



'Unreportable'

CASE NO.: LC 64/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SENIOR REAL ESTATE CC

Applicant

and

AMANDA TSOEU

First Respondent

**THE MESSENGER OF COURT FOR THE
DISTRICT OF WINDHOEK**

Second Respondent

**THE CHAIRPERSON OF THE DISTRICT LABOUR
COURT FOR THE DISTRICT OF WINDHOEK**

Third Respondent

HEWAT SAMUEL JACOBUS BEUKES

Fourth Respondent

CORAM: PARKER J

Heard on: 2012 June 13

Delivered on: 2012 July 4

JUDGMENT

PARKER J: [1] The applicant, represented by Ms Petherbridge, has launched an application by notice of motion under Case No. LC 64/2012 and prays that the matter be heard on urgent basis, and prays for orders set out in the notice of motion. The first respondent, acting in person, has moved to reject the

application, and in that behalf the first respondent has filed answering papers. In her answering affidavit she raises, also, points *in limine*, apart from grounds on the merits of the case.

[2] The present application under Case LC 64/2012 is, with respect, a maze of confusion and imperceptibility of superlative proportion. To start with, I do not see any good reason why despite orders made in 'MP7' and 'MP8' under Case No. LC 2/2008 (attached to the applicant's founding affidavit therein) the applicant has brought the present application under a different Case No. LC 64/2012. 'MP7' is an order made by the Labour Court (*per* Ndauendapo AJ (as he then was)) on 15 February 2008. 'MP8' is an order made by the Labour Court (*per* Swanepoel J) on 6 October 2011. The relief prayed for in the present application (LC 64/2012) is substantially similar to the relief sought and granted in the application Case No. LC 2/2008 ('MP7'). The relief granted in the application 'MP8' is also under Case No. LC 2/2008 and it is simply a reiteration of the order made in 'MP7': it says, in substantial terms, that:

'2. The order numbers 3 and 4 of the court order LC 2/2008, dated 15 February 2008 are still of full force and effect.'

[3] Thus, in virtue of the orders in 'MP7' and 'MP8', annexed to the founding affidavit, with respect, I fail to see the purpose of this Court in the present proceeding granting an order sought in para 2 of the present application Case No. LC 64/2012 which is substantially along the same lines as the orders already granted by the Court, as aforesaid. This conclusion is confirmed in no uncertain terms by the following statement in the founding affidavit by Ms Petherbridge:

'Two Labour Court orders have already been obtained in terms whereof execution in this matter has been stayed pending an appeal by the applicant against the default judgement obtained by First Respondent. This default judgement was obtained in the absence of the Applicant on 21 January 2008. The appeal lies against this judgement.'

[4] It now behoves me to deal with the contentions of the first respondent. From the outset I note that the first respondent's second and third points *in limine*, which, in a deserving case may dispose of the application, ought to have been raised with the Court that made the order in 'MP7' under Case No. LC 2/2008 or at the latest with the Court that made the order in 'MP8'. There is nothing on the papers to show that those points were raised with the Court, particularly the Court that made the order on 15 February 2008 ('MP7'). In any case, whether or not they were raised is of no moment in the present proceeding. What is important is that it cannot now be raised in the present proceeding in the selfsame Court, which – significantly – is not sitting as an appeal court or review court. What is important and significant for my present purposes is, therefore, this. As I see it, the position of the first respondent as articulated in the second and third points *in limine*, as aforesaid, is that the Court in the present application has no jurisdiction to hear the application. Is the first respondent now contending that the Court in 'MP7' and 'MP8' had jurisdiction? She does not say. It is my view that it would seem it is the first respondent's averment that this Court *qua* Labour Court whether in 'MP7', 'MP8' or in the present proceeding has no jurisdiction to hear the application in virtue of s.18 of the repealed Labour Act. If I am right in my supposition, then, I must say, as far as 'MP7' and 'MP8' are concerned the first respondent is chasing the wrong Court. If the first respondent is of the opinion that the Court in 'MP7' and 'MP8' had no jurisdiction to have determined the application in terms of s.18 of the repealed Labour Act, then the correct route – as

a matter of law – open to the first respondent to pursue is to appeal from those decisions to the Court above. That she has not done up to date. In the present proceeding, I have no power in any hue or shape to make any order that would have the effect of setting aside the decision of the selfsame Court in ‘MP7’ and ‘MP8’, when this Court cannot arrogate to itself the power of review or appeal respecting the orders made in ‘MP7’ and ‘MP8’. (See *Hendrik Christian t/a Hope Financial Services and Others v Lorentz Angula Inc. And Others* Case No. A 244/2007 (Unreported).) That, however, is not the end of the matter.

[5] It is my view that this Court in the present proceeding cannot hear the application, apart from the reasons given below, because this application seeks virtually the same relief that was sought and granted in the ‘Two Labour Court orders’, as Ms Petherbridge, counsel for the applicant, acknowledges in her founding affidavit, and as seen in the above-quoted statement in that affidavit; bar the issue of contempt of court. Accordingly, in my opinion, what remains – as a matter of law – is therefore, without a doubt the hearing of the appeal from the decision of the district labour court, but only if there is an appeal noted in terms of the applicable rules. And in this regard, and taking into account the stay of execution sought also in the present application, it is important to append hereunder *verbatim et literatim* the entire judgment of the learned chairperson of the district labour court, apart from the bolded and italicized parts thereof which appear to have been lifted holus bolus from case law:

[1] This court is ostensibly seized with a fresh notice of appeal duly filed in terms of rule 19 of the rules of the district labour court. It is common cause that the noting of this appeal is done way out of time, some 44 months later after this court on 12 February 2008 refused to grant the applicant

rescission for the default judgment granted against it on 21 January 2008.

[2] The late filing of the notice of appeal is for the most part attributed to the decision of the applicant to withdraw its notice of appeal from the Labour Court on 21 June 2011 (See Judge Miller's judgment – Senior Real estate CC and Amanda Tsoeu (LCA 9/2011) at paragraph 4). Incidentally, the applicant considers the notice of appeal filed in the Labour Court as a nullity and as such the applicant allegedly had no other option but to file a fresh notice of appeal.

[3] According to the legal representative of the applicant, the notice of appeal filed on 13 February 2008 did not comply with rule 19 of the rules of the district labour court. The applicant subsequently filed an amended appeal on 14 March 2008. However, as mentioned earlier the applicant for reasons that will become apparent in due course ultimately withdrew both notices of appeal from the Labour Court on 21 June 2011.

...

[50] Having heard arguments from both Counsel for the applicant and the respondent who appeared in person, this court makes the following order:

- (1) The application for condonation for the late filing of the notice of the rescission judgment appeal is dismissed;
- (2) No order as to costs.'

[6] It is worth rehearsing the following statements by Ms Petherbridge in her founding affidavit for they are crucial to the present proceeding in the light of the above-quoted judgment of the district labour court:

'Two Labour Court orders have already been obtained in terms whereof execution in this matter has been stayed pending an

appeal by the applicant against the default judgement obtained by First Respondent. This default judgement was obtained in the absence of the Applicant on 21 January 2008. The appeal lies against this judgement.'

[7] From all the above, I accept the first respondent's submission that no appeal has been noted against 'the default judgment that was obtained in the absence of the applicant on 21 January 2008'. Indeed, that no appeal has been noted against the default judgment is irrefragably and indisputably clear if regard is had to the judgment of the district labour court, part of which is quoted above, where the district labour court dismissed the applicant's application for condonation of the late filling of the notice of appeal against the district labour court's decision, refusing the applicant's application for rescission of that default judgment.

[8] The cumulative effect of all the above analyses and conclusions can be put in a nutshell thus: The default judgment granted by the district labour court on 21 January 2008 is valid and enforceable: it has not been rescinded by the court which granted the judgment because the application to have it rescinded was refused by the district labour court which granted that judgment; and to date no appeal has been noted against that default judgment or the dismissal of the rescission application because an application to the district labour court to condone the late filing of the notice of appeal in terms of rule 21 of Rules of the district labour court (see *Namibia Breweries Ltd v Kaeka and Another* 2011 (1) NR 16) was refused. It follows that the default judgment is valid and of force: it has not been set aside on appeal, as I have said more than once. *A priori*, even if I assumed, without deciding, that the Court in 'MP7' and 'MP8' had the jurisdiction to make orders of stay of execution of the default judgment pending the

finalization of the appeal, those orders may be unfair to implement because although, the order in 'MP7' was made on 15 February 2008 and the order in 'MP8' was made on 6 October 2011, no appeal had been noted when any of the orders was made. Curiously, the application for condonation of the late filing of the notice to appeal from the default judgment was heard on 4 October 2011, as aforesaid, but the legal representative of the applicant did not inform the presiding judges in 'MP7' and 'MP8' about the fact that no appeal had been noted against the default judgment. Thus, the legal representative of the applicant failed to inform the Court of a material matter within her knowledge and about which the Court should have been informed (see *Disciplinary Committee for Legal Practitioners v Lucius Murorua and Law Society of Namibia* Case No. A211/2008 (judgment delivered on 29 June 2012) (Unreported)). Be that as it may, as matters stand, what is significant for my present purposes is that no appeal court has set aside the aforementioned district labour court's default judgment; and what is more; no appeal has been noted against the judgment, as I have said *ad nauseam*.

[9] I have said already that this Court is not competent to set aside the 'two Labour Court orders' of 15 February 2008 and 6 October 2011. But there is before this Court a fresh application which all round is similar to those applications in respect of which those 'two Labour Court orders' were made to stay execution of the selfsame default judgment obtained from the district labour court, Windhoek, on 21 January 2008, pending finalization of an appeal from that judgment. It is this application that I must determine. From the papers filed of record and upon the authority of *Namibia Breweries v Kaeka* supra which I accept as correct statement law, and which I adopt, I think I should decline to grant the relief respecting stay of execution of the default judgment. It was held in *Namibia*

Breweries v Kaeka that a party applying for the stay of execution of a judgment pending appeal in terms of the repealed Labour Act, 1992, should note an appeal before making such application; and failure to do so will result in the application being dismissed. In the present proceeding, as I have demonstrated previously, no appeal has been noted against the default judgment. It follows that the present application falls to be dismissed.

[10] Of the view I have taken of this application as shown in the foregoing reasoning and conclusions, it will serve no purpose to deal with the other points *in limine* raised by the first respondent. Furthermore, in virtue of the foregoing ratiocination and conclusions I exercise my discretion in declining to grant the relief sought in paras (3) and (4) of the notice of motion. And as to the issue of costs; again, from the foregoing analyses and conclusions, I think this is a proper case in which it would be just and fair to make no order as to costs. And as regards the relief of urgency; it is my view that the decision to hear the matter on urgent basis has not occasioned any prejudice to either the applicant or the first respondent. The other parties have not filed answering affidavits. The applicant and the first respondent filed papers and their respective positions were argued during the hearing of the application.

[11] In the result, I make the following orders:

1. The applicant's non-compliance with the time limits prescribed by the Rules (as may be necessary) is condoned and the application is heard on urgent basis in terms of rule 6(12) of the Rules.
2. The application is dismissed.

3. There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Ms M C Petherbridge

Instructed by:

Petherbridge Law Chambers

ON BEHALF OF THE FIRST RESPONDENT:

In person

COUNSEL ON BEHALF OF THE THIRD RESPONDENT:

Ms T M W Koita

Instructed by:

Government Attorney