

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AMANDA TSOEU

APPELLANT

And

SENIOR REAL ESTATES CC

RESPONDENT

Coram: Shivute, CJ, Strydom, AJA *et* Mtambanengwe, AJA

Heard on: 11/10/2010

Delivered on: 01/12/2010

APPEAL JUDGMENT

STYDOM, AJA:

[1] This is an appeal from the Labour Court. The matter started in the district labour court. The appellant was employed by the respondent as a secretary. The appellant alleged that after a period of some seven weeks the respondent terminated her employment. According to the respondent the appellant was not able to cope with

the work for which she was employed as a consequence of which the parties agreed to terminate the employment relationship.

[2] As a result of the termination of her employment, the appellant then filed a complaint with the district labour court in terms of sec. 19 of the Labour Act, Act 6 of 1992 (the Act). (Act 6 of 1992 has since been repealed by Act 11 of 2007. However, in terms of Schedule 1 sec 15 of the latter Act, disputes at the time pending under Act 6 of 1992, must still be concluded under the provisions of Act 6 of 1992. The present matter is such a dispute.) From this point on matters started to go wrong. An attempt was made to serve the district labour court proceedings on the sole member of the respondent, a Mr. Senior. He however refused to accept the proceedings when they were so served on him. Consequently no notice to defend was served by the respondent in terms of Rule 7 of the Rules of the district labour court, and as a further result whereof the appellant was able to apply for and was promptly granted judgment by default in an amount of N\$ 96,000-00. It was only when the appellant started to take steps to execute on the judgment that the respondent realized that something was terribly wrong.

[3] The respondent then launched an application for the rescission of the judgment in order to stop execution on the judgment obtained by the appellant. This application was made in the district labour court. This application was unsuccessful and the respondent then filed a notice of appeal against the finding of the district labour court. In order not to confuse the various appeals I shall henceforth refer to this

appeal as the rescission appeal. However, the filing of a notice of appeal did not suspend the execution of the judgment. This is so because section 19(2) of the Act provided that the noting of an appeal shall not stay the execution on a judgment or order of the district labour court. This section furthermore provided that only the Labour Court can stay execution on application to it.

[4] As a result of the provisions of section 19(2) the respondent thereupon launched an urgent application in the Labour Court for the stay of execution of the judgment obtained in the district labour court, pending the outcome of the rescission appeal. In the meantime the appellant had also obtained a garnishee order in the district labour court which necessitated the respondent to amend the relief claimed in the Labour Court to also include the suspension of this order. The relief claimed by the respondent is as follows:

“2. That a *rule nisi* do issue calling upon the respondents to show cause, if any, to this Honourable Court on a date to be determined by this Honourable Court, why an order should not be made in the following terms:

2.1 staying the execution of the judgment granted by the District Labour Court for the district of Windhoek on 21 January 2008 under case number DLC 474/07, pending the resolution of an appeal by the applicant;

2.2 setting aside the warrant of execution issued under case number DLC 474/07;

- 2.3 in the alternative to paragraph 2.2 *supra*, interdicting and restraining the respondents from in any way, executing upon the warrant of execution issued in terms of case number DLC474/07;
- 2.4 that the first respondent be directed to pay the costs of this application. In the event of second respondent opposing this application then those respondents opposing the application should be ordered to pay the costs jointly and severally, the one paying the other to be absolved.
3. The order in terms of sub-paragraphs 2.1, 2.2 and 2.3 hereof shall serve as an *interim interdict* with immediate effect pending the finalisation of this application.”

[5] The appellant opposed the application launched by the respondent. The appellant appeared personally to oppose the application. After argument the learned President of the Labour Court issued the following order:

- “2. That the execution of a judgment granted by the District Labour Court for the district of Windhoek on 21 January 2008 under case number DLC474/07, is stayed pending the resolution of an appeal by the applicant.
3. That the warrant of execution and garnishee order issued under case number DLC 47/07 (*sic*) is hereby set aside.
4. That the first and second respondents are hereby interdicted and restrained from in any way, executing upon the warrant of execution, garnishee order dated 28 January 2008 and 12 February 2008, and any other order issued in execution of the default judgment under case number DLC 47/07 (*sic*).”

[6] On the record it is not clear why the learned President of the Labour Court granted prayer 4 above as that prayer was couched in the alternative to prayer 3.

However, there is no appeal against the granting of that order. The second respondent, referred to in the order, is not a party before this Court and I need not further refer to him.

[7] Thereafter the appellant applied for leave to appeal to this Court in terms of the provisions of sec. 21(1)(a) of the Act. This application was dismissed and the Labour Court issued the following order in this regard, namely:

- “1. That the application is hereby dismissed.
2. That the application brought before this Honourable Court is an abuse of the court’s process, and are (*sic*) vexatious and frivolous.
3. That the applicant pays the costs of the application to 1st respondent on an attorney and own client scale.
4. That the matter is referred to the Prosecutor-General to further investigate.
5. That the applicant is prohibited to proceed with the matter until the costs of the 1st respondent had been paid in full.”

[8] Faced with this order the appellant submitted a petition to this Court for leave to appeal. A Judge of this Court granted leave to appeal to the appellant and issued the following order, namely,

- “1. That the petitioner’s application *vis-à-vis* the first respondent for leave to appeal against-

- (a) paragraphs 2, 3 and 4 of the order of the Labour Court made on 15 February 2008 in case No. LC 2/2008 and
- (b) paragraphs 1, 2, 3 and 5 of the order of the Labour Court made on 19 February 2008 in case No. LC 3/2008

is granted subject to the following conditions:

- (i) that, in relation to the order referred to in paragraph (a), the grounds upon which the appeal may be prosecuted be limited to the following questions of law:

- (aa) Does the notice of appeal against the judgment or order of the District Labour Court comply with the prescribed constitutive legal requirements for notices of that nature?

- (ab) If not, what is the effect of such non-compliance on the validity of the notice of appeal in question?

- (ac) If the effect of such non-compliance is that the notice of appeal is void *ab initio* (or that it is otherwise defective), was it competent for the Labour Court to grant a stay of execution of the District Labour Court's order under s 21(2) of the Labour Act, 1992 as contemplated in paragraphs 2, 3 and 4 of the order referred to in paragraph (a) and was it the proper forum to decide that issue in proceedings other than the appeal itself? (my emphasis)

- (ii) that, in relation to the order referred to in paragraph (b), the grounds upon which the appeal may be prosecuted be limited to those mentioned in paragraph (i) and the following additional question of law: Was it competent or permissible for the Court *a quo* to make an order in the application for leave to appeal prohibiting the petitioner to proceed with the matter until the costs of the respondent had been paid in full?

(iii) that, if the petitioner intends to prosecute the appeal, she lodge a notice of appeal with the registrar of the Court and the respondent or his legal practitioner within 10 days from the date of this order stating whether all the orders referred to in paragraphs (a) and (b) are appealed against and, if not, which ones and which parts thereof;

(iv)

(v)

(vi)"

(Sub-paragraphs (iv), (v) and (vi) deal with procedural aspects which were complied with by the appellant.)

[9] The appellant, following upon the order of this Court, duly filed a notice of appeal on the following grounds:

"AD PARAGRAPH 1(B)(I)(AA) THEREOF

1. The notice of appeal against the judgment of the District Labour Court does not comply with Rule 19(1) and (2) of the Rules of the District Labour Court, in terms of which an appeal to the Labour Court shall be noted in the District Labour Court, in the following respects:

1.1 It does not set out the point of law or fact appealed against;

1.2 It does not set out the grounds upon which the appeal is based.

AD PARAGRAPH 1(b)(i)(ab) THEREOF

2. Due to the said non-compliance with Rule 19(2) the noting of the appeal is void *ab initio*.
3. It is further void *ab initio* as the said defective noting of appeal freezes the entire appeal procedure by *inter alia* disabling the clerk of the court to process the appeal and the Chairman of the District Labour Court to amplify her reasons. In this regard Rule 19 of the Rules of the District Labour Court shall be read with Rule 51(8)(a) of the Rules of the Magistrate's Court Rules.

AD PARAGRAPH 1(b)(i)(ac) THEREOF

4. As no appeal was lawfully noted the Labour Court could not competently grant stay of execution as section 21(2) of the Labour Act of 1992 was the sole legal source of its power to do so, which allows for stay only when an appeal has been lawfully noted.
5. The Labour Court was not the proper forum of deciding stay as no proper appeal to it was pending and the hearing was thus a rehash of the hearing and thus a negation of the District Labour Court's jurisdiction and authority.
6. It was *ultra vires* the Court *a quo's* competence to prohibit appellant by way of costs to proceed with the matter as *inter alia* the matter has been decided in the Supreme Court already that the Court's discretion to do same is firmly contained by Article 12 and such prohibition must come with reasons."

[10] From the above outset of the background history of this matter it is clear that the respondent was to a great extent the author of its own misery. The service of the documents initiating the proceedings in the district labour court was properly effected in terms of Rule 5(2)(a) of the District Labour Court Rules which provided that service

of process can be by the delivery of such process to a respondent by the complainant or any adult person designated by the complainant. Mrs. Beukes who sought to serve the process was obviously such a person designated by the complainant. Respondent's unjustified refusal to accept the documents set in motion a chain of events which have brought the parties to the highest Court without the matter being taken any step closer to finality. In the process many questionable steps were taken and orders made but which fall outside the ambit of the appeal before us. The appeal before us is circumscribed by the order set out herein before. Such order was necessary because there is no general appeal from the Labour Court to this Court. Appeals from the Labour Court are limited to questions of law only. (See sec. 21(a) of the Act as amended.)

[11] The task of this Court was not made easier by the fact that the appellant is a lay person who mostly had to fight her battles personally because legal practitioners, appointed for her by the Directorate Legal Aid, either disappeared or withdrew, at critical times. Furthermore the respondent informed the Court that it abided by the decision of the Court so that we also did not have the benefit of argument on behalf of the respondent.

[12] There are two issues which must firstly be decided because the appeal against the order of the Labour Court, made in regard to the stay of execution, and the order made in regard to the application for leave to appeal proceedings, depend thereon. The first question is whether the Labour Court was the correct forum to order a stay of

execution in the proceedings which started in the district labour court where a default judgment was granted in favour of the appellant.

[13] Sub.sec. 21(2) of the Act provided as follows:

“(2) The noting of an appeal under subsection (1) shall not stay the execution of the Labour Court’s or a district labour court’s judgment or order, unless the Labour Court on application directs otherwise.”

In my opinion the provisions of the subsec. is clear. Any application for a stay of execution, whether it be for a judgment or order of the district labour court or the Labour Court itself, must be brought before the Labour Court. In this regard the effect of the noting of an appeal is different from the situation in ordinary civil matters where the notice of appeal generally stays any execution on a judgment or order of the Court which gave it. The respondent therefore correctly brought its application before the Labour Court.

[14] The next issue concerns the alleged defective notice of appeal by the respondent in the rescission appeal and the question whether the forum for deciding that issue was the present proceedings where respondent applied for a stay of execution or whether that issue could only be decided in the appeal proceedings itself.

[15] For the reasons set out hereunder I am of the opinion that the issue of the alleged defective notice of appeal can only be decided in the appeal proceedings themselves. It is so that once a notice of appeal is filed, it sets in motion the steps spelled out in the District Labour Court Rules namely, the clerk of the court must within 21 days from the noting of the appeal transmit the record of proceedings before that court to the registrar of the Labour Court. The clerk of the court must give effect to the Rules notwithstanding defects which may be present in the notice of appeal. It is not for the clerk of the court or the magistrate to ignore a defective notice of appeal. (See in this regard *R v Noah*, 1959 (3) SA 530 (E), *Nixon v Wilson NO*, 1959 (4) SA 215(O), *Snyman v Crouse*, 1980 (4) SA 42 (O) and *Jordan v Penmill Investments CC and Another*, 1991 (2) 430 (E).) Although these cases deal with Rule 51 of the Magistrate's Court Rules, those Rules also apply to the district labour court in so far as the latter Rules do not make provision for any procedure to be followed in any matter before the district labour court. (See Rule 26). I can find no reason why the principle laid down in the above cases should not apply to Rule 19 of the District Labour Court Rules more so as Rule 19(2) of the latter Rules is almost identical to Rule 51(7) of the Magistrate's Court Rules. Only the court of appeal, in this instance the Labour Court, seized with the rescission appeal, can deal with and pronounce on the matter and decide whether to condone or not to condone any shortcoming or non-compliance with the Rule.

[16] A further reason why appellant's argument in this respect cannot be accepted, is that the Court *a quo* was only seized with the application to stay execution on the

default judgment. Any other Judge of the High Court, sitting as President of the Labour Court, may be designated to hear the rescission appeal.

[17] A further reason why appellant's argument in regard to the notice of appeal in the rescission appeal cannot be accepted is that up to and until the rescission appeal is heard the respondent (i.e. the appellant in the rescission appeal) can take steps, if so advised and if necessary, to attempt to rectify any defect which may exist in its notice of appeal. If such steps are taken it would necessarily involve the granting of condonation and that in my opinion can only also be dealt with by the Court hearing the rescission appeal.

[18] The Court *a quo* was therefore correct in dismissing this argument by the appellant and as this was the only ground of appeal raised in regard to the proceedings to stay execution of the judgment and the garnishee order, it follows that the appeal against those orders must be dismissed.

[19] This brings me to the orders issued by the Labour Court in regard to the application for leave to appeal by the appellant. The finding by this Court that the issue of the notice of appeal in the rescission appeal can only be heard by the Labour Court seized with the rescission appeal also took care of the appellant's appeal against these orders. (See sub.pa. (ii) read with sub.pa. (i)(ac) of the order of this Court dated 19 May 2008.) However, in regard to the order whereby the appellant was prohibited to take any further steps until full payment of the costs of the

respondent, the order by the Learned Judge of this Court allowed a further or additional ground, namely:

“ (ii).....(Was) it competent or permissible for the Court *a quo* to make an order in the application for leave to appeal prohibiting the petitioner to proceed with the matter until the costs of the respondent had been paid in full?”

[20] An order prohibiting a litigant to proceed with litigation until an order of costs against that litigant is satisfied will only be given by a court in exceptional circumstances. (See *Argus Printing and Publishing Co. Ltd v Rutland*, 1953 (3) SA 446 (CPD) at 449C – F, and *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*, 2008(2) NR 753 (SC) a judgment of this Court by Maritz, JA, in which myself and Chomba, AJA, concurred.) Such an order, especially in the case of an indigent party, may close the doors of the court to that party and prohibit access to the court. In the instance of Namibia that access is guaranteed by Article 12 of our Constitution. Everything points to the fact that the appellant is not a person with financial resources and that was in fact stated by the appellant in the Court *a quo*. The court made a finding that the appellant’s application was an abuse of the process of the court but gave no reasons for this finding. No reasons were also given for the ruling which prohibited the appellant from taking any further steps until the costs of the respondent were paid in full. I can understand the order to pay costs on an attorney and client basis. This followed in all probability on the unfounded allegations, made by the appellant during argument, in which she accused the learned Judge of impropriety in connection with the stay proceedings. However, to

prohibit her from taking any further steps in connection with the proceedings until the costs of the respondent were paid in full was, in respect of the appellant, virtually a final order which stopped her in her tracks. And to do so in proceedings where the appellant was exercising her right, also guaranteed by the Constitution, to attempt to obtain leave to bring the matter on appeal, was in my opinion not permissible. It is so that this Court has found that the Court *a quo* was correct to reject appellant's submissions regarding the alleged defective notice in the rescission appeal but the appellant is a lay person who was in all probability advised by other lay persons to follow this line of argument. This resulted from the fact that legal practitioners appointed to act for her left her in the lurch at critical times. Where proceedings involve a lay person as a party the cases show that the courts exercised more tolerance and were more accommodating in such instances than where the parties were legally represented. (See *Goldberg v Kroomer and Others*, 1947 (4) 867 (TPD) at 872 and the *Christian's-case*, *supra*, at para. [8], and the cases referred to therein.) These cases took into account that a party is a lay person and that the court should not be too meticulous and, as was stated by Maritz, JA, in the *Christian's-case*, *supra*, the Court should look at the substance of the lay person's complaint rather than the form.

[21] The order of the Court *a quo* may have an effect on the rescission appeal and the steps to be taken by the appellant to defend the matter. It already seems that for that reason the prosecution of the appeal has come to a standstill as we were informed by the appellant that no date for the appeal has yet been determined. This

in itself is a reason why it is not permissible to let the order stand as the appellant may not be able to pay the full costs of the respondent which will give rise to a stalemate situation where neither party can bring the matter to finality. To permit that would completely undermine the rights of both parties to bring this matter speedily to an end, and would furthermore negate their right to have the merits of the dispute adjudicated upon by a Court of Law.

[22] In the result the following orders are made:

A. In regard to the stay proceedings:

The appeal is dismissed.

B. In regard to the order made in respect of the Application for Leave to Appeal proceedings:

1. Paragraphs 2, 3 and 4 of the order of the Labour Court granted on 19th February 2008, are confirmed.
2. Paragraph 5 of the order of the Labour Court granted on 19th February 2008 whereby the appellant was prohibited to proceed with the matter until the costs of the 1st respondent were paid in full, is hereby set aside.

3. In so far as he/she has not yet done so the clerk of the district labour court is hereby ordered to comply with the provisions of Rule 19(3) of the Rules of the district labour court and within 21 days of this order transmit the record of the rescission appeal to the Registrar of the Labour Court.

4. In so far as he/she has not yet done so the Registrar of the Labour Court is ordered, on receipt of the above record, to comply with the provisions of Rule 18(1) of the Labour Court Rules.

STRYDOM, AJA

I agree

SHIVUTE, CJ

I agree

MTAMBANENGWE, AJA

ON BEHALF OF THE APPELLANT: In person

ON BEHALF OF THE RESPONDENT: No appearance