REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CIV-MOT-GEN-2022/00271

In the matter between:

JEANE-PIERRE HANGAYIKA	**APPLICANT**

and

AMAZING KIDS PRIVATE SCHOOL & ACADEMY	**1ST RESPONDENT**
EMMA KAKONA	**2ND RESPONDENT**

Neutral citation: *Hangayika v Amazing Kids Private School & Academy* (HC-MD-CIV-MOT-GEN-2022/00271) [2022] NALCMD 77 (09 December 2022)

Coram: CHRISTIAAN AJ
Heard: **05 December 2022**
Delivered: **09 December 2022**

Flynote: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73 (4) of the rules of court for the matter to be heard on urgent basis – Furthermore, there can be no urgency when urgency is self-created.

Labour Court – Costs – Costs in terms of s 118 of Act 11 of 2007 – Frivolous and vexatious - What constitutes –Court holding that the clear intention of the legislature for the enactment of Section 118 of the 2007 Labour Act was to also cure the injustice occasioned to parties at the receiving- end of 'frivolous' or 'vexatious' proceedings, and the exceptions, that where created in section 118, where enacted precisely to cure such mischief by bringing within the ambit of the exceptions also those cases, which put the other side to unnecessary trouble and expense, which the other side ought not to bear.

Summary: Practice – Applications and motions – Urgent applications – Applicant must satisfy the requirements of rule 73 (4) for the application to be heard as a matter of urgency – Court finding that applicant knew since December 2021 that he was no longer the principal but a teacher, later appointed as an acting principal – Applicant waited until 05 December 2022 to institute the proceeding at extremely breakneck speed, praying for the court to hear the matter on the basis of urgency – Court finding that the fact that the relief sought through the arbitration hearing before the Labour Commissioner would become moot was not capable of satisfying the requirement in rule 73 (4) – Court finding further that applicant had not set forth explicitly the reasons why he claims he could not be afforded substantial redress in due course – Consequently, court refused the application for lack of urgency. The application was dismissed with costs as it was considered 'frivolous and vexatious' in the premises.

ORDER

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1. The application is refused for lack of urgency and is struck from the roll.
2. The applicant is to pay the costs of the application.
3. The matter is considered finalized and is removed from the roll.

JUDGMENT

CHRISTIAAN AJ:

[1] The applicant, represented by Mr Bangamwabo, brought an application by notice of motion and prays the court to hear the matter on the basis of urgency. The first and second respondents oppose the application. The first and second respondents were represented by Ms Kemp.

[2] The matter revolves around a resolution of a Labour dispute instituted and launched in terms of and under Chapter 8 of the Labour Act, No.11 of 2007. The applicant was employed by the first respondent as a High School Principal since January 2013. The applicant claims that he was arbitrarily removed from position as a school principal of the first respondent. The applicant referred a dispute of unfair labour practice on the basis of an alleged unilateral change of conditions of employment to the Labour Commissioner on 11 November 2022.

[3] The main relief sought by the applicant in this urgent application is to interdict the first and second respondents from removing the applicant from his current position as the school principal until the pending labour dispute has been adjudicated and finalized. It further seeks to prohibit the respondents from interfering with applicant's duties as school principal and from appointing someone else to occupy the applicant's current position of the School Principal. A further condition is that the interim interdict, if granted, shall endure until such time that the dispute pending before the Labour Commissioner's office has been adjudicated and finalized.

[4] In the instant proceedings, the burden of the court is to consider and determine the issue of urgency only. Because of this I need to refer to rule 73(3) and 73(4) of the High Court Rules. The rule reads as follows:

'(3) In an urgent application the court may dispense with the forms and service provided in these rules and may dispose of the application at such time and place and in such manner and in accordance with such procedure which must as far as practicable be in terms of these rules or as the court considers fair and appropriate.

(4) In an affidavit filed in support of an application under subrule(1), the applicant must set out explicitly-
(a) the circumstances which he or she avers render the matter urgent; and
(b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'(Underling my emphasis)

[5] To determine the urgency of this matter, one has to establish if the applicant has complied with the provisions of rule 73(3) and 73(4). Fortunate enough guidelines have been set out in our case law to assist courts in the determination of issues of urgency.

[6] I therefore repeat hereunder, relying on the authorities, what Masuku J states in the matter of *Nghiimbwasha and Another v Minister of Justice and Others*[1]*.* The court dealt with the interpretation of the word 'must' contained in rule 73(4) as well as the responsibility of an applicant in a matter alleged to be urgent, para 11 and further reads:

'The first thing to note is that the said rule is couched in peremptory language regarding what a litigant who wishes to approach the court on urgency must do. That the language employed is mandatory in nature can be deduced from the use of the word "must" in rule 73 (4). In this regard, two requirements are placed on an applicant regarding necessary allegations to be made in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.

[7] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to

[1] *Nghiimbwasha and Another v Minister of Justice and Others [Appeal 38 of 2015]* [2015] NAHCMD 67 (20 March 2015).

set out and underscore the level of disclosure that must be made by an applicant in such cases.

[8] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency.'

[9] Parker AJ, on the interpretation and application of rule 73(4) said in *Fuller v Shigwele*[2]:

'[2] Urgent applications are now governed by rule 73 of the rules of court (i.e. rule 6 (12) of the repealed rules of court), and subrule (4) provides that in every affidavit filed in support of an application under subrule (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 afforded substantial redress at a hearing in due course. Indeed, subrule (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 or urgency, the applicant must satisfy both requirements. And *Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 tells us that where urgency in an application is self-created by the applicant, the court should decline to condone the applicant's non-compliance with the rules or hear the application on the basis of urgency.'

[10] Rule 73(3) provides that a judge, in urgent applications, may dispense with the forms and service provided for in the rules and dispose of the matter as he or she deems fit. An affidavit filed in support of an application, in terms of rule 73(4), must set forth explicitly the circumstances which an applicant avers render the matter urgent also giving the reasons why he claims that he could not be afforded

[2] *Fuller v Shigwele* (A 336/2014) [2015] NAHCMD 15 (15 February 2015), para 2.

substantial redress at a hearing in due course. The issue of absence of substantial redress in due course, in the main, determines the urgency of the matter.

[11] In determining whether a matter is urgent or not, each case is decided on its own facts.[3]

[12] The urgency of the matter, according to the applicant, is to be found in paragraphs 37 - 39 of the founding affidavit. It is, therefore, against the contents of these paragraphs that the issue of whether or not the matter is urgent has to be determined.

[13] In paragraphs 37 - 39, the applicant states that the matter is extremely urgent because the respondents conducted interviews of candidates to fill the position of the school principal on 22 November 2022. The applicant further argue that the respondents are about to appoint a candidate to replace him any time soon. Furthermore, the applicant claims that he cannot get redress in due course because if appointment is to occur, the arbitration hearing which is ongoing before the labour Commissioner would become moot, as he seeks a relief to set aside his removal as the principal of the first respondent. The applicant highlighted that one of the reliefs he seeks from this court is to interdict the respondents from conducting interviews pending the outcome of the disciplinary hearing is already moot as the respondents proceeded to conduct the interviews despite being aware of the dispute before the Labour Commissioner.

[14] The first and second respondents take the point that the application is not urgent and that the requirements for urgency set out in rule 73 of this court's rules have not been complied with.

[15] It is further argued on behalf of the respondents that the alleged unilateral change of terms and conditions of employment of the applicant arose as far back as December 2018, although the applicant relies on his subsequent appointment as acting principal which dates back to December 2021. The applicant referred the

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[3] *Tjipangandjara v Namibia Water Corporation* (Pty) Ltd (LC 60/2015) [2015] NALCMM 11 (11 May 2015).

dispute to the Labour Commissioner on 11 November 2022 which is 11 months after the alleged unfair labour practise arose.

[16] The high water mark of the urgency of the application seems to be in paragraph 37 and 39 of the applicants founding affidavit which says:

'37. I submit that the present matter is urgent, extremely urgent actually. This is so because the Respondents conducted interviews of candidates to fill in my position as the school principal on 22 November 2022. Thus, the Respondents are about to appoint a candidate to replace me any time soon. It follows; I cannot get redress in due course because if appointment is to occur, the arbitration hearing before the labour Commissioner would become moot as I primarily seek a relief to set aside my removal as the principal of the First Respondent. One of the reliefs that I seek, namely; interdicting the Respondents from conducting interviews pending the outcome of the disciplinary hearing is already moot as the Respondents proceeded with the interviews despite being aware of my dispute before the Labour Commissioner.

38. The respondents have already demonstrated that they are not going to wait for the outcome of the Arbitration hearing before placing someone else as a principal. Thus, should the Court not grant an interim interdict in my favour, I would not be able to get any substantial redress in due course to retain my position as principal as same would be occupied by someone by then.

39. In the circumstances, I submit that I have made out a case for the reliefs I seek and I pray for an order in terms of the notice of motion. I further submit that, considering the Respondents' frivolous conduct as set out above, a cost order in terms of section 118 of the Labour Act is justifiable.'

[17] There is a question which immediately springs to mind and this is: having regard to what is said in paragraphs 37 and 39 above, can it seriously be said that the applicant has explicitly set forth the circumstances which they aver make their matter urgent? Lastly, can it also be seriously said that they have properly disclosed the reasons why they claim that they will not be afforded substantial redress at a hearing in due course? I fail to see how the questions can be answered in the positive because the provisions of rule 73(3) and 73(4) have clearly not been

satisfied. One searches in the applicants papers, in '*a room full of confusion and doubt'*, for the circumstances and reasons referred to in rule 73(3) and (4).

[18] The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent.'(Underlined for emphasis)

[19] The applicant raise as one of his grounds of urgency, by way of the founding affidavit, violation of his labour, contractual and constitutional rights. I have no difficulty in accepting as a general principle that an unlawful activity may create a basis for urgency. The applicant says that the circumstances which render the matter urgent are the alleged unlawful actions of the first and second respondents. That notwithstanding, the applicant must still make out a case that they will not obtain substantial redress in due course.

[20] Ms Kemp, for the respondents, submitted that the applicant failed to explicitly set forth the circumstances which make their case urgent as well as the reasons which demonstrate that they will not be afforded substantial redress at a hearing in due course. It is further argued that the applicant's urgency is self-created.

[21] Ms Kemp, for the respondents, submitted that the applicant did not show why he could not be afforded substantial redress at a hearing in due course. It is argued that the applicant at present is still employed by the respondent in his full-time teacher position and receives the same benefits that he received whilst employed as a full-time principal and suffers no prejudice. It was further argued that the dispute of an alleged unilateral change of conditions arose during 2018 when the subsequent offer of full-time teacher was made to the applicant and/or when he was appointed in a different full-time position. Ms Kemp further argued that even if the applicant was unaware that the acceptance of the fulltime teacher appointment meant that it would replace his full-time principal position, the applicant became aware of this on 09 December 2021 when he was appointed as the acting principal, and this brings this application under the caption of self-created urgency. That the threshold to persuade the court that it cannot be afforded substantial redress at a hearing in the ordinary course, is higher.

[22] The applicant has not set forth explicitly (1) the circumstances which he avers render the matter urgent and (2) the reasons why he claims he could not be afforded substantial redress at a hearing in due course within the meaning of rule 73(4) (*a*) and (*b*) of the rules of court. It has often been said in previous judgments of our courts that failure to provide reasons may be fatal to the application and that mere lip service is not enough. (*Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G).

[23] As to rule 73(4) (*a*), applicant submitted that the relief through the arbitration hearing will become moot if the appointment of the new person is to take place. The aim of the application is to prevent the respondents from appointing a candidate to replace him any time soon, since they have already conducted interviews on 22 November 2022, but such submission does not answer the requirement in rule 73(4) (*a*). The fact that the relief through arbitration process will become moot and that the applicant does not want to wait for the arbitration hearing to be finalized, cannot be used as a ground to approach the court to seek the relief he now seeks at extremely breakneck speed. The applicant has, as I have said previously, known since December 2021 that he is no longer the principal of the school. The applicant waited until November 2022 to institute the proceeding at extremely breakneck speed, praying the court to hear the matter on the basis of urgency. The conclusion is reasonable and inescapable that the urgency is self-created.[4](*Bergmann v Commercial Bank of Namibia Ltd and Another* 2001 NR 48 (HC)).

[24] As respects satisfying the requirement in rule 73(4) (*b*), the applicant has not set forth explicitly reasons why applicant claims he could not be afforded substantial redress in due course. All that is said 'the arbitration process will not become moot, once the new person is appointed as the principal, but to prevent the respondents from selling the quota to third parties'. But this statement cannot satisfy the requirement of rule 73(4) (*b*). Besides, there is an ongoing arbitration process, where the issues between the parties are being ventilated. This clearly demonstrates that

[4] *Berman v Commercial Bank of Namibia Ltd and Another* (APPEAL 336 OF 2000) [2000] NAHC 25 (06 November 2000).

the applicants cannot, therefore, be heard to say that they cannot and will not be afforded substantial redress at a hearing in due course.

[25] I cannot agree more with the submissions made by counsel for the first and second respondents, that applicant failed to explicitly set forth the circumstances which make his case urgent as well as the reasons which demonstrate that they will not be afforded substantial redress at a hearing in due course. I therefore take the view that the applicant's urgency is not only self-created, but also self-serving in that the applicant seeks to protect a financial benefit to be derived from the fishing quotas sought to be interdicted and this brings this application under the caption of commercial urgency. This court is replete with authority that the possibility of financial hardship or financial losses does not constitute a ground for urgency.

[26] Based on these reasons, I am of the view that the applicant has failed to demonstrate that the matter is of such urgency that the provisions of the rules need to be abridged.

Costs

[27] I will now turn to the issue of costs, section 118 of the Labour Act[5] reads as follows:

> 'Despite any other law in any proceeding 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.'

[26] In *National Housing Enterprise v Beukes and Others*[6], Van Niekerk J while dealing with s 20 of the Labour Act 6 of 1992, said the following about the terms *frivolous* or *vexatious*:

> *[20] "… The question arises: what does it mean to say that a party has "acted frivolously or vexatiously"? In 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) Nicholas, J as he then was, while dealing with an application to stay proceedings which were alleged to be*

[5] Labour Act 11 of 2007.

[6] *National Housing Enterprise v Beukes and Others* 2009 (1) NR 82 (LC) at 87E-88F, referred to with approval in *Namibia Seaman And Allied Workers Union v Tunacor Group Ltd* 2012 (1) NR 126 (LC).

vexatious or an abuse of the process of the court, said this: "In its legal sense, "vexatious" means frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant.'

[21] It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word acted, indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that the proceedings are vexatious in effect even though not in intent."

[28] In other words, it occurs to me that these words mean that the party allegedly acting vexatiously or frivolously must act in a manner that is in all the circumstances of the case without pure and honourable motive; one that is entirely groundless; without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and serve to disturb and vex the spirit of the other party.

[28] In the matter of *Aussenkehr Farms (Pty) LTD v Namibia Development Corporation Ltd*[7] 18 where Ngcobo AJA stated:

"[18] The Court <u>has an inherent power to protect itself and others against an abuse of its process</u>. As was said in Hudson v Hudson and Another, "<u>When the court finds an attempt to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse"</u>. The power to prevent the abuse of the process of the court is an important tool in the hands of courts to protect the proper functioning of the courts and to prevent the judicial process from being abused by litigants who instituted proceedings to harass their adversaries with vexatious litigation. It prevents the court process from being turned into an instrument to perpetuate unfairness and injustice, and the administration of justice from being brought into disrepute"[8] (My Emphasis)

[29] If one then returns to the facts of this case it becomes clear – and even if I accept to some degree that the applicant believed in the justice of his cause and also that his plight motivated his belated referral to an extent– that this is a case where the proceedings are without doubt to be considered an abuse, which put the first and second respondents to unnecessary additional trouble and expense, four years after

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[7] *Aussenkehr Farms (Pty) LTD v Namibia Development Corporation LTD* SA 23/2010 [28/03/2012] (Delivered 13/08/2012) para 1.

[8] *Tambaoga Shirichena* v *Namibia Training Authority* (LCA 04/2016) [2016] NAHCNLD 81 (23 September 2016).

a change of the conditions of service. What aggravates the situation in addition is that the applicant could have withdrawn his application after a sober reconsideration of his position once he had been appraised of the first and second respondents grounds of opposition. In spite of this opportunity he nevertheless persisted doggedly with this urgent application. In all the circumstances, I believe therefore that this is a fit and proper instance where the applicant should lose the protective shield afforded by section 118 against a costs order.

[30] Having considered section 118, I am of the view that the applicant acted in a 'frivolous or vexatious manner'. I find no reason why the costs should not follow the result in this matter, I therefore order that the applicant pay the costs of the first and second respondents.

[31] In the result, it is ordered as follows:

1. The application is refused for lack of urgency and is struck from the roll.
2. The applicant is to pay the costs of the application.
3. The matter is considered finalized and is removed from the roll.

P CHRISTIAAN

Acting Judge

APPEARANCES

APPLICANT:	F Bangamwabo, FB Law Chambers, Windhoek
FIRST AND SECOND RESPONDENT:	M Kemp, Richard Metcalfe Legal Practitioners, Windhoek