

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON COSTS

Case No: HC-MD-LAB-APP-AAA-2021/00072

In the matter between:

ROADS AUTHORITY

APPLICANT

and

SAKARIA L. HANGULA

RESPONDENT

Neutral Citation: *Roads Authority v Hangula* (HC-MD-LAB-APP-AAA-2021/00072) [2021] NALCMD 53 (6 December 2021)

Coram: **MASUKU J**

Heard: 10 November 2021

Delivered: 10 November 2021

Reasons: 06 December 2021

Flynote: Labour Law – Labour act 11 of 2004 – section 118 of the Act – costs issued in circumstances where the institution or defence of proceedings is frivolous or vexatious -

Summary: The court having found against the applicant in this application was faced with the consideration of the issuance of the propriety of the issuing a costs order in favour of the respondent. The application emanated from the initial application wherein which the applicant sought to vary the execution of an arbitral award pending appeal. The respondent successful in jubilation now seeks a costs order. The court having considered the arguments presented by both parties found as follows:

Held: that when regard is had to the provisions of section 118 of the Labour Act, the powers of the court to issue a costs order against either party, amounts to the expression of the disapproval of the conduct of the party, in so far as the institution, defence, or continuation of the matter was carried out in frivolous and/or vexatious.

Held that: an order of costs may be issued where there is some egregious or pernicious conduct by a party in the prosecution of proceedings

Held that: when an application fails to meet the prescribed requirements such as urgency, it cannot be said that the institution of that application is frivolous and/or vexatious.

Held further that: the degrading circumstances that a party finds itself in cannot be used as a measure to allow for costs so prayed for.

Held: that parliament enacted the provision to allow for individuals to approach court without the fear of being mulcted with costs orders should they be unsuccessful in their course.

The court found that the applicant was not frivolous and or vexatious in the institution of the proceedings and ordered each party to pay their own costs.

ORDER

1. Each party is ordered to bear its own costs.
 2. The matter is removed from the roll and is regarded as finalised.
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RULING

MASUKU J:

Introduction

[1] The Namibian Parliament, in its manifold wisdom, promulgated the Labour Act, No. 11 of 2004. In section 118 of the said Act,¹ the legislature decreed that no order for costs would be issued by the Labour Court in labour matters, save in situations where the institution, defence, or further pursuit of proceedings is either frivolous or vexatious.

[2] The Labour Court has, in its judgments, in the past few years, in dealing with the issue of costs, held that notwithstanding s 118 of the Act, the court may nevertheless issue an order for costs where there is some egregious or pernicious conduct by a party in the prosecution of the proceedings that it requires that an order for costs should be unleashed on the party.²

¹ 'Despite any other law in any proceedings before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'

²*Namibia Tourism Board v Kankondi* (HC-MD-LAB-MOT-REV-2018/00096) NALCMD 22 (17 August 2018) and *Sefelana Cash & Carry Namibia (Pty) Ltd t/a Metro Cash & Carry v*

[3] The question confronting the court in this matter is straightforward and it is this – is this a case in which it is appropriate for the court to issue an order for costs either for the reason that it falls within the rubric of s 118 of the Act, or there is some conduct by the losing party, which falls within the court's power in the conduct of proceedings before it, to sanction an errant party by an order to pay costs.

Background

[4] The poser recorded in paragraph 3 above arises in the following circumstances. The respondent Mr. Sakaria L. Hangula, an adult male, was employed by the Roads Authority, the applicant in this matter. It was alleged that the applicant had caused a driver's licence to be issued to an individual without the latter having undergone the requisite tests for proficiency. As a result, the respondent was charged with the following counts, namely fraud and/corruption; gross negligence; bringing the organisation into disrepute and dishonesty or breach of trust, which in the view of its employer, necessitated an internal disciplinary hearing.

[5] The respondent was, at the conclusion of the disciplinary, was found guilty and was accordingly dismissed by the respondent. He did not take the dismissal lying down. He approached the Office of the Labour Commissioner, where he reported a labour dispute of unfair dismissal. Conciliation efforts came to nil, resulting in an arbitration hearing before an arbitrator appointed by the Labour Commissioner.

[6] The arbitrator, for reasons that need not detain us in these proceedings, found for the respondent in the award issued on 08 October 2021. The arbitrator ordered payment of compensation to the respondent in the amount of N\$ 531.390 and immediate reinstatement. The award was to be complied with by 08 November 2021.

[7] Dissatisfied with the award, the applicant noted an appeal. Because of the imminence of the date of compliance with the award, the applicant approached this court on urgency, seeking an order varying the execution of the award, pending the hearing of the appeal, by ordering the applicant not to pay the compensation awarded and not reinstating the respondent to his previous position.

[8] This application was opposed by the respondent, who came out guns blazing, and claims that he has been out of employment for a considerable period and needs the money issued in terms of the award, to be paid.

[9] At the hearing of the matter, the respondent successfully raised the question of urgency, or lack of it. The court came to the view that the applicant failed in its papers filed of record, to deal with the urgency requirements, stipulated in rule 6 (24) and (26) of the Labour Court Rules. As such, the application was struck from the roll. It was at that juncture that the respondent applied for an order for costs to be granted in his favour.

Determination

[10] I am of the considered opinion that the respondent's prayer for costs, in this particular matter, is ill-conceived, when full and proper regard is had to the provisions of s 118 of the Act and the residual powers of the court to issue a costs order to express its disapproval of some conduct on the part of a party to the proceedings.

[11] As one reads, it is clear that costs will be issued when the jurisdictional factors mentioned in s 118 are found to exist. This is certainly not the case in the instant matter. It has not been in any manner shown that the applicant, in launching these proceedings was acting in a frivolous or vexatious manner. I say this without fear of contradiction.

[12] Furthermore, it is not the respondent's case that there is any conduct or behaviour by the applicant in the conduct of the proceedings that is so

egregious or pernicious that it should move the court's hand to exercise its powers of retribution by granting an order for costs. In my considered view, there is nothing done or said by the respondent that would warrant an order for costs, without creating a chilling effect on litigants whose cases are for one reason or the other, unsuccessful.

[13] I am of the considered opinion that the applicant in this matter, by approaching the court, was desirous of obtaining an order for the variation of effect of the award, pending the hearing of the appeal. The fact that the application was found not to meet the requirements for invoking the urgency provisions, or that there was a lapse in judgment by the applicant does not, *per se*, mean that the institution of the proceedings falls within the realms of the frivolous or the vexatious.

[14] If the court were to pander to the entreaties of the respondent, what Parliament meant to avoid would be allowed to actually eventuate, namely to avoid a chilling effect on litigants within the labour sphere in bringing or defending proceedings for the fear that if they should be unsuccessful, they may be ordered to pay costs. In that event, the most vulnerable in society, namely the employees would be the greatest sufferers and Parliament was very much alive to this possibility, hence the promulgation of s 118 of the Act.

[15] The failure by the applicant to make the necessary allegations regarding urgency in the papers filed of record, or to not heed the respondent's warning about some aspects of the matter does not, in and of its own, merit the serious and far-reaching step of unleashing the sjambok of a costs order. It would be wrong and unconscionable, in a labour matter, to punish a party for mounting a case that is not successful, in the absence of the exceptions allowed in s 118 and in the stark absence of any pernicious or egregious conduct by that party.

[16] I am not insensitive to the fact that the respondent has, as it was argued, been out of employment for some time, which understandably affects his ability to provide for himself and his family, and which in a sense, infringes

on his dignity. That is not, however, a reason to overlook the legislative solicitudes expressed in s 118, sympathetic as one may be to the respondent's lot presently.

Conclusion

[17] In view of the brief discussion above, together with the reasons advanced, it is my considered view that this is not a proper case in which to mulct the applicant in costs for the reason that it was the unsuccessful party in these proceedings.

[18] It was for the above reasons that I find that the respondent's application for it to receive a favourable order for costs, should fail, as it is unmeritorious in the circumstances of this case.

Order

[19] The order that commends itself as being appropriate in the circumstances, is the following:

1. Each party is ordered to pay its own costs.
2. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES

APPLICANT: C. Stanley
Of Adv SS Makando Chambers

RESPONDENT: H. M. N. Ndilula
Of Kadhila Amoomo Legal Practitioners