

NOT REPORTABLE

CASE NO: SA 62/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

Appellant

NAMIBIA ELECTRICAL SERVICES CC

and

ELI NEFUSSY

Respondent

Coram: DAMASEB DCJ, ANGULA AJA and UEITELE AJA

Heard: 5 July 2021

Delivered: 13 July 2021

Summary: The appellant (as plaintiff) instituted this action against the respondent (as defendant) for an alleged breach of the contract entered into by the parties. In terms of the agreement appellant undertook to perform certain electrical installation works for the respondent. The appellant alleged that it executed and completed the work which was required to be performed in terms of the contract. As a result thereof the appellant suffered damages for which the respondent is allegedly liable. The respondent defended the action and counterclaimed for damages suffered as a result of the appellant's defective or faulty workmanship.

The matter became subject of judicial case management and at a pre-trial conference held on 3 October 2018, the managing judge directed the parties to file their respective witness statements on or before 28 February 2019. The matter was then set down for trial the week commencing 23 September 2019. The parties failed to file their respective witness statements as directed by the managing judge.

The appellant sought condonation for its failure to file witness statements as directed by the court. The appellant also applied to vacate trial dates given by the court. Both applications were opposed by the respondent. The court, in the course of considering the two applications, was informed that the parties had decided to refer the matter to private arbitration. Notwithstanding this communication, the hearing of the applications proceeded and both applications were dismissed. The managing judge further granted absolution from the instance in respect of the main claim and counterclaim.

On appeal, this court had to determine whether under the circumstances the court below was entitled to consider the two applications after it was informed by the parties that they had decided to refer the matter to private arbitration.

Held, that once the parties had conveyed to the court that they had decided to refer the matter to private arbitration, it was no longer open for that court to proceed and determine the applications. The court below misdirected itself and as result, the appeal is allowed without costs.

APPEAL JUDGMENT

UEITELE AJA (DAMASEB DCJ and ANGULA AJA) concurring:

Introduction

[1] The appellant (NES) appeals against the judgment and orders absolving the respondent (Nefussy) from the instance in respect of an action which NES instituted against Nefussy in the High Court. The appeal is opposed by Nefussy.

Background

[2] During April 2016, NES instituted an action in the High Court claiming payment in the amount of N\$250 619, 95 from Nefussy. NES alleges that that amount is due and owing to it by Nefussy arising from a contract in terms of which NES made certain electrical installation works at Nefussy's residence and for which Nefussy has failed, neglected or refused to pay.

[3] Nefussy defended the action and launched a counterclaim against NES in terms of which he claimed an amount of N\$345 756,97 as damages he allegedly suffered as a result of NES's poor workmanship in performing electrical installation works at his residence. Nefussy furthermore counter claimed an amount of N\$31 301,52 from NES, allegedly being damages suffered by him as a result of NES incorrectly installing an electrical business-meter instead of a residential meter at his residence.

[4] The case was docket allocated to a managing judge who case managed it and at a pre-trial conference held on 3 October 2018, the court, amongst other, ordered the parties to file their respective witness statements on or before 28 February 2019. On 14 February 2019, the managing judge allocated trial dates and set the matter

down for trial during the week of 23-27 September 2019. Both parties did not file any witness statements as ordered on 3 October 2018.

[5] On 18 September 2019, that is about two court days before the trial was scheduled to commence, NES filed an application for the condonation for its non-compliance with the court order of 3 October 2018 and also applied to vacate the trial dates. Nefussy opposed both the condonation application and the application to vacate the trial dates.

[6] After hearing the application on 23 September 2019, the court *a quo* made the following order:

'IT IS ORDERED THAT:

1. The plaintiff's application for condonation of non-compliance with court order dated 3 October 2018 and of non-compliance with rule 96 (3), is refused.
2. The plaintiff's application for vacation of the set-down trial dates of 23-27 September 2019, is refused.
3. Both parties having not complied with the provisions of court order dated 3 October 2018, and having not served any witness statement within the time specified in such order, are in terms of rule 93(5), not to be allowed to give oral evidence.
4. In regard to the plaintiff's claim; the court grants absolution from the instance in favour of the defendant.
5. Each party shall bear own costs.

6. In regard to the defendant's counterclaim; the court grants absolution from the instance in favour of the plaintiff.
7. Each party shall bear own costs.
8. The matter is removed from the roll and regarded as finalised.'

[7] NES is aggrieved by the order absolving Nefussy from the instance and it is against that order that the appeal lies.

The grounds of appeal

[8] NES sets out its grounds of appeal as follows:

- '1. The learned judge misdirected himself in considering the application for vacation of trial dates (postponement application) and the condonation application after he was informed by the parties that they had decided to refer the case to private arbitration.
2. The learned judge erred in granting absolution from the instance in favour of the respondent on the main claim, and the appellant on the counterclaim:
 - 2.1 The orders for absolution from the instance are not competent orders as no evidence had been led by the appellant or the respondent.
 - 2.2. The learned judge was in any event not entitled to proceed with the trial after he was informed that the parties had settled the litigation by referring the matter to private arbitration.'

[9] From the grounds of appeal it is clear that there are two issues that we are required to resolve. The first is whether the court *a quo* was entitled to consider the application to condone NES's non-compliance with the court order of 3 October 2018 and the application to vacate the trial dates after it was informed by the parties that they had decided to refer the case to private arbitration. The second issue is whether or not an order of absolution from the instance was competent.

[10] I pause here to mention that at the hearing of this matter, Mr Marcus who appeared for NES in this court indicated that he will limit his appeal to the first question only. In order to resolve the first question, (that is, whether or not the court *a quo* was entitled to consider the application to condone NES's non-compliance with the court order of 3 October 2018 and the application to vacate the trial dates after it was informed by the parties that they had decided to refer the case to private arbitration) I find it appropriate to briefly recount what transpired at the hearing of 23 September 2019 in the court *a quo*.

Proceedings in the High Court

[11] In the process of addressing the court with respect to the application for condonation and vacation of trial dates, counsel for NES (Ms Cilliers) said:

'... Subsequently to that and my Learned colleague will address Your Lordship thereon there has also been an agreement reached between the parties of this matter being transferred for arbitration, then all the terms in terms of that was also agreed

upon between the parties but my Learned Colleague will address Your Lordship thereon ...¹ (Underlined for emphasis)

[12] After Ms Cilliers addressed the court, the presiding judge indicated that he expected to be given a satisfactory explanation as regards the non-compliance with the court order of 03 October 2018 and the prospects of success of the action. Ms Cilliers replied that she did not think that it would be fair to address those aspects because the affidavit in support of the application did not make mention of those aspects.

[13] In his address to court counsel for Nefussy (Mr Dicks) started off by lamenting the practice of requiring the plaintiff and the defendant to simultaneously file their witness statements. In his address to court Mr Dicks amongst other submissions said:

'... As my learned Colleague informed the Court and as I said for more than a year, this matter is better determined by an electrical expert, and if necessary a quantity surveyor. At the 11th hour now the parties have come to an arrangement in that regard. The only outstanding issue is the issue of costs. The parties will ask this Court to allow them to draft an agreement which will include the terms of the referral and that the matter then be removed from the roll of this Court and be considered finalised. The only outstanding issue which the parties cannot agree on, they can agree on the costs of litigation, they cannot agree on is the costs of, the wasted costs of the vacation of these dates.'² (Underlined for emphasis).

¹ Record p 138 line 37 to p. 139 line 10.

² Record p 144 lines 19-28.

[14] After Mr Dick's address as quoted above, the court enquired from him what will happen in the event that the application for condonation is granted. Mr Dicks replied as follows:

'... In the light of the fact that the parties have resolved the matter, it will not be on the roll further, it will be considered finalised before this Court once the Court has made the draft order and order of Court.'³(Underlined for emphasis)

[15] After the legal practitioners addressed it, the court indicated that it was ready to make an order and it did make an order dismissing the application for condonation and also refused the application to vacate the trial dates⁴. Thereafter, in view of the fact that none of the parties had filed witness statements, the presiding judge invited the parties to address him on why he must not grant an order of absolution from the instance in respect of both the main claim and the counterclaim. In an attempt to show cause why the court must not grant absolution from the instance, Ms Cilliers submitted:

'... the parties have agreed on the terms in settlement of this matter and this will dispose of this matter immediately which means it will not clock up the Court's roll any further. It will not be prejudicial to anymore of the parties because they have agreed on these terms my Lord.'⁵

[16] Mr Dicks, when it was his turn to address the court on the question of why absolution from the instance must not be granted, made the following submission:

³ Record p 145 Lines 31-34.

⁴ I quoted the full Order in para [6] of this judgment.

⁵ Record p 150 Lines 10-15.

'Well you refer to absolution from the instance, My Lord I am not sure whether that would be a proper order at this stage because absolution is normally granted either after the plaintiff's case is closed and no *Prima facie* case is made out well after both parties cases are closed and no *Prima facie* case is made out.'⁶

[17] Mr Dicks went on and said:

'I do not know whether my learned Colleague said the parties have settled the dispute that is the word the Court is using, the dispute as by no means being settled. What the parties did discuss and what I proposed already a year ago is that this matter must be referred to an expert in the electrical field to sort this matter out. We discussed the terms this morning, we wrote them down, one of those terms are a draft order will be handed to Court and we will ask the Court to make such an order, if the Plaintiff say there is already a firm agreement then the Plaintiff can proceed on that basis in the future.'⁷

Did the parties agree to refer the matter to private arbitration?

[18] Having regard to what I have quoted in the preceding paragraphs the question that requires an answer is whether or not the parties conveyed to court that they agreed to refer the dispute between them to private arbitration.

[19] I am of the firm view that both Ms Cilliers (when she said '. . . there has also been an agreement reached between the parties of this matter being transferred for arbitration . . .') and Mr Dicks (when he said '. . . the parties have come to an arrangement in that regard...' and '. . . In the light of the fact that the parties have

⁶ Record p 155 Lines 14-19.

⁷ Record p 162 Lines 18-28.

resolved the matter . . .') on 23 September 2019 conveyed to the court that they resolved, in other words agreed, that the dispute between them must be referred to private arbitration. Mr Chibwana who appeared for Nefussy in this court conceded, correctly in my view, that the parties had agreed to refer the dispute between them to private arbitration. What the parties did not convey to court are the terms on which the dispute would be referred to private arbitration. They nonetheless requested the court to grant them an opportunity to prepare a draft order which will reflect the terms on which the matter will be referred to private arbitration.

[20] In view of my finding that the parties agreed to refer the matter to private arbitration I am of the further view that once that agreement was conveyed to the court, it was not open for the court to proceed and to hear the application for condonation and vacation of the trial dates and make an order in that respect. The court should have given effect to what the parties desired and requested it to do, namely make an order referring the dispute between them to private arbitration. I say so because in the matter of *Kauesa v Minister of Home Affairs & others*⁸ this court, referring to several aspects raised by the court *a quo* in its judgment which had not been advanced by either counsel on behalf of the litigants, stated that:

'... a frequent departure from counsel's, more correctly the litigants' case, may be wrongly interpreted by those who seek justice in our courts of law. It is the litigants who must be heard and not the judicial officer.

⁸ *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at 183D–G.

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions.’

[21] It thus follow that the court *a quo* misdirected itself when it proceeded to hear the application for the condonation of NES’s non-compliance with the court order of 3 October 2018 and the vacation of the trial dates. In the light of the finding that the court *a quo*, misdirected itself the appeal must succeed.

Costs

[22] There remains the issue of costs. It is trite that an award of costs is in the discretion of the court and that the general rule is that costs follow the result unless there are exceptional circumstances to justify a contrary order.

[23] Mr Marcus on behalf of NES asked for an order of costs in the appeal. Mr Chibwana on the other hand pointed out that Mr Marcus in his heads of arguments contested the competence of the court *a quo*’s order of absolution from the instance, which ground of appeal was not persisted with at the hearing of this appeal. In those circumstances it would be fair and just if the court makes no order as to costs with regards to the appeal and more so in the light of the fact that both NES and Nefussy failed to comply with the court *a quo*’s orders of 3 October 2018.

[24] As indicated earlier NES in its notice of appeal and also in its heads of argument contested the court *a quo*’s competence to grant an order of absolution from the instance. Mr Marcus in his oral submissions, however, did not persist with

that ground of appeal. Mr Chibwana after questioning from the court conceded that the parties conveyed to the court *a quo* that they agreed that the matter be referred to private arbitration. Since an award of costs is in the discretion of the court I am of the view that the circumstances of this case justify departure from the general rule. The proper order therefore is to allow the appeal, but not to make any order as to costs, both in the court *a quo* and on appeal.

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

- (a) The appeal succeeds. The order of the court *a quo* is set aside and substituted with the following order:

‘The dispute between the plaintiff and the defendant is referred to private arbitration on the terms to be agreed upon by the parties. There is no order as to costs.’

- (b) There is no order as to costs in the appeal.

UEITELE AJA

DAMASEB DCJ

ANGULA AJA

APPEARANCES

Appellant

N Marcus

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Respondent

T Chibwana

Instructed by Koep & Partners