

REPUBLIC OF NAMIBIA



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-LAB-MOT-REV-2017//00019

In the matter between:

NAMIBIA ESTATE AGENT BOARD

APPLICANT

and

RICHARD G A STEEN

FIRST RESPONDENT

ALINA INDOMBO

SECOND RESPONDENT

Neutral citation: *Namibia Estate Agent Board v Steen & Another* (HC-MD-LAB-MOT-REV-2017/00019) [2018] NALCMD 33 (14 December 2018)

Coram: MASUKU, J

Heard on: 14 August 2018

Delivered: 14 December 2018

Flynote: Labour Review- first respondent defending matter- then withdrawing opposition to the review application – applicant opted to provide information requested and deal with merits of complaint before labour commissioner – such act

not frivolous or vexatious conduct – s 118 of the Labour Act not applicable- No order as Costs.

Summary: This is an application wherein the applicant seeks for a review and setting aside of the ruling, made by the second respondent, refusing to compel the first respondent to provide the applicant with the first respondent's record of income from 1 August 2015 to the date of hearing; records of all investments and returns on such investments from 1 August to date of hearing ; all financial statements of business enterprises in which the first respondent had a financial interest from 1 August 2015 to the date of hearing of the arbitration hearing; first respondent's income tax returns for the tax years end of February 2015 and onwards; and the decision by the second respondent refusing the applicant the right to call as witness the first respondent's bank manager, who had been subpoenaed duces tecum to provide the first respondent's bank statement. The First respondent opposed the review application; however, he withdrew his opposition on 16 June 2018, just before the hearing on 14 August 2018. The first respondent through his legal representative or in person failed to appear at court for the hearing

The applicant now seeks for an order of costs against the first respondent on the basis that the first respondent acted frivolously.

Held the costs in labour matter are limited to the provision of s 118 of the Labour Act 11 of 2007.

Held that the conduct of the party, against whom a costs order is sought, must have acted vexatiously and frivolously in instituting, proceeding with, and defending the matter without sufficient ground.

Held that the first respondent did not act frivolously in defending the review application, instituted by the applicant.

ORDER

1. The application for review succeeds.
2. There is no order as to costs.
3. The respondent's legal practitioner is ordered to file an affidavit explaining her failure to attend the hearing scheduled on 16 August before this court by 20 January 2018.
4. The matter is postponed to 31 January 2019, at 08:30, to determine if the reasons proffered by the respondent's legal practitioner for the non-appearance ought to be condoned.

JUDGMENT

MASUKU, J:

Introduction

[1] This is an application for review in terms of rule 14 of the Rules of the Labour Court¹. The first respondent initially opposed the application. He, however, withdrew his opposition shortly before the scheduled hearing of the matter. This leaves the court at large to grant the application for review.

[2] Essentially, the applicant now seeks only an order for costs, consequent upon the employment of one instructing and one instructing counsel in view of the respondent's withdrawal of opposition. The application for an order for cost is predicated on the allegation that the first respondent's conduct in initially opposing the application for review was frivolous.

The parties

¹ Labour Court Rules (14)

[3] The applicant is the Namibia Estate Agents Board, a statutory body established in terms of the provisions of the Namibia Estates Agent Board Act². The applicant, on 1 January 2013 entered into a contract of employment with the 1st respondent, Mr. Richard A. G. Steen, as its manager. This contract ended when the applicant dismissed the 1st respondent on allegations of impropriety on 14 August 2015. Dissatisfied with the dismissal, the respondent lodged a dispute of unfair dismissal before the office of the Labour Commissioner. The process culminated in an arbitration conducted by the 2nd respondent, Ms. Alina Indombo.

[4] I shall, for purposes of this judgment, refer to the applicant as such. In view of the fact that the respondent did not oppose, nor join issue in this matter, I shall refer to Mr. Steen as the respondent, save in occasions when it may be necessary to refer to the 2nd respondent as well.

The background

[5] The applicant instituted review proceedings in terms of rule 14 of the Rules of this court. It essentially sought an order that the decisions and/or rulings, taken by the 2nd respondent on 27 September 2017 be reviewed and set aside. The applicant specifically prayed for the following orders:

(a) The decisions/rulings of the second respondent refusing to compel the first respondent to provide the applicant with the following documentation:

(i) All records of income received by the first respondent from 1 August 2015 to the date of hearing;

(ii) Records of all investments and return for the tax years end of February 2015 to date of hearing;

(iii) First respondent's income tax returns for the tax years end of February 2015 and onwards;

(iv) All financial statements of business/ enterprise in which the first respondent had a financial interest in from 1 August 2015 to date of hearing;

² Act no. 112 of 1978.

(b) The decision/ruling of the second respondent refusing the applicant the right to call as a witness the first respondent's bank manager, who had been subpoenaed *duces tecum* to provide the hearing with the first respondent's bank statements be set aside.'

[5] It is pertinent to observe that the applicant did not initially seek an order of costs against the respondent. This development came about his was only when the first respondent withdrew his opposition to the review application as indicated above.

Pertinent facts

[5] The first respondent referred a dispute of unfair dismissal and unfair labour practice to the office of the Labour commissioner on 17 November 2015. The matter was eventually adjudicated upon by the second respondent. Conciliation took place on 19 April 2016. Thereafter the applicant and first respondent attempted settlement which came to naught.

[6] On 7 July 2016, the first respondent, upon failure by the applicant to revert on the first respondent's counter offer for settlement and after at least two months of awaiting a response, requested the conciliator, being the second respondent, to refer the matter for arbitration.

[7] The second respondent set the matter down for hearing on 28 July 2016 for arbitration. Subsequent to this date the matter was set down for hearing several times and it was eventually heard between 12 and 14 September 2017. The applicant was, at all material times, since the initial conciliation meeting represented by Mr. Francois Kopplinger. The respondent, was represented by Siyomunji Law Chambers and eventually by Ms. Ileni Gebhardt.

[8] The applicant, by correspondence dated 25 August 2017, requested the respondent to disclose his financial records as stated in para [5] above. The respondent refused to disclose the documents as requested, indicating that the documents concern his financial interests which are confidential. As regards the tax returns, the first respondent indicated that he does not have the full copies.

[9] Thereafter the applicant, invoked rule 35 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour commissioner, that is to subpoena the bank manager of which bank at which the respondent held a bank account, to produce the documents: first respondent's financial records, and to testify as a witness for the applicant at the arbitration hearing.

[10] The applicant alleged that the request of the financial records was necessary for its case in relation to the financial loss suffered by the applicant, allegedly at the hands of the respondent.

[11] On 12 September 2017, at the arbitration hearing the applicant and first respondent made submissions before the second respondent, on the issue of whether the first respondent is required to disclose his financial records as requested and as to whether the first respondent's bank manager must testify and provide first respondent's bank records. The first respondent vigorously opposed the request for disclosure. It was argued on his behalf that the proper rule to invoke when a party to a dispute before arbitration proceedings, seeks discovery of documents, is rule 26. The applicant immediately heeded this advice and requested the arbitrator to order the first respondent to produce the documents in terms of rule 26 (1) of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner.

[12] The second respondent considered the argument by the parties and delivered her ruling. She dismissed the applicant's application and decided against the delivery of the requested documents by the first respondent to the applicant and thus refused that the bank manager who had been subpoenaed to testify for the applicant. The second respondent then postponed the arbitration hearing to 13 October 2017.

[13] On 24 October 2017, the applicant lodged an application for the review of the second respondent's ruling made on 27 September 2017, dismissing applicant's application to compel first respondent to disclose the documents referred in para [4] above, and the refusal of the applicant's right to call first respondent's bank manager.

[14] The first respondent opposed the review application and in this regard filed an affidavit in opposition. The respondent subsequently withdrew his opposition on 16 July 2018. The applicant filed its heads of argument on 30 July 2018 and persists with the review application and requested the court to grant a costs order against the first respondent, on the basis that the first respondent acted frivolously in his initial opposition of the review application until 16 July 2018.

[15] The respondent, in his heads of argument, submits that his legal practitioner telephonically informed the applicant of his intention to withdraw his opposition to the review, the reason being that the respondent, after due consideration of the review application, instead desired to focus his attention and energies on the referral for unfair dismissal. The first respondent thus opposed the costs order, relying on s. 118 of the Labour Act,³ (the 'Act').

[16] The application was heard on 14 August 2018. The first respondent, despite having filed its heads of argument, failed to attend the hearing and no explanation was tendered therefor. This is an issue the court views in a very serious light and will not be tolerated. Counsel should know better and may, in appropriate circumstances, attract censure for failure to attend. If there is any reason why counsel cannot attend, leave should be sought in good time and granted in proper cases. In this regard, the respondent's counsel is called upon to explain her failure to attend the hearing on 14 August 2018.

The relevant provision of the Act

[17] Section 118 of the Act⁴ provides as follows:

'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.'

³

⁴ Labour Act 11 of 2007

[18] The question for determination is whether the first respondent's conduct in initially defending the review application was frivolous or vexatious, as contemplated in s. 118 of the Act.

[19] To answer this question, I can do no better than rehearse, what is stated in *Onesmus v Namibia Farm Workers Union*,⁵ at para 27 - 28, regarding the meaning to be attached to the words vexatious and frivolous as employed in the Act. The court stated as follows in that case:

[27] Before I answer that question, it must be mentioned that courts have given meaning to the words vexatious and frivolous in previous judgments. In this regard, I do not have to try to re-invent the wheel, so to speak. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*,⁶ the court gave the following meaning to the words in question:

'In its legal sense, "vexatious" means "frivolous, improper" instituted without sufficient ground, to serve solely as an annoyance to the defendant . . .' See also *Namibian Seaman and Allied Workers Union v Tunacor Group Ltd* and the recent Supreme Court judgment in *Permanent Secretary of the Judiciary v Ronald Mosementla Somaeb and Another*.⁷

[28] In other words, it occurs to me that these words mean that the party allegedly acting vexatiously or frivolously must act in a manner that is in all the circumstances of the case without pure and honourable motive; one that is entirely groundless; without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and serve to disturb and vex the spirit of the other party'.

[20] In *National Housing Enterprise vs. Beukes and Others*⁸ it was stated that the purpose of the s. 118 is similar to its predecessor s. 20 of the repealed 1992 Labour Act, it was held:

⁵ *Onesmus vs Namibia Farm Workers Union* (LC 3/2013) [2018] NALCMD 17,

⁶ 1979 (3) SA 1331 (W).

⁷ SA 14/2018 (SC) delivered on 2 July 2018, at paras [12] and [13]. 2009 (1) Nr 82 LC p 88

⁸ 2009 (1) NR 82 LC, p 88

'It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often-inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinized. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'.

[21] Having referred to the relevant cases and the meaning ascribed therein to the words in question, the question confronting the court, is whether the behavior of the respondent herein, fits any of the epithets mentioned in the paragraph above.

[22] The first respondent's referral to the Labour Commissioner is based on unfair dismissal and unfair labour practice. The applicant bears the onus to prove that the dismissal of the first respondent was substantively and procedurally fair. The applicant also had to deal with the aspect of the respondent's financial loss that he may have incurred after he was dismissed and further deal with the issue of mitigation of loss by the first respondent.

[23] Therefore the applicant required the respondent to disclose his financial records of income and financial interest in business/enterprise from 1 August to the date of hearing, and provide his tax return, to enable applicant to properly prepare its case, in respect of loss of income by the first respondent and mitigation of his losses.

[24] The respondent, in his opposing affidavit admitted, the purpose for which the applicant sought the requested documents, however he maintained his opposition to disclose the documents indicating that same are confidential and that the applicant was not entitled to know the income the first respondent had derived from the business activities he may have been engaged in.

[25] The respondent formally withdrew its opposition to the review application on 16 July 2018 without tendering any explanation in his notice to withdraw. Three days prior to this date, he telephonically informed the applicant, that he shall provide the applicant with the requested documents in his possession, and those not in his possession shall be requested from the relevant authority and there after provided to the applicant.

[26] In his heads of argument, the respondent tenders the reason for the withdrawal, namely, that after due consideration of the review application, he preferred to focus on the merits referral of unfair dismissal and would not persists with the opposition to the review application. Although the first respondent filed his heads of argument, he failed to attend the hearing, in person or through his legal practitioner.

[27] In *Commercial Investment Corporation (Pty) Ltd v Namibian Food and Allied Workers Union and Others*⁹, it was held that:

[10] Section 20 of the Act specifically proscribes an order as to costs in circumstances where the respondent (as in this case) did not oppose the application and in fact ceased with its unlawful conduct by the time the matter was called in open court. That is indeed the end of the matter. I cannot use the peripheral jurisdictional provisions of s 18(1)(f) or (g) to override (impliedly so) the specific provisions of s 20 of the Act. The upshot of the matter is that a Labour Court cannot give a costs order against a respondent in an unopposed matter, particularly in circumstances where the unlawful conduct had ceased by the time the matter was called in open court '.

[28] I adopt the reasoning articulated above as applicable in the present matter. In my considered view, there are, however, further reasons why I am of the view that to grant the applicant's prayer in such circumstances, would fly in the face of the legislative prescription in question and would render nugatory the very harm that the Legislature sought to forestall by enacting s. 118.

⁹ 2007 (2) NR 467 (HC) 468-469

[29] It must not be forgotten that in the instant case, the respondent, in opposing the review application, did so in support of a decision made by the arbitrator, meaning that the arbiter, after considering the submissions made by both parties, took the position that the respondent was on the right side of the law. It would accordingly be absurd, in my view, for a party who supports a decision by the court and oppose an application to have same set aside, to be regarded as having acted frivolously or vexatiously. The fact that a person in the respondent's position opposed the application does not, on its own bring the opposition within the realms of vexatious or frivolous as explained above. He was within his rights to support the decision that had been reached by the arbitrator.

[30] It would equally be queer for a party, who had initially filed opposition in a labour matter, to be mulcted in costs for reconsidering his or her position by subsequently withdrawing the opposition. If Mr. Dicks' argument were to be upheld, it would mean that the respondent would be punished for withdrawing his opposition, but if he had not so withdrawn, thus prolonging the matter, but subsequently lost the application, he would be not considered as one who acted frivolously or vexatiously. That would be fly in the face of reason and would be the high watermark of unreasonableness in my view. Furthermore, it would serve to defeat the object of the provision in question.

[31] The legislative solicitudes behind the promulgation of s. 118, must not be allowed to sink into oblivion. Parties should, in that regard, be allowed to pursue matters genuinely and where, as in this case, they receive counsel to the effect that they should not pursue the opposition on preliminary legal skirmishes but rather reserve their time and energy for the matter on the merits, that could hardly be regarded as being frivolous or vexatious. It just means a new course, which saves the applicant time and money has been adopted and this cannot be punished by an adverse costs order in the light of the policy reason behind the provision in question in labour matters.

Conclusion

[32] In the circumstances, I am of the view that although the applicant may be aggrieved by the initial opposition of the application for review, the fact that the respondent changed his mind and withdrew his opposition does not mean that the respondent was frivolous, pursuing what he considered at the time, to be a decision of the 'court', as it were, which upheld his own argument.

Order

[33] As a result I order as follows:

1. The application for review succeeds.
2. There is no order as to costs.
3. The respondent's legal practitioner is ordered to file an affidavit explaining her failure to attend the hearing scheduled on 16 August before this court by 20 January 2018.
4. The matter is postponed to 31 January 2019, at 08:30, to determine if the reasons proffered by the respondent's legal practitioner for the non-appearance ought to be condoned.

T.S. Masuku
Judge

APPEARANCES

APPLICANT:	M. G. Dicks
Instructed:	Kopplinger Boltman
FIRST RESPONDENT:	No appearance