANT

and

WILLEM JOHANNES COETZEE
AUGUST MALETZKY
THE MESSENGER OF COURT
FIRST NATIONAL BANK OF NAMIBIA LIMITED

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT

Having heard Mr. Hinda, SC assisted by Mr. Akweenda for the applicant and Mr. Maletzky for the First and Second Respondents

IT IS ORDERED:

1. That the applicant's non-compliance with the forms and service provided for by the Rules of this Honourable court is condoned and that this application is heard as an urgent matter as envisaged by Rule 55 of the Rules of this Honourable Court.
2. That the Warrant of Execution issued by the District Labour Court for the District of Windhoek, in favour of the First Respondent, on 24th September 2015 in the amount of N\$ 870 789.96 is hereby stayed pending the outcome of the application for the rescission of the judgement granted by this Court.

3. That the Garnishee order granted by the District Labour Court for the District of Windhoek in favour of the First and Second Respondents on 13th October 2015 is hereby stayed pending the outcome of the rescission application referred in paragraph 2 *supra*.
4. That the Third Respondent is hereby ordered not to execute the said warrant of execution pending the outcome of the application for rescission and/or the finalization of the matter.
5. That the Fourth Respondent is hereby ordered not to pay any amount to the First, Second and Third Respondents in terms of the warrant of execution pending the outcome of the application for rescission and/or the finalization of this matter.

BY ORDER OF COURT'

[10] On the 30 October 2015 the Respondent filed an application for rescission of the said default judgment. The Applicants opposed the application, by notice delivered on the 04 November 2015. However, the Applicants did not file any answering papers to the said rescission matter.

[11] Before the application for rescission of the default judgment was heard, the Applicants filed the present application in this court, on the 12 November 2015.

[12] The default judgment was subsequently rescinded by the District Labour Court.

The present application

[13] The Applicants now ask this court to set aside the "proceedings" relating to the said:

- (a) urgent application to stay execution, and
- (b) the application to rescind the default judgment.

Applicants' argument

[14] The Applicants state that they launched this application to obtain a declaratory order that the proceedings in terms whereof the Respondent had obtained the order to stay execution, was irregular and null and void.¹

[15] The First Applicant pointed out that he used to appear on behalf of litigants in labour disputes, in the District Labour Courts, in terms of Act No. 6 of 1992. As such, he represented the Second Applicant in respect of the labour dispute between the Second Applicant and the Respondent in the District Labour Court.

[16] The Applicants contend that the method used by the Respondent to obtain relief in the District Labour Court on the 23 October 2015 was unfair, harsh, discourteous and not sanctioned by law.²

[17] In support of their argument, the Applicants state that the Respondent, in its application for stay of execution, addressed that application to both the Registrar of the High Court and the Clerk of the District Labour Court, which was confusing and embarrassing.

[18] Applicants further contend that the Respondent, in its application for stay of execution, joined the First Applicant to the proceedings, though the First Applicant had no interest in such proceedings. Such conduct, the Applicants argue, is unlawful and prejudicial to the First Applicant.

¹ Paragraph 13.13 of the Applicants' Founding Affidavit.

² Paragraph 13.14 of the Applicants' Founding Affidavit.

[19] The First Applicant contend that he objected to the aforesaid “irregularities” to the Fourth Respondent (Chairperson of the District Labour Court) but the latter disregarded those objections.

[20] The Applicants, therefore, argue that they are entitled to the relief they seek as more fully set out in the Notice of Motion.³

Respondent’s argument

[21] The Respondent contends that the Applicants’ remedy is either an appeal or review of the decision of the District Labour Court, not the setting aside of the proceedings. The Applicants could not institute an appeal or review of the decision of the District Labour Court, since at the time they launched the present application, the District Labour Court had not made a decision in the rescission application.

[22] The Respondent further argues that there were no irregularities committed by the District Labour Court. The District Labour Court had power to rescind or vary any judgment granted by it in the absence of the other party.

[23] The application for the stay of execution was filed in the District Labour Court and not in the High Court. The name of the Registrar of the High Court appeared on the application by mistake. The Applicants had filed a notice of intention to oppose the application for the stay of execution and, therefore, they were not prejudiced.

[24] In regard to the joinder of the First Applicant, the Respondent contends that the First Applicant had played a special role in obtaining default judgment in the District

³ Paragraph 13.20 of the Applicants’ Founding Affidavit.

Labour Court. The First Applicant had put constant pressure on the Third Respondent to pay the money to the Second Applicant. Therefore, the Respondent argues, the First Applicant had interest in the matter.

[25] The Respondent argues further that it is entitled to a costs order on a scale of legal practitioner and client, including costs of one instructing and one instructed counsel, on the basis that the Applicants have acted vexatiously and/or frivolously in instituting and proceeding with this application.

[26] The Applicants knew that the First Respondent and the Second Respondent did not conclude any Settlement Agreement in the amount of N\$ 870 789.96 (or any amount). Notwithstanding the above, the Applicants proceeded to request the aforesaid default judgment in the District Labour Court on the 10 July 2015, and later proceeded to launch the present application in this court on the 12 November 2015.

[27] In its Answering Affidavit, the Respondent quoted the undermentioned excerpt, as part of the submissions made by the First Applicant in the District Labour Court, on the 10 July 2015, in support of the application for default judgment namely:

“Most importantly, is that respondent in this court had undertaken to honour a proposed deed of settlement filed of record in this matter on 31/07/2013. In fact it is also on the court's file. Subsequently, thereto an application for default judgment was made before Magistrate Britz already in 2013. We then discontinued the application on request of the respondent on the commitment that we go for a settlement agreement. This matter was set down on 3/07/2015 last week for hearing but respondent failed although was duly informed and have failed to turn up at court. Matter was then moved to 10/07/2015 and respondent was duly served with notice of the application which they have acknowledged receipt of on 3/07/2015.

In light of this little background [sic] history, the purpose is to seek this court indulgence and to condone non-compliance with the rules of this court.

I am pretty sure that the relief we seek today appears strict but given effort that the applicant made is quite enormous.

Also given the remedies the respondent has in terms of the law they can move an application for rescission of judgement as the case may be. Remedies will protect this court and respondent is welcome to this court and ventilate its reasons why the order should not stand. In support there is an affidavit of applicant attached to this application. That is my submissions."⁴

[28] In their Replying Affidavit the Applicants do not deny that the First Applicant made the above-quoted submissions, but indicate that the First Applicant attended the proceedings as representative of the Second Applicant.⁵

Analysis

[29] The Applicants approached this court for a declaratory order that the proceedings in terms whereof the Respondent had obtained the order to stay execution was irregular and null and void.

[30] In terms of item 15(4) of Schedule 1 to the Labour Act⁶, a matter that was pending before a District Labour Court or Labour Court, in terms of the provisions of the previous Act, must be concluded by that Court as if the previous Act had not been repealed.

[31] Section 18(1) (e) of Act 6 of 1992 ⁷ provided that the Labour Court shall have exclusive jurisdiction to issue any declaratory order in respect to:

- (a) the application or interpretation of any provision of the Act,
- (b) any law on the employment of any person in the service of the state,

⁴ Paragraph 21 of the Respondent's Answering Affidavit.

⁵ Paragraph 21 of Applicants' Replying Affidavit

⁶ Act 11 of 2007: Schedule 1 deals with transitional provisions

⁷ Labour Act No. 6 of 1992

- (c) any term or condition of any collective agreement,
- (d) any wage order or
- (e) any contract of employment.

[32] As is apparent from the above provisions, the proceedings of a District Labour Court are not one of the matters on which a Labour Court may issue a declaratory order. On the basis of the foregoing, I agree with the arguments submitted by the Respondent that the Applicants' remedy in this matter lies in appeal or review process.

[33] The Applicants have not delivered any notice of appeal, nor any grounds of appeal, in respect of the proceedings which the Applicants are now challenging. Furthermore, the Applicants have not called upon Chairperson of the Labour Court to dispatch the record of the proceedings complained against. It is therefore apparent that the application before this court is not an appeal and does not meet the requirements of an appeal.

[34] In addition, the Applicants have not called upon the Chairperson of the District Labour Court and all persons affected, to show cause why the proceedings or decision of the District Labour Court should not be reviewed, corrected or set aside. Furthermore, no one had been called upon to dispatch the record of the proceedings to be reviewed, corrected or set aside. It is also apparent that the application before this court is not and does not meet the requirements of a review application.

[35] In the absence of any challenge to the decision of the District Labour Court by way of appeal or review, such decision stands unassailed and binding.

[36] In view of the foregoing, it is clear to me that the Applicants have not made out a case that they are entitled to the relief they seek and therefore this application stands to be dismissed.

[37] As regards the issue of costs, it is apparent from the papers filed of record that the complaint which was filed by the Second Applicant against the Respondent on the 8 February 2007, was dismissed by the District Labour Court on or about the 22 February 2013. The Applicants have not challenged that issue. That notwithstanding, the Second Applicant somehow managed to resurrect the same matter on the 10 July 2015 on account of the purported Settlement Agreement between the Second Applicant and the Respondent, which did not exist. On the basis of such scheme, a default judgement was obtained against the Respondent.

[38] It is now common cause that such default judgment has since been rescinded.

[39] Nowhere in the papers had any of the Applicants indicated that they had any reason to believe that the purported Settlement Agreement indeed existed.

[40] The present application is founded on the proceedings that relied on a non-existent Settlement Agreement. The resultant default judgment has since been rescinded. The Applicants had no justification to institute or proceed with the present application. Though the First Applicant was initially merely a representative of the Second Respondent, by instituting and proceeding with the present application, he together with the Second Applicant, had acted frivolously and vexatiously. In view of the fact that no Settlement Agreement was signed by the Second Applicant and the Respondent, the present application was instituted without any justifiable ground, and the Applicants acted solely to cause annoyance to the Respondent.

[41] For the above reasons, I am satisfied that the conduct of the Applicants justify a costs order to made against them.

[42] However, I am not satisfied that the Respondent has placed before court sufficient material to show that a costs order on the normal scale will not be sufficient to meet its costs in opposing the application. For that reason I will not grant a punitive costs order, but would grant an ordinary party-and-party costs order.

[43] In the result I make the following order:

- (a) the application is dismissed
- (b) the Applicants are ordered to pay, jointly and severally, the costs of the First Respondent, such costs to include costs consequent upon the employment of the one instructed and one instructing counsel.

B. Usiku

Judge

APPEARENCES:

APPLICANTS:

Mr August Maletzky (In Person)

Mr Willem Johannes Coetzee (In Person)

First Respondent:

Dr Sakeus Akweenda

(With Mr Clive Kavendjii)

Instructed by Kangueehi & Kavendjii