

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title: Anna Leonard and Oshana Security Services CC	 Appellant Respondent	Case No: HC-NLD-LAB-APP-AAA-2021/00006
		Division of Court: High Court, Northern Local Division
		Heard on: 30 October 2023
		Delivered: 20 November 2023

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Leonard v Oshana Security Services CC* (HC-NLD-LAB-APP-AAA-2021/00006)
[2023] NALCNLD 03 (20 November 2023)

ORDER

1. The costs order sought by the Respondent against the Appellant is refused.
2. The matter is removed from the roll.

MUNSU J:

Introduction

[1] In this matter, the respondent seeks a costs order against the appellant following the withdrawal of the appeal. On 19 July 2021, the appellant filed an appeal against an arbitral award issued by the office of the Labour Commissioner. During April 2022, the appellant saw a need to amend her notice of appeal. To that end, she was to bring an application for condonation for the late filing of the amended notice of appeal.

[2] Pursuant thereto, this court ordered the appellant to file her condonation application by 22 April 2022. The appellant did not comply with the said order. On 23 May 2022, this court ordered the appellant to file a sanctions affidavit for non-compliance with the court order of 22 April 2022. Once again, the appellant failed to comply with the last-mentioned order.

[3] On 16 March 2023 the court heard the appellant's application for condonation, and dismissed same on 11 April 2023. The said order effectively meant that the appellant could not go ahead with the appeal. Subsequent thereto, the appellant filed a notice of withdrawal of the appeal. The court issued an order from chambers removing the matter from the roll. On the request of the respondent, the matter was placed back on the roll for the issue of costs to be argued.

Submissions by the respondent

[4] Ms Mugaviri for the respondent submitted that the non-compliance by the appellant and her legal practitioner of record was *mala fide* and amounted to a flagrant disregard of the respondent's rights and the rules and orders of this court in bringing the matter to finality.

[5] Counsel submitted that the appellant in her founding affidavit to the condonation application stated that her non-compliance with court orders was due to the medical ailments of her legal practitioner of record during April to June 2022. It was pointed out that the appellant contradicted herself as the same affidavit shows that her legal practitioner of record attended to a criminal matter during the period 11 to 14 April 2022 and was also involved in another criminal trial during the period 18 to 28 April 2022 as well as a civil trial on 5, 10, and 11 May 2022. Counsel contended that the appellant's conduct and that of her legal practitioner of record cannot be excused as it was negligent, unreasonable and amounted to an abuse of the court process.

[6] Furthermore, it was submitted that special circumstances exist warranting the granting of a costs order in favour of the respondent.

Submissions by the appellant

[7] Mr Aingura for the appellant urged the court not to heed to the respondent's call. It was submitted that the appellant resists a costs order for the following reasons:

- (a) The order of 22 July 2023 removing the matter from the roll and considering it as finalised has the effect of an appealable order, as such, the court has no jurisdiction to reconsider the matter.
- (b) Neither the appellant nor her legal practitioner acted in a frivolous or vexatious manner in instituting or proceeding with the matter.
- (c) The respondent failed to deliver a statement of the grounds of opposition within the time limits prescribed by rule 17(16) of the Labour Court.
- (d) Section 18 of the Legal Aid Act precludes the granting of costs in proceedings where legal aid has been granted.

Discussion

[8] Mr Aingura argued that the order of 22 July 2023 has all the attributes of an appealable order, namely:

- (a) Final
- (b) Definitive of the parties' rights
- (c) Dispositive of at least a substantial portion of the relief sought.¹

[9] I am unable to agree with the above proposition for the reason that this court never made any order relating to costs. All it did was to remove the matter from the roll. The fact that the court stated that the matter is regarded as finalised does not mean that the court determined the parties' rights as regards costs. If the respondent is to approach the Supreme Court at this stage, the issue of costs will be dealt with for the first time, without this court having pronounced itself.

[10] The appellant also argued that the respondent could only be heard by this court if it had

¹ Reference was made to *Knouws No (In his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC); *Shetu Trading CC v Chair of Tender Board of Namibia and Others* 2012 (1) NR 162 (SC).

brought an application for rescission. I am unable to agree either, for the reason that it is not the respondent's case that the order of 22 July 2023 should be rescinded. In fact the respondent should be pleased with that order. All that the respondent wants, is for the court to pronounce itself on the issue of costs, which was not done. Thus, the point *in limine* lacks merit.

[11] The other issue raised by the appellant was that, the respondent too, did not comply with the rules of court by failing to deliver a statement of the grounds of opposition as contemplated by rule 17(16). I did not hear the respondent to deny this assertion, other than to say that the record was incomplete.

[12] The notice of appeal filed did not call for the delivery of the record, thus, the respondent was obliged to file a statement stating the grounds of opposition within 14 days from delivery of its intention to oppose the appeal. Given that the respondent did not apply for condonation, the appeal remained unopposed. This is fatal to the respondent's case. It seems to me that the reason the appellant raised this issue belatedly, was because she only discovered it at a later stage during the proceedings.

[13] Notwithstanding the above finding, it is appropriate to deal with the merits of the issue serving before court. It is indeed so that the purpose of an award of costs to the successful party is to indemnify the party in some measure for the expenses incurred in initiating or defending a litigation.² The award of costs is wholly within the discretion of the court and is a judicial discretion that must be exercised reasonably.³ The general rule is that costs follow the event, and the successful party should be awarded the costs.

[14] Section 118 of the Labour Act, 2007 states that:

'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.'

[15] In *Sefelana Cash & Carry (Namibia) (Pty) Ltd t/a Cash & Carry v Mwandingi*⁴ the court held that s 118 of the Labour Act was enacted to primarily protect employees who, in many cases, are not possessed of the financial resources to litigate toe to toe with their employers, who are, for the

² See AC Cilliers Law of Costs at 1-4 par 103.

³ See *Du Toit v Dreyer* 2017 (1) NR 190 (SC).

⁴ *Sefelana Cash & Carry (Namibia) (Pty) Ltd t/a Cash & Carry v Mwandingi* (HC-MD-LAB-MOT-REV-2018/00156) NALCMD 239 [2020] (18 June 2020).

most part, endowed with large financial resources.

[16] The court further held that the Labour Court does not ordinarily issue costs orders, save in circumstances where the institution, defence or continuation with proceedings, is regarded as vexatious in terms of s 118 of the Labour Act, 2007. Additionally, the court went on to say that it is in situations where the behaviour of a party before court leaves a lot to be desired, and may include misleading the court or a chronic failure to comply with court orders and prosecute a case, with the requisite degree of promptitude.

[17] In the present matter, the appellant filed her notice of appeal out of time. She sought condonation, however, same was refused. This necessitated the withdrawal of the appeal. The court did not deal with the merits of the appeal.

[18] In dismissing the appellant's application for condonation, the court had the following to say.

[11] The reason for the appellant's non-compliance with the court orders is that her counsel was indisposed. She attached her counsel's medical certificates.

[12] While the court takes note that the appellant's legal representative was indisposed between the months of April to June 2022, the explanation provided does not account for the entire period.

[13] Furthermore, it appears from the appellant's explanation that her counsel appeared in different courts during that period. He was involved in a criminal trial in the Regional Court sitting at Oshakati during the period 11 to 14 April 2022. He was also involved in another criminal trial before this court during the period 18 to 28 April 2022 as well as a civil trial before this court on 5, 10 and 11 May 2022.

[14] Considering the duration of the non-compliance and the fact that the appellant still appeared in different courts for trials during the said period, this court does not find the explanation given to be reasonable.'

[19] Further, the appellant had not dealt with the prospects of success of the appeal. The reasoning of the court was that all the appellant was required to do, was to file papers in her application for condonation, which her counsel could have done at his comfort, including after

hours, without having to appear in court as he did in the other matters.

[20] The court noted, however, that in some of the trials counsel participated, proceedings had to be adjourned due to his ailment. I am therefore not convinced that the appellant's conduct or that of her legal practitioner of record can be said to have been egregious or pernicious. I do not find exceptional circumstances to warrant an order for costs, bearing in mind the provision of s 118.

Order

[21] In the result, I made the order as above.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Appellant:	Respondents:
S Aingura Of Aingura Attorneys Oshakati	G Mugaviri Of Mugaviri Attorneys, Oshakati