REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 185/2014

In the matter between:

SHOPRITE NAMIBIA (PTY) LTD	**APPLICANT**
And	
NAMIBIAN COMMERCIAL CATERING FOOD & ALLIED WORKERS UNION AND ALL ITS MEMBERS CURRENTLY ON STRIKE	**1ST RESPONDENT**
ALL THE EMPLOYEES OF SHOPRITE NAMIBIA (PTY) LTD CURENTLY ON STRIKE OR INTENDING TO STRIKE	**2ND RESPONDENT**
THE LABOUR COMMISSIONER	**3RD RESPONDENT**
THE INSPECTOR-GENERAL OF THE NAMIBIAN POLICE	**4TH RESPONDENT**

Neutral citation: *Shoprite Namibia v Namibian Commercial Catering Food and Allied Workers Union* (LC185-2014)[2015]NALCMD22(24 September 2015)

Coram: UNENGU AJ

Heard: **16 July 2015**

Delivered: **24 September 2015**

Flynote: Labour Court proceedings – s 118 of the Labour Court Act 11 of 2007 regulates costs orders – Court dismisses applications for costs with costs as first respondent has not opposed the applications – Costs order granted against the applicant on attorney and client scale.

Summary: Labour Court proceedings – The power of the Labour Court to give costs orders is regulated by s 118 of the Labour Act 11 of 200 7 – Applicant's applications for costs orders in unopposed applications have been refused with costs on attorney and client scale and confirmed the rule *nisi*.

ORDER

(i) The rule *nisi* issued on 18 and 19 December 2014 are confirmed.

(ii) The application for costs by the applicant is dismissed with costs, which costs to include costs of one instructed and one instructing counsel on attorney and client scale.

JUDGMENT

UNENGU AJ:

A. Introduction and background

[1] The applicant is Shoprite Namibia (Pty) Ltd, a private company registered in terms of the applicable legislation in the Republic of Namibia and has its head office in Diehl Street, Southern Industrial Area, Windhoek.

[2] The first respondent is the Namibian Commercial, Catering, Food and Allied Workers Union (NACCAFWU), a trade union registered with the office of the Labour Commissioner in terms of section 57 of the Labour Act, 11 of 2007 with head office at Erf 899, Mbabane Street, Wanaheda, Windhoek.

[3] The second respondents are the employees currently on strike or intending to strike (more fully set out in annexure “A).

[4] The third respondent is the Labour Commissioner cited herein in his capacity as the Labour Commissioner appointed in terms of section 120 of the Act and having his office at 249-582 Richardine Kloppers Street Khomasdal, Windhoek. The second respondent is cited in so far as he may have an interest in these applications and no relief is sought from him save for costs, if his opposition to these applications, if any, are frivolous and/or vexatious.

[5] The fourth respondent is the Inspector General of the Namibian Police cited herein in his official capacity with his address for service being Banhoff Police Station, Banhoff Street, Windhoek and/or Police Headquarters Lazarette Street, Windhoek.

[6] This is the return date of two rule *nisi* issued on 18 and 19 December 2014 by Smuts, J (as he then was). The rule *nisi* were granted to address the unlawful strike action by the applicant’s employees at the applicant’s stores in Namibia on 18 and 19 December 2014.

[7] The first rule *nisi* was issued on 18 December 2014 in the following terms:

‘1. The applicant’s non-compliance with the forms and service as provided for by the rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 6(24) and 6(25) of the rules of the above Honourable Court condoned.

2. That a rule *nisi* is issued calling upon the first and second respondents to show cause, if any, on **28 January 2015** at **15h15** why an order in the following terms should not be made final:

2.1 That the 1st and 2nd respondents and all the employees currently on strike at the applicant’s independence Avenue premises and whose names appear on annexure **“A”** hereto:

2.1.1 Be interdicted and restrained from withholding their services and participating in the strike or any other industrial action of any nature whatsoever; and

2.1.2 Be directed to immediately after service of this order, to vacate the premises of the applicant forthwith and when not working;

2.1.3 That the first and second respondents shall pay the costs of this application, alternatively that in the event of any of the respondents opposing who opposes this application be ordered to pay costs thereof, such costs to include the costs of one instructing and one instructed counsel. (Underlined for my emphasis)

2.2 That the fourth respondent be directed and authorized to remove the first and second respondents from the premises of the applicant with such measures as the fourth respondent deems necessary.'

3. That the relief granted in paragraph 2.1.1, 2.1.2 and 2.2 above shall operate as an interim interdicts with immediate effect and shall remain effective pending the return day of the application;

4. Granting the applicant leave to serve this notice of motion together with the rule nisi issued by this Court by a member of the Namibian Police and as follows:

4.1 By serving a copy thereof at the business address pf the first and second respondents, and

4.2 By affixing a copy of the application together with the rule nisi on a least two walls on the premises of the applicant and at any other place where the members of the first and second respondents are gathered for purpose of picketing; and

4.3 By audibly and with the assistance on a loudspeaker system or other similar device, announcing the content of the rule nisi to those persons who are members of the first respondent and the second respondents, and inviting

any such person to contact the applicant's legal practitioners of record to obtain copies of the notice of motion and the rule nisi.

5. That should any of the respondents intend opposing this application such respondent shall file a notice to oppose on or before 16 January 2015.

6. That the evidence presented in support of this application be transcribed and served on the legal representatives of the respondent(s) opposing this application and that such evidence with the notice of motion herein shall be regarded as the founding affidavit in this application;

7. Applicant shall be entitled to supplement the transcribed evidence by the filing of a further affidavit of affidavits and such affidavit(s) shall be filed in the event of this matter being opposed.

8. The respondents may anticipate this order on delivery of not less than 24 hours' notice to the applicant.'

[8] The second rule *nisi*, of 19 December 2014, was issued in these terms:

'1. The applicant's non-compliance with the forms and service as provided for by the rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 6(24) and 6(25) of the rules of the above Honourable Court condoned.

2. That a rule *nisi* is issued calling upon the first and second respondents to show cause, if any, on **28 January 2015** at **15h15** why an order in the following terms should not be made final:-

2.1 That all employees, at all the stores of the applicant, be directed to immediately, after service of the order, to vacate the premises of the applicant forthwith and when not working;

2.2 That the 1st and 2nd respondents shall pay the costs of this application, alternatively that in the event of any of the respondents' opposing such

application that all those respondents who opposes this application be ordered to pay the costs hereof, and;

2.3 That the 4th respondent be directed and authorized to remove the first and second respondents from all of the premises of the applicant, nationwide, with such measures as the 4th respondent necessary;"

and, in any event and insofar as may still be necessary;

2.4 That all applicant's employees at all the stores and/or places of employment of the applicant be interdicted and restrained from withholding their services and participating in any unlawful strike and/or unlawful industrial action.

2.5 That the relief claimed in paragraph 2.1, 2.2, 2.3 and 2.4 above shall operate as an interim interdict with immediate effect and shall remain effective pending the return day of the application.

4. Granting the applicant leave to serve this notice of motion together with the rule *nisi* issued by this Court by a member of the Namibian Police and as follows:

4.1 By serving a copy thereof which includes a scanned copy electronically provided at the business address of the first and second respondents, and

4.2 By affixing a copy of the application together with the rule *nisi* on at least two walls on the premises of the applicant and at any other places where the members of the first and second respondents are gathered for purposes of picketing; and

4.3 By audibly and with the assistance on a loudspeaker system or other similar device, announcing the content of the rule nisi to those persons who are members of the first respondent and the second respondents, and inviting any such person to contact the applicant's legal practitioners of record to obtain copies of the notice of motion and the rule nisi.

5. That should any of the respondents intend opposing this application such respondent shall file a notice of oppose on or before 16 January 2015.

6. Applicant shall be entitled to supplement the founding affidavit by the filing of a further affidavit or affidavits and such affidavit(s) shall be filed in the event of this matter being opposed.

7. The respondents may anticipate this order on delivery of not less than 24 hours' notice to the applicant.'

[9] Both the rule *nisi* were granted without opposition, from all the respondents. Similarly, none of the respondents are opposing the rule *nisi* on the return date. The first respondent is only opposing the confirmation of the costs orders through Mr John Paparo who deposed to and filed the answering affidavit on its behalf.

[10] Mr Paporo states in his answering affidavit from para 3 to para 10 as follows:

'3

'Firstly I wish to deny categorically that the First Respondent at any stage incited the employees of the applicant to take part in any illegal strike and any allegations by the Applicant is this regard are without any basis whatsoever and are consequently denied.

4

I further wish to put it on record that the first respondent never opposed the application for numerous relieves brought by the applicant last year and on the basis of which a rule nisi was issued.

5

What the first respondent opposes is the application for costs which I respectfully submit has no basis at all.

6

I am advised that the issue of cost in the Labour Court is regulated by section 118 of the Labour Act, No.7 of 2007 which provides that:

"Despite any other law to the contrary in any proceedings before it, the Labour Court must not make an order of costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceedings with or defending those proceedings."

7

In the present matter the first respondent has not instituted any proceedings or proceeded with any and the application was unopposed.

8

What the First Respondent simply did was to resist a costs order being granted against it and I respectively submit this cannot be equated with:

"instituting, proceeding with or defending those proceedings"

9

Equally, the other respondents have not "instituted proceedings with or defended any proceedings" and as such no cost order can be made against them.

10

What the applicant if it believed that is suffered damages as a result of the conduct of the respondents, which is denied, ought to have done was to institute civil proceedings against those to be held liable.

11

In the premises I respectively submit that the applicant's application for costs is with respect without any merit and frivolous and must be dismissed with costs.'

C The events of 18 -19 December 2014 as per founding affidavit of Ms Smith

[11] On 26 September 2014 the applicant referred a dispute to the Labour Commissioner together with its statement of claim.

On 5 December 2014 an interim arbitration award was granted (in the dispute), which was made an order of Court under number LC 185/14 on the 11th of December 2014 (see annexure "KS3"). "KS3" in para 2 reads that:

'2. The following interim order is herewith made an award of the arbitrator;

(a) The members of the Respondent be interdicted from participating in and/or proceeding with any unlawful industrial actions and/or strikes;

3. Enforceability

The interim award is valid until the final award is made by the arbitrator. The order may become a Court order in filing same with the Registrar of the Labour Court of Namibia by either the parties.'

[12] On 19 December 2014 the applicant through its legal practitioner Mr Boltman sent an email to Mr Paporo, the General Secretary of the first respondent. (see annexure "KS4"). In the email Mr Paporo is informed as follows:

'Good morning Mr Paporo.

We obtained a Court order yesterday evening, same is attached hereto for your convenience.

I have been informed by Ms. Smith that the employees had a meeting with NACCAFWU yesterday evening, and that the resolution of that meeting was that the strike will continue today and that, come Monday, a nationwide strike will commence.

This email serves to request that you confirm, in writing, that no strike action will take place and that you have personally instructed any and/or all persons that are deemed to be members of NACCAFWU not participate in any unlawful strike action, not this Monday nor any other time.

We will approach the Labour Court again today, at 16h00 or as soon thereafter as may be heard, for an order in the following terms:

1. That all employees, at all the stores of the applicant, be directed to immediately, after service of this order, to vacate the premises of the applicant forthwith and when not working;
2. That NACCAFWU and/or all strike employees shall pay the costs of this application;
3. That the Namibian Police be directed and authorized to remove any NACCAFWU official and/or member and/or any striking employee from the premises of the applicant with such measures as the fourth respondent deems necessary;
4. In any event, and insofar as it may be necessary, that all the employees at all the stores and/or places of employment of applicant be interdicted and restrained from withholding their services and participating in any planned unlawful strike and/or unlawful industrial action.

The documents to be used for this application are already in your possession, the union being a party to the dispute before the arbitrator Mr Holger Sircoloumb, in which dispute an interim arbitration award was issued (of which you have full knowledge) and which award was subsequently made an order of Court.

Once the draft papers have been prepared they will be sent to you as soon as possible.

Mr. Paporo, we require a response, as per the above, before 12h00 today, failing which and/or in the event that the response does not unequivocally inform our office that the nationwide strike will not proceed on Monday, and in that event, we shall proceed to the Labour Court to obtain the relief indicated hereinabove.

Best regards.'

[13] The applicant alleges that there was no response from Mr Paporo on abovementioned email correspondence. The applicant further argues that the email to Mr Paporo was sent on the premises and on information obtained by Ms Smith informing her that a meeting was held in the evening, after the Independence Store employees vacated the premises (following their application to the Labour Court) where the officials of the first respondent and the Windhoek based employees

resolved that the strike at the Windhoek Stores will continue and that a nationwide strike will commence on Monday the 22nd December. About 10h15 on 19 December Ms Smith was informed that Mariental Shoprite was on strike. She alleges that she was initially informed that the nationwide strike would only occur on the 22nd of December, meaning it says that after the email was sent to Mr Paporo when some stores have already commenced with the strike action. She was further informed by her Regional Managers that this seems to be the position with most of their 78 Stores Nationwide. This argument is hearsay, therefore, will be ignored.

[14] On 19 December 2014 Ms Smith sent a memorandum via email to all her store managers by way of an email to the address of Namibian All Stores (see annexure. “KS7”). The memorandum was read out by all of the store managers to the employees; she personally phoned the managers and/or sent text messages to them and/or received confirmatory mails that they had complied and informed her that they read the memorandum to the employees. In essence annexure “KS7” read that ; ‘Dear managers, you are to immediately read this memorandum to all of the employees in your stores, they are to return to work by 12h00 today, and if they refuses they should be given a final ultimatum to return to work by not later than 13h00 and/or 14h00 whichever may be relevant. Ignore the date of 22 December 2014. Once you have read this memorandum email confirmation of this to me’. She alleges further that universally, the reply from the employees, as was communicated to her, was non-committal and they did not confirm that they will not strike and/or that they will cease with the strike. The ultimatums were not adhered to and the employees did not allow the applicant to continue trading, the doors of their stores remained closed.

Applicant further alleges that it notified NACCAFWU of the applicant’s intention to seek interdictory relief. There has been no response to the notification, and as a result therefore, the applicant approached the court on an urgent basis.

D The oral evidence presented by applicant in support of its urgent relief sought on 18 December 2014

Testimony of Mr Boltman

[15] Ms Campbell for the applicant called Mr Boltman as the first witness. He testified that he is the legal practitioner of the applicant. She asked him what he personally did to bring the application to the notice Mr Kapolo, the General Secretary of first respondent. He testified that he had written a letter via email to Mr Kapolo (earlier in the morning after 10:18) asking for the strike to stop. He further testified that on the same day around 16:30 he drove to Shoprite Independence Avenue and approached Mr Joseph Garoëb the Deputy General Secretary of NACCAFWU, who was standing with Ms Justina (the person) who was speaking on behalf of all the employees during this proceedings. They were standing outside in the presence of police officers when he approached them. He asked them if they are going to proceed with the strike or going to at least vacate the premises. Justina informed him in no uncertain terms that 'they will not do anything but they will continue as is'. He informed her and Mr Garoëb that the applicant will go to the High Court, to seek an order to remove him from the premises and if necessary to compel the police to remove him from the premises and to stop with this strike.

[16] Mr Boltman further testified that during those proceedings they went through arbitration with great difficulty and with a lot of effort were able to settle the matter by way of an agreement and the respondents agreed not to continue or to incite their members with unlawful strikes but only for them to threaten another nationwide strike on 27th of September by way of letter dated 26 September. He further testified the applicant is required each and every time to go to the Labour Court to stop unlawful strikes and (threats). When he came to the door, the first respondent returned and said that they will not strike anymore. He testified further that the dispute is still being arbitrated notwithstanding the parties having reached an agreement to settle the matter after the union refused to sign that agreement and fired the legal practitioner.

Testimony of Mr Bertolini

[17] He testified that he is the Regional Human Resources Manager of Shoprite. That at around 17:00 he personally handed 3 copies of the notice of motion document to Ms Jennifer Kavhiyovha and Mr Willem Humbu (who act as shop stewards for NACCAFWU), and explained to them the content thereof, that Shoprite was going to court and also informed them the time they intended to go to court. He further testified that they accepted the documents. He testified that Ms Jennifer Kavhiyovha and Mr Willem Humbu where in charge of the group of employees, they had positions of authority because they were speaking on behalf of the staff and the staff would scream up on what they said. He testified that he tried to convince the employees to go back to work and stop the illegal strike but to no avail. He further testified that there has been no trading since time the employees decided to go on an illegal strike.

Testimony of Ms Smith

[18] She testified that she is the Divisional Human Resource Manager for Shoprite Group of Namibia. She testified that they did not receive notice of the strike. In essence she confirmed the testimony of Mr Bertolini. That they took all reasonable steps to bring this matter to the attention of the first respondent and second respondent.

E John Paporo

[19] He states in his answering affidavit that he was the General Secretary of the first respondent and that he was duly authorised by the first respondent to depose to the application and to oppose the applicant's application for costs. He denied categorically that first respondent, at any stage incited the employees of the applicant to take part in any illegal strike and any allegations by the applicant in that regard were without any basis whatsoever and were consequently denied.

[20] He went further and put on record that the first respondent never opposed the application for numerous reliefs brought by the applicant last year and on the basis of which a rule *nisi* was issued. He said that what the first respondent opposes was the application for costs which he submits has no basis at all. He denied that the applicant suffered damages as a result of the conduct of the respondents.

B Submissions

[21] Mr Maasdorp is acting for the applicant while Mr Rukoro is for the first respondent. In essence Mr Rukoro counsel for the first and second respondent's in his heads of argument submitted that it is common cause that on 18 and 19th December the respondents had not opposed any proceedings and that they were not even before court. In (para 9.3-9.7) he submitted that the Labour Court on 18 and 19 December 2014 did not have jurisdiction or legal competence to issue a cost order against the respondents as the peremptory provisions of section 118 had not been met. He argued further that the costs against respondents in this instance was erroneously sought and granted.

[22] On the other hand Mr Maasdorp counsel for the applicant in his heads of argument (para 9) submitted that the court must consider the merits of the case and in particular the conduct of the first respondent, to assess if a costs order is warranted. Only when will this Honourable Court be able to assess whether the first respondent's opposition is frivolous or vexatious, which is necessary for any costs order. In para 10, he submits that that there were unlawful strikes at several of the applicant's stores throughout Namibia on 18 and 19 December 2014, is undeniable. No attempt is made to deny this in the answering affidavit by Mr Paporo on behalf of the first respondent. Because of this, the crucial examination, it is submitted, must be aimed toward ascertaining the role of the first respondent and its officials in the unlawful conduct, he argued.

[23] Mr Maasdorp further argued that (para 11) Ms Smith in her supplementary affidavit explained that it was very difficult for the applicant to get information on the involvement of the first respondent in the strikes. While there remains no direct

evidence of the first respondent inciting the applicant's employees to strike unlawfully on 18 and 19 December 2014. He submitted further that the inference that it did so is inescapable, having regard to the material before this Court, including the following:

'11.1 it is clear from the transcriptions of the oral evidence led on 18 December 2014, that the applicant and the first respondent had been engaged in acrimonious exchanges, amongst others, involving threats of strike action, shortly before the unlawful strikes.

11.2 Mr Garoëb, the first respondent's Deputy Secretary General[1] was present at the Shoprite Independence Avenue store on 18 December 2014. He was in the company of Ms Jennifer Kavhiyovha who was the leading voice on behalf of employees at the time. Ms Kavhiyovha, amongst others, threatened Ms Smith with her life and stated that if the employees did not get their money, she, Ms Kavhiyovha, would make sure that Ms Smith was dead.[2] When the applicant's attorney enquired from Mr Garoëb and Ms Kavhiyovha at about 16h30 on 18 December 2014 whether they were going to stop the unlawful strike, Ms Kavhiyovha responded that they would proceed, which necessitated the bringing of the urgent application on the 18th of December 2014.[3]

11.3 On 19 December 2014, Ms Smith received information that a meeting had been called by the first respondent on the evening of the 18th December 2014 where it was resolved that the unlawful strikes would continue. Ms Smith then caused an email to be sent to Mr Paporo, the first respondent's Secretary General, requesting a response on the allegations, failing which an application would have to be brought to the Labour Court on an urgent basis. No response was forthcoming from Mr Paporo.[4]

11.4 The employees leading the way in the unlawful strike actions at various stores, in addition to the Independence Avenue store, held themselves out to be representatives of the first respondent.[5]

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[1] Founding Affidavit of Karen Smith delivered on 19 December 2014, at page 6 para 15.
[2] Page 27 of transcription of oral evidence.
[3] Page 11 of the Transcript.
[4] Founding affidavit, Karen Smith, 19 December 2015, page 7 para 14.
[5] Grove Mall, Affidavit by E Wagner, at para 4.3; Gustav Voights, Affidavit of Cloete, para 4.3, Academia, Affidavit of Izaaks, para 4.2.

11.5 Several of the leaders of the unlawful strike actions at the various stores actually informed the applicant's senior personnel that they were taking considerations or consulting with the first respondent on the days in question.'[6]

[24] Mr Maasdorp furthermore submitted (para 12) that the first respondent elected to advance only a bald denial of the allegations concerning its involvement. According to him the denial does not create any dispute of fact whatsoever, and certainly not a genuine one, and the Honourable Court can safely conclude from the facts before it, he said. He submits that the first respondent instigated and actively supported the unlawful conduct by the applicant's employees that gave rise to the rules *nisi* issued on 18 and 19 December 2014 and should therefore be held responsible. This conduct was plainly unlawful and clearly frivolous and vexatious, rendering the first respondent liable to pay the applicant's cost he argued. Thereafter requested that the rule *nisi* be confirmed including the orders that the first respondent is liable for the applicant's cost.

[25] In para 26 of his heads Mr Maasdorp further submits that in the present matter, the applicant was forced by clearly unlawful, frivolous and vexatious conduct on the part of the first and second respondent to come to Court to protect its rights. Under the now repealed section 20, if the first and second respondent's simply refrained from defending the proceedings, the applicant would have been deprived of any indemnification for the costs of approaching this Court.

[26] Mr Maasdorp further submitted (para 13) that if this Court should find the fact that the first respondent's opposition in the form it has adopted, did not remove it from the blanket protection of section 118 that is afforded parties that do not oppose at all, then the first respondent may still be held liable for all costs incurred by the applicant prior to the issue of the notices of application for the two rule *nisi*.

[27] Both counsel augmented their written submissions with oral submissions. In his oral submissions, Mr Maasdorp, questioned Mr Rukoro's argument in the heads of argument where he stated in para 4.3 thereof that all the other orders have

[6] Klein Windhoek, affidavit of Nampala, at page 14, Grove Mall, affidavit of Wagner, para 4.7.

become absolute and that the only issue for determination by the court at that stage was whether to confirm or to discharge the order and the issue of costs. It would seem that Mr Maasdorp wanted the first respondent to also oppose the confirmation or the discharge of the orders as Mr Paporo in his answering affidavit indicated that the factual allegations against him and the Union were without merits.

[28] The question now arises as why does Mr Maasdorp want the first respondent also to oppose the discharge or the confirmation of the rule *nisi*? The reason for that is, in my view, to vindicate the applicant's request for costs. Mr Maasdorp knew that if the first respondent did not oppose the rule *nisi*, the applicant might have a problem in justifying the relief of costs.

[29] In my view, the issue of discharge or confirm the rule *nisi*, even though the first respondent argued that it did not arise at that stage, is uncontested therefore will be made final. Mr Maasdorp referred the court to the matter of *Namibia Estate Agents Board v Like and Another N O*[7], heard by Geier J where a costs order was granted *de bonis propriss* against the arbitrator. This matter is distinguishable from the facts of the matter at hand.

[30] In the present matter none of the respondents, including the first respondent did not oppose the applications brought by the applicant. In any event Geier J awarded costs against the arbitrator *de bonis propriss* on the scale of attorney and client because of the conduct of the arbitrator. The court found that she was biased and malicious during the hearing of the arbitration proceedings. Because of her conduct as pointed out above, she lost the protection afforded her in terms of s 134 of the Labour Act[8] thereby exposed herself to the provisions of s 118 of the Act.

[31] On the other hand, Mr Rukoro in opposition of the costs order against his client, argued that s118 of the Act is peremptory, that despite any other law, in any proceedings before it, the Labour court must not make a costs order against a party unless that party has acted in a frivolous or vexatious manner by instituting

[7]2015 (1) NR 112.
[8]11 of 2007.

proceedings and or defending such proceedings. And the first respondent did none of the aforesaid actions, therefore the costs order was not appropriately sought and granted on the 18 and 19 December 2014. He also distinguished the matter of *Namibia Estate Board* supra from the present matter, as his client, the first respondent did not oppose the applications of 18 and 19 December last year.

[32] The issue of costs in labour matters is regulated by s 118 of the Act which reads:

'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 frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.' (emphasis).

[33] In the proceedings before me, it is the applicant not the first respondent who has instituted, and proceeded with proceedings. By defending a costs order against it, I do not think the first respondent is frivolous or vexatious. Section 118 provides for proceedings instituted or defended frivolously or vexatiously in order to trigger an order of costs.

[34] Mr Paporo in his answering affidavit denied that the first respondent has incited the employees of the applicant in any way to strike. He referred to the second respondent as employees of the applicant not as members of the first respondent as the applicant is alleging. In fact Ms Smith in her supplementary affidavit supports Mr Paporo on that point when she conceded that it was very difficult for the applicant to get information on the involvement of the first respondent in the strike. The concession is correctly made in my view, and is contrary to the submission of Mr Maasdorp that the inference is inescapable that the first respondent has incited the employees of the applicant to strike. The submission is without substance. Similarly, the testimony of Ms Bertolini presented during the hearing of the application that Ms Jennifer Kavhiyovha and Mr Willem Humbu were in charge of the group of the employees and that they had positions of authority is devoid of proof, therefore, mere speculation. The fact that the employees screamed up to what they were speaking, does not necessary mean that Ms Kavhiyovha and Mr Humbu were authorised by all

the employees (per annexure A) to speak on their behalf. It could be that they liked what the two were speaking and screamed. That said, I fail to figure out which conduct of the first respondent should be regarded as frivolous or vexatious to trigger a cost order following the provisions of s 118 of the Act.

[35] In *National Housing Enterprise v Beukes and Others*[9], Van Niekerk J while dealing with s 20 of the old Labour Act 6 of 1996 of which s 118 of the current Act is a carbon copy said the following about the terms frivolous or vexatious:

> '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 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.'

[36] That being the case, and in my view, the applicant is the party which is vexatious by asking costs against the first respondent without sufficient ground causing an annoyance to the latter and put the first respondent unnecessary trouble and expense which the first respondent ought not to bear by defending the application for costs. Therefore, I agree with Mr Rukoro in his submission that indeed it is the applicant who under the circumstances of the matter and in light of the crystal clear provisions of s 118 still persists with the costs order issue, which, according to him, was obtained in an irregular way, is acting in a frivolous and vexatious way.

[37] In *Commercial Investment Corporation (Pty) Ltd v Namibia Food and Allied Workers Union and Others*[10], with similar facts, Heathcote AJ refused to give a costs order in an unopposed matter. The judgment I agree with and find to be applicable to the matter at hand as far as the first respondent is concerned.

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[9] 2009 (1) NR 82 (LC) at 87E-88F.
[10] 2007 (2) NR 467.

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[38] With regard the rule *nisi* of 18 and 19 December 2014 I gather from the submissions of counsel that on the return date of the rule *nisi*, namely the 16 July 2015, the conduct of the first respondent complained of by the applicant ceased long ago. Even though Mr Rukoro referred to the cessation of the conduct of the first respondent in his submission as 'water under the bridge', with the exception of the orders for costs, he did not oppose the rule *nisi* of 18 and 19 December 2014.

[39] Therefore, and for reasons stated above, I decline to give costs orders against the first respondent as both urgent applications were unopposed, but decided to give costs orders against the applicant because, to ask an order for costs in the circumstances of this matter is vexatious and such conduct has to be discouraged with an appropriate costs order.

[40] In the result I make the following orders:

(i) The rule *nisi* issued on 18 and 19 December 2014 are confirmed.

(ii) The application for costs by the applicant is dismissed with costs, which costs to include costs of one instructed and one instructing counsel on attorney and client scale.

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Acting Judge

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APPEARANCES

APPLICANT :	R Maasdorp Instructed by Köpplinger Boltman, Windhoek
FIRST RESPONDENT:	S Rukoro

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Instructed by Tjituri Law Chambers, Windhoek