

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directive 61

Case Title: At Helmsman Group (Pty) Ltd Applicant and Ernst Dawid Frederik 1 st Respondent Deputy Sheriff - District of Windhoek 2 nd Respondent	Case No: HC-MD-LAB-MOT-GEN-2022/00125
	Division of Court: Main Division
	Heard on: 8 August 2022
Heard before: Honourable Lady Justice Rakow	Delivered on: 29 August 2022
	Reason released: 30 August 2022
Neutral citation: <i>At Helmsman Group (Pty) Ltd v Frederik</i> (HC-MD-LAB-MOT-GEN-2022/00125) [2022] NALCMD 47 (29 August 2022)	
Order:	
1. Condoning the Applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings, and to hear the matter as one of urgency as contemplated in terms of Rule 6(24) of the Rules of the Labour Court.	
2. Staying the Arbitration Award in <i>toto</i> pending the final determination of an appeal logged herein under case number: HC-MD-LAB-APP-AAA-2022/00033.	
3. An order in terms whereof the court order dated 13 December 2021, making the arbitration award a court order under case number: HC-MD-LAB-APP-AAA-2021/00293 is	

hereby rescinded.

4. An order in terms of which the writ of execution issued on 11 March 2022 under case number: HC-MD-LAB-APP-AAA-2021/00293 is hereby set aside *in toto*.

5. No order as to costs.

6. The matter is regarded finalized and removed from the roll.

Reasons for order:

RAKOW J:

Introduction

[1] This matter came as an urgent application in terms of s 89(7) of the Labour Act 11 of 2007 before me. The parties are the At Helmsman Group (Pty) Ltd as the applicant, with the respondents Mr Frederik and the Deputy Sheriff for the district of Windhoek. Mr Frederik registered a Labour Award on 13 December 2021, which award was received from an arbitrator from the Labour Commissioner's office in Rundu. He further obtained a Writ of Execution against the property of the applicant to enforce payment of the order which was issued by this court on 23 March 2022.

[2] The applicant noted an appeal and completed form 11 and served it on the office of the Labour Commissioner on 22 April 2022. There is, however, no indication that such an appeal was served on the Registrar of the Labour Court but a notice of registration of an appeal under case number HC-MD-LAB-APP-AAA-2022/00033 was filed by the applicant as part of his founding affidavit. It further seems from perusal of that file that the notice of appeal was served on the first respondent via mail, which was dispatched on 27 April 2022.

[3] In his affidavit, Mr Shivolo who filed it on behalf of the applicant, requests the court to vary the effect of s 89(6)(b) of the Labour Act suspending *in toto* the operation of the arbitration award pending the outcome of the applicant's appeal and that the first respondent be interdicted from proceeding with any proceedings or actions aimed at the execution of the award issued against the applicants in favour of the first respondent. The deponent proceeded and explained that the

applicant and respondent had an employer – employee relationship but it was ended after the respondent left the employment of the applicant together with other workers after a theft case was opened against them at the Namibian Police.

[4] The respondent then proceeded to file a complaint for unfair labour practice and unfair dismissal with the office of the Labour Commissioner. It seems that the matter appeared according to the deponent on 1 September 2021, from where it was postponed to 3 September 2021 and then the respondent failed to appear at the proceedings. The result was that the complaint was dismissed. The applicant was again served with a notice to appear for 3 November 2021, but their representative assumed that it relates to the same proceedings, which they realized was finalized when they closely studied the record. It seems that the arbitrator dealt with the matter that day and proceeded and made a labour award on 7 December 2021, which came to the attention of the applicant on 9 December 2021.

[5] They approached their legal practitioners of record and were advised to file an application in terms of s 88 of the Labour Act, which they then did. It then transpired that whilst they thought that the matter was dismissed on 3 September 2021, the proceedings show that it was transferred to the Rundu office of the Labour Commissioner. The applicant proceeded with his rescission application which was filed with the arbitrator. They learned that the rescission application was eventually dismissed by the arbitrator after 15 March 2022, without them receiving any notice of the said proceedings. They only received notice of these proceedings on 20 April 2022. The supporting affidavit of a certain Mr Coleman was also filed as he was the person who mainly dealt with the proceedings in this matter.

[6] On behalf of the respondent it was submitted that the only reason why the application was made, was to bully him. He maintains that there is no prospects of success and that he was indeed badly treated by the applicant. He then proceeds and places arguments before court that would better be considered in the appeal matter. The first respondent is not legally represented.

Legal considerations

Urgency

[6] The applicant indicated that it was hampered in instituting processes, because it did not have knowledge of the whereabouts of the first respondent. The first respondent is further

insisting on the deputy-sheriff executing the said warrant of execution, making the stay of such a warrant a matter of urgency. There is further an appeal pending before this court but the applicant fears that it, if it now satisfies the writ, will not be in the position to recover their payment as the first respondent is difficult to trace.

[7] In *Fuller v Shigwele and Others*¹, Parker AJ said the following:

'Urgent applications are now governed by rule 73 of the rules of court (ie rule 6(12) of the repealed rules of court), and sub rule (4) provides that in every affidavit filed in support of an application under sub rule (1) the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course. Indeed, sub rule (4) rehearses para (b) of rule 6(12) of the repealed rules. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant claims he or she could not be afforded substantial redress in due course. It is well settled that for an applicant to succeed in persuading the court to grant the indulgence sought, that the matter be heard on the basis of urgency, the applicant must satisfy both requirements. '

[8] The court is satisfied that both the requirements for urgency were met in the affidavit filed on behalf of the applicant by Mr Shivolo. The circumstances were set out clearly and the available relief was also dealt with, especially that they fear they could not get hold of the respondent again. They also sets out fully their prospects of success on appeal, which I might add, is contradicted by the first respondent but not in the matter before myself today.

Relief requested

[9] The court now has to consider whether the applicant made out a case for the relief it seeks. It further seems that the first respondent did not place anything before court to destruct the applicant's version regarding the relief it seeks.

[10] The relief requested was as follows:

1. Condoning the applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings, and to hear the matter as one of urgency as contemplated in terms of Rule 6(24) of the Rules of the Labour Court.

¹ *Fuller v Shigwele and Others* (A 336/2014)[2015] NAHCMD 15, (5 February 2015) para 2

2. Staying the Arbitration Award *in toto* pending the final determination of an appeal logged herein under case number: HC-MD-LAB-APP-AAA-2022/00033.
3. An order in terms whereof the court order dated 13 December 2021, making the arbitration award a court order under case number: HC-MD-LAB-APP-AAA-2021/00293 is hereby rescinded.
4. An order in terms of which the writ of execution issued on 11 March 2022 under case number: HC-MD-LAB-APP-AAA-2021/00293 is hereby set aside *in toto*.
5. That the second respondent be interdicted from proceeding to enforce the writ of execution under case number: HC-MD-LAB-APP-AAA-2021/00293.
6. The first respondent be interdicted from proceeding with any proceedings or action aimed at the execution of the award issued against the applicant in favour of the respondent pending the finalisation of the aforesaid proceedings.
7. Cost of suit only in the event that this application is opposed.
8. Any further and or alternative relief.

[11] The court is of the opinion that not all the above relief should be granted in this matter. After considering the grounds placed before this court, I am of the opinion that the applicant should be allowed to proceed with its appeal and the warrant of execution stayed. It is, however, necessary to deal with the registered court order HC-MD-LAB-APP-AAA-2021/00293, although not strictly speaking, necessary to rescind but it becomes a problem if for instance the appeal matter is successful and needs to be referred back to the Labour Commissioner, then there seems to be a jurisdictional issue as there is already a case with an order registered at the High Court.

[12] I therefore make the following order:

1. Condoning the Applicant's non-compliance with the Rules of Court relating to service and time periods for exchanging pleadings, and to hear the matter as one of

urgency as contemplated in terms of Rule 6(24) of the Rules of the Labour Court.

2. Staying the Arbitration Award in *toto* pending the final determination of an appeal logged herein under case number: HC-MD-LAB-APP-AAA-2022/00033.

3. An order in terms whereof the court order dated 13 December 2021, making the arbitration award a court order under case number: HC-MD-LAB-APP-AAA-2021/00293 is hereby rescinded.

4. An order in terms of which the writ of execution issued on 11 March 2022 under case number: HC-MD-LAB-APP-AAA-2021/00293 is hereby set aside in *toto*.

5. No order as to costs.

6. The matter is regarded finalized and removed from the roll.

Judge's signature:	Note to the parties:
<p style="text-align: center;">E RAKOW Judge</p>	<p style="text-align: center;">Not applicable</p>
Counsel:	
First Respondent:	
<p style="text-align: center;">Mr G Kasper Of Murorua Kurtz Kasper Incorporated, Windhoek</p>	<p style="text-align: center;">Mr ED Frederik (In person) Windhoek No appearance for 2nd respondent</p>