



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-MOT-GEN-2021/00103

In the matter between:

NAMIBIA PUBLIC WORKERS UNION

APPLICANT

and

NAMIBIA BROADCASTING CORPORATION

1st RESPONDENT

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

2nd RESPONDENT

MINISTER OF FINANCE

3rd RESPONDENT

IMMANUEL HEITA

4TH RESPONDENT

Neutral citation: *Namibia Public Workers Union v Namibia Broadcasting Corporation* (HC-MD-LAB-MOT-GEN-2021/00103) [2021] NALCMD 27 (16 June 2021)

Coram: PARKER AJ

Heard: 19 and 26 May 2021

Delivered: 16 June 2021

Flynote: Costs – Labour cases – Labour Court’s power to grant costs order limited by s 118 of the Labour Act 11 of 2007 – Section provides that costs may be granted against a party acting frivolously or vexatiously – No proof to establish

applicant acted frivolously or vexatiously against first respondent – Applicant seeking to enforce Joint and Procedural Agreement existing between applicant trade union (acting on behalf of its members) and the members' first respondent employer – Applying dragging second respondent (the Government) to court unnecessary – Government not in any employer-employee relationship with applicant's member – Consequently, applicant acting frivolously and vexatiously against second respondent – Costs order granted against applicant in favour of second respondent.

Summary: Costs – Labour cases – Labour Court's power to grant costs order limited by s 118 of the Labour Act 11 of 2007 – Section providing that costs may be granted against a party acting frivolously or vexatiously – Applicant withdrawing application against all respondents – First respondent and second respondent applying for costs – Court finding that r 97 (1) of the rule of the High Court did not apply in virtue of s 118 of Act 11 of 2007 – Court finding that applicants application was to ensure first respondent's conduct did not breach the Joint and Procedural Agreement existing between applicant's members (employees of first respondent) and first respondent – As against first respondent applicant did not act in a frivolous or vexatious manner – But against second respondent applicant acted in a frivolous or vexatious manner by dragging the wrong respondent before the court unnecessarily – Costs order granted against applicant in favour of second respondent

ORDER

1. No costs order is granted against applicant in favour of first respondent.
 2. Applicant must pay costs in favour of second respondent.
 3. The matter is considered finalized and is removed from the roll.
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RULING

PARKER AJ:

[1] In an urgent application the applicant, a registered trade union in terms of the Labour Act 11 of 2007, instituted motion proceedings seeking declaratory order; and prayed the court to hear the matter on basis that it was urgent. The applicant union instituted the proceedings on behalf of its members, ie the striking employees. The employees' employer is the National Broadcasting Corporation (NBC), the first respondent. The second respondent is the Government of the Republic of Namibia (GRN); the third respondent is the Minister of Finance; and the fourth respondent is the conciliator who was seized with the industrial dispute between applicant's employees and the employer in terms of the Labour Act. No order is sought against the Minister of Finance (third respondent) and the fourth respondent (the conciliator). The purpose of this observation regarding third and fourth respondents will become apparent shortly. First respondent moved to reject the application; so did second and third respondent.

[2] The application was set down for hearing on 19 May 2021. After points of elucidation raised by the court have been answered to by Mr Marcus, counsel for applicant, Mr Muhongo, counsel for first respondent, and Ms Ihalwa, counsel for second respondent, by agreement between the parties, the hearing of the application was postponed to 26 May 2021.

[3] On 26 May 2021, Mr Marcus confirmed to the court what applicant had delivered on the ejustice system at 20H44 on 25 May 2021, as Mr Muhongo drew the court's attention to, namely, a notice of withdrawal whereby applicant withdrew the application and a second notice whereby applicant withdrew the application against the second and third respondents.

[4] In virtue of the notices of withdrawal, both first respondent and the second respondents have asked for their costs. If this was a civil matter brought in the High Court, r 97 (1) of the rules of court would expect the applicant to include in the notice of withdrawal a consent to pay costs. Ordinarily, r 22 of the Labour Court Rules would have applied but for s 118 of the Labour Act. It is, therefore, to the interpretation and application of s 118 of the Labour Act that I now direct the enquiry. The question that arises is this. Did applicant act in a frivolous matter or vexatious

manner by instituting those proceedings, within the meaning of s 118 of the Labour Act? Both Mr Muhongo and Ms Ihalwa say, the applicant so acted.

[5] In *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd* 2012 (1) NR 126 para 23, Hoff J said, acting 'in a frivolous manner' means acting without sufficient grounds and acting in 'in a vexatious manner' means acting for the purpose of causing trouble or annoyance to the respondent.

[6] On the papers, I find that applicant has put forth sufficient grounds why it alleged first respondent had by its conduct contravened the Joint and Procedural Agreement signed by applicant and first respondent on 8 September 2011. The fact that first respondent may have a good defence to resist applicant's contention is not enough to sustain the allegation that applicant acted in a frivolous manner. In my view, the facts in the applicant's founding papers constitute sufficient grounds. They may not be good grounds of the kind required to grant the order sought (see *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 para 15), but that is neither here or nor there. As Mr Marcus submitted – correctly, in my view – at this stage, the court is not called upon to determine whether good grounds exist to grant the declaratory orders sought (see *Christian loc cit*).

[7] In the result, I find that first respondent has failed to establish that by bringing the application, applicant acted in a frivolous manner. Having so found, I have no good reason to find that applicant acted 'for the purpose of causing trouble or annoyance to the first respondent'. (*Tunacor Group Ltd loc cit*) The purpose of the application in my view was to ensure that first respondent did not act in contravention of the aforementioned Joint Recognition and Procedural Agreement. In my view the application conduces to the objects of the Labour Act set out in the long title, in particular, the regulation of basic terms and conditions of employment and the protection of employees from unfair labour practice.

[8] Consequently, I conclude that by bringing the application, applicant did not act in a frivolous or vexatious manner in respect of first applicant; and so, no costs order

should be granted against applicant in favour of first respondent. But the same cannot be said in respect of the second respondent. It is indisputable that GRN (second respondent) does not stand in an employer-employee relationship with the members of applicant: GRN is not a party to the Joint Recognition and Procedural Agreement which is the subject matter of this proceeding. Consequently, upon the authority of *Tunacor Group Ltd*, I find that applicant acted in a frivolous manner when they dragged second respondent to court unnecessarily; and so applicant ought to be mulcted in costs in favour of second respondents only, because no order was sought from third respondent.

[9] In the result, I order as follows:

1. No costs order is granted against applicant in favour of first respondent.
2. Applicant must pay costs in favour of second respondent.
3. The matter is considered finalized and is removed from the roll

C PARKER
Acting Judge

APPEARANCES:

APPLICANT:

N MARCUS

Of Nixon Marcus Public Law Office

1st RESPONDENT:

T MUHONGO

Instructed by Shikale & Associates, Windhoek

2nd & 3rd RESPONDENT:

L IHALWA

Of Government Attorney