REPORTABLE

CASE NO: SA 21/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NATIONAL HOUSING ENTERPRISE	**Appellant**

and

EDWIN BEUKES	**First Respondent**
SIMON PHILLEMON NUUJOMA	**Second Respondent**
GOTTFRIED MBAHIMUA UAENDERE	**Third Respondent**
EVELYNE UANIVI	**Fourth Respondent**
GUSTAV HANGANEE MUPURUA	**Fifth Respondent**
CATHLEEN EILEEN MULLER	**Sixth Respondent**
LORETTE PHILANDER	**Seventh Respondent**

Coram:	MAINGA JA, ZIYAMBI AJA and GARWE AJA
Heard:	**8 July 2014**
Delivered:	**2 March 2015**

APPEAL JUDGMENT

GARWE AJA (MAINGA JA and ZIYAMBI AJA concurring):

Introduction

[1] This is an appeal against the judgment of the Labour Court (per Kauta AJ, as he then was) handed down on 27 February 2013. Pursuant to certain findings

made in that judgment, the Labour Court dismissed with costs an urgent application filed by the appellant seeking an order setting aside proceedings that were due to commence in the District Labour Court.

[2] The background to those proceedings is aptly captured in the review judgment of Smuts J dated 13 May 2011 in a matter involving the same parties. In summary it was the finding of Smuts J that the proceedings that had taken place before the District Labour Court, at the end of which an order had been made in favour of the respondents, were so replete with numerous irregularities that such proceedings could not be allowed to stand. In the event the learned judge set aside the entire proceedings, including the judgments and orders made by the District Labour Court, and further ordered that in the event that any of the parties decided to proceed with the complaint, such proceedings were to take place before a different chairperson of the District Labour Court.

[3] Following the review judgment of Smuts J, the respondents approached the District Labour Court and sought a new date for the hearing of the matter. On 29 June 2012 the appellant filed an application, on a certificate of urgency, in which it sought an order setting aside the proceedings before the District Labour Court and dismissing the relief sought by the respondents. The gravamen of the application was that the proceedings were frivolous and vexatious and 'obviously unsustainable'. It was further contended that the proceedings amounted to an abuse of the process of the court. In the alternative, an order was sought, in the event that the main relief was refused, directing the respondent Edwin Beukes, to provide security in the sum of N$350 000 for the appellant's costs in the

proceedings that were to take place before the District Labour Court and in the event of failure to provide such security by 20 July 2012, permitting the appellant, on the same papers, to apply for the setting aside of the proceedings before the District Labour Court.

[4] The urgent application was set down before Kauta AJ. In his judgment, Kauta AJ accepted the general principle that a court has an inherent right to control its process and in particular to prevent an abuse of its process in the form of frivolous and vexatious litigation. He further accepted the position that in a proper case, the court retains the power to strike out such a claim.

[5] Having considered a number of authorities on the subject, Kauta AJ came to the conclusion that this was not a proper case for the exercise of such a power. In particular the learned judge was of the view that whilst such a power can be exercised in proceedings involving the same parties in the same forum in which the litigation would have commenced, the exercise of such power was unprecedented in a case in which a superior court, on application, is asked to stay the proceedings taking place before a lower court on the basis that such proceedings were frivolous, vexatious and ‘obviously unsustainable’.

[6] On the alternative prayer for an order for the respondents to furnish security for costs, the learned judge was of the view that, there being no requirement for the provision of security in the applicable rules in a case where payment of security is sought in respect of frivolous and vexatious litigation, such relief was

not available to the appellant. The Rules are the Magistrates' Court Rules which also apply to the District Labour Court.

[7] In the result, the learned judge dismissed the application, but made no order as to costs.

[8] Dissatisfied, the appellant appealed to this court against the decision of the court *a quo* and now seeks the setting aside of the order of the court *a quo* and the substitution thereof with an order as prayed for in the court *a quo*.

The appellant's submissions on appeal

[9] In submissions made before this court the appellant contended that the conclusions arrived at by Kauta AJ evidenced a number of substantial errors. Amongst these was the failure to consider certain contentions relied upon by the appellant, such as the suggestion that the respondents, in accepting retrenchment packages, had perempted the right to be re-instated, that reinstatement was sought in respect of an employee who was now deceased and that any possible claim for compensation would be time-barred and prescribed.

[10] The appellant further contended –

(a) That the submissions previously made before Smuts J had not been made in the context of an application to permanently stay proceedings that amounted to an abuse of process.

(b) That the court *a quo* had failed to consider the merits of the relief sought by the respondents or the grounds upon which the appellant contended that such relief was obviously unsustainable. Any claim for compensation on behalf of any of the respondents would have become time barred and since a period of eight (8) years had lapsed since their retrenchment, reinstatement was effectively impossible.

(c) That s 117(1)*(h)* and 117(1)*(i)* of the Labour Act 11 of 2007 (the Act) empowers the Labour Court to make any order which the circumstances may require in order to give effect to the objects of the Act and further the Labour Court may generally deal with all matters, necessary or incidental to its functions under the Act. In other words the Labour Court is at liberty to make any order which the circumstances may require in order to give effect to the objects of the Act, one of which is to achieve a fair determination and disposal of issues between the litigants in labour proceedings.

(d) That in order to obviate the patently unfair results that would ensue were the District Labour Court proceedings to continue, particularly in view of the fact that the respondents are likely to continue with the hearing of the proceedings and appellant is likely to be subjected to meritless and obviously unsustainable but expensive proceedings in which substantial irrecoverable costs would be incurred, the Labour Court has jurisdiction to grant the relief sought ‘in order to give effect to the objects of the Act’ as provided in s117(1)*(h)* of the Act.

(e) That in terms of s 117 of the Act, the Labour Court can compel the furnishing of security for costs as it has jurisdiction to deal 'with all matters necessary or incidental to its functions under this Act concerning any labour matter'.

The respondents' submissions on appeal

[11] The respondents accept that the Labour Court has the inherent power to set aside proceedings that amount to an abuse of the process of the Court. However, they argue that such power must relate to proceedings between the same parties in the same forum in which the litigation emanates and not to proceedings pending before a lower court, which are sought to be set aside on the basis that such proceedings constitute an abuse of the process of that lower court. In this regard they further submit the following:

(a) That the invitation to the Labour Court to stay the proceedings of the District Labour Court on the basis that such proceedings are an abuse of court process would mean that the Labour Court would have to deal with the merits of a matter not pending before it.

(b) That the Labour Court correctly refused to grant the request for security for costs because the proceedings in respect of which such security for costs was sought were not pending before it.

(c) That matters pending before a District Labour Court can only be dealt with by the Labour Court on appeal or as an interlocutory matter incidental to the proceedings but 'which does not deal with the merits of the matter'.

Issues for determination

[12] Although both sides have raised various issues in their submissions, it is clear that there is one central issue that falls for determination. That issue is whether the Labour Court has the inherent jurisdiction to stay proceedings that are pending before a lower court on the basis that such proceedings are frivolous and vexatious and obviously unsustainable. In the alternative, the issue that falls for determination is whether the Labour Court has jurisdiction to require a party appearing before a District Labour Court to provide security for costs in respect of proceedings taking place before that court.

The other issues raised by the appellant would depend on whether the Labour Court has the necessary power or jurisdiction to intervene in unterminated proceedings before a lower court. If it does not, then that would be the end of the matter. If it does, the question that would then arise is whether the proceedings before the District Labour Court stand to be dismissed on the basis that they are frivolous and vexatious and obviously unsustainable.

The powers of the Labour Court

[13] It is a correct statement of the law that at common law, our superior courts have inherent jurisdiction to prevent an abuse of their process by either staying

proceedings in certain circumstances or even dismissing them altogether, but the power to do so will be exercised sparingly and only in exceptional circumstances. Proceedings will be stayed when they are vexatious or frivolous or when their continuance, in all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties - *The Civil Practice of the Supreme Court of South Africa*, 4 ed, by Herbstein and Van Winsen at p 245; see also *Namibia Financial Institutions Supervisory Authority v Christian and Another* 2011 (2) NR 537 (HC).

A court also has inherent jurisdiction to dismiss proceedings altogether as being frivolous or vexatious in order to prevent an abuse of its powers but the elementary right of free access to the courts will not be interfered with by the summary dismissal of an action without hearing evidence, on the ground of vexatiousness, unless it is manifest that the action is so unfounded that it could not possibly be sustained and it is clear that the failure of the action is a foregone conclusion – *The Civil Practice of the Supreme Court of South Africa, op cit*, at pp 247-248.

Inherent jurisdiction is the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them – *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* (1971) 2 DLR (3rd) 75.

[14] An action may be held to be vexatious if it is 'obviously unsustainable' or 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant' – *Golden International Navigation SA v ZEBA Maritime Company Limited*; *ZEBA Maritime Company Limited v MV Visvliet* 2008 (3) SA 10 (C).

[15] A court will grant a stay where the case 'stands outside the region of probability altogether and becomes vexatious because it is impossible' – *Ravden v Beeten* 1935 CPD 269, 275-276.

The District Labour Court

[16] At the relevant time the District Labour Court exercised the powers of a Magistrates' Court. The use of the word 'exercised' is deliberate because it is common cause it no longer exists as such. It is also not in dispute that it is not a superior court and that it can only exercise such powers as are given to it in terms of statute. A Magistrates' Court has no inherent jurisdiction to control its own process or to develop the common law – *The Civil Practice of the Magistrates' Court in South Africa* by Jones and Buckle, 10 ed, Vol 2; the Rules at Rule 5.

Whether the Labour Court has the power to interfere in uncompleted proceedings of a lower court

[17] Whilst there can be no doubt that the Labour Court does enjoy the inherent jurisdiction to control its own process, the issue that arises in this appeal is whether, it has similar jurisdiction to control process in a lower court.

[18] There is a plethora of decided cases which are authority for the proposition that it is inappropriate for a superior court to intervene in unterminated proceedings of a lower court.

[19] In *Masedza and Others v Magistrate Rusape and Another* 1998 (1) ZLR 36 Devittie J remarked at p 39G-40A:

> 'The position has always been that the right of appeal against an interlocutory decision of a magistrate's court is limited to cases where there has been a conviction. The justification has been stated in several case authorities. In *Ellis v Visser and Another* 1956 (2) SA 117 (W), Murray J stated at p 124:
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> > "If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case for the accused person to claim that this matter be decided *in limine* without awaiting the results of the merits of the case. The result would, I think, create chaos – one envisages a succession of appeals from the Local Division to the Provincial Division and the Appellate Division, whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by appeals, as there can be no miscarriage of justice, no abuse of process of the court, if the ordinary procedure is followed."'

At p 40C the learned judge continued:

> 'But it is not every type of irregularity that will justify the court intervening by way of review. *McComb v Assistant Resident Magistrate and Attorney General* 1917 TPD 717 was a case where the magistrate had refused to allow certain questions to be put to a State witness. The matter was postponed in order to allow an application

to be made for a *mandamus* that the magistrate allows the questions. This is what the court said at 718:

> "Moreover, as pointed out by my brother Gregorowski, if the court is called upon to intervene whenever a magistrate disallows a question in cross-examination, it might protract the hearing of the case indefinitely. After having got the court's ruling on the question, when the matter comes up before the magistrate again, the attorney may wish to put other questions which the magistrate deems wholly irrelevant and the magistrate may disallow them, and an application may again be made to this court for a *mandamus* to compel the magistrate to allow the questions. That only shows how undesirable it is for the court, in the absence of good reasons, to intervene in the middle of (or rather, as in this case, at the beginning) of criminal proceedings upon an application of this nature."'

[20] There is however an exception to this rule. In a proper case a superior court can grant relief – before completion of the proceedings in a lower court – in order to obviate a grave injustice. In general a superior court should be slow to intervene in unterminated proceedings in a court below and should confine the exercise of such powers to rare cases where grave injustice might otherwise result or where justice might not by any other way be attained. In *Mantzaris v University of Durban–Westville and Others* (2000) 10 BLLR 1203 (LC), Lyster AJ remarked at 1210H-J and 1211A:

> 'This approach arises from principles which have long been established by our courts, that as a general rule a superior court will not entertain an application for review, when such review seeks to interfere with uncompleted proceedings in an inferior court (*Lawrence v Assistant Magistrate*, *Johannesburg* 1908 TS 525; *Ginsberg v Additional Magistrate, Cape Town* 1933 CPD 357 at 361; *Ellis v Visser* 1956 (2) SA 117 (W) at 120-121; *Sita v Olivier* 1967 (2) SA 442 (A); *Haysom v Additional Magistrate Cape Town* 1979 (3) SA 155 (C) at 160; *Mendes v Kitchings NO* 1996 (1) SA 259 (E) at 260).

> In the matter of *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) the court held that a superior court would be slow to exercise any power upon the unterminated course of criminal proceedings in a court below, but it would do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained.'

[21] On a consideration of all the above authorities, I take the view that a superior court can, but only in very exceptional circumstances, intervene in uncompleted proceedings, be they civil or criminal, in order to prevent or obviate a clear miscarriage of justice. The process for achieving such intervention may be an appeal or a review application.

[22] Coming back to the facts of the present case, it is clear that the proceedings before Kauta AJ were neither an appeal nor a review. Rather they were proceedings based on the inherent jurisdiction of the Labour Court to interfere in unterminated proceedings of a lower court.

[23] In general, the position must, I think, be accepted as correct that the exercise of inherent jurisdiction by a court must be limited to matters coming before it and not another court.

[24] In *Nyaguwa v Gwinyayi* 1981 ZLR 25, the petitioner filed an urgent chamber application in the High Court of Zimbabwe for the issuance of a *rule nisi,* calling on the respondent to show cause on the return day why he should not be allowed to regain occupation of premises pending the outcome of an application to be filed in the Magistrates' Court for the rescission of the default judgment pursuant to which

an order of ejectment had been granted. Counsel for the petitioner in that case stressed in his submissions that he was relying on the inherent jurisdiction of the High Court to remedy an injustice.

[25] In dismissing the application, Pittman J remarked at 27D-G:

> 'I understand Mr Jagger's submissions to be that this court has an inherent jurisdiction to remedy injustice, that the obtaining and enforcement of the ejectment order had been unjust, and that unless this court granted the petitioner the right to reoccupy the premises, pending the outcome of his application for rescission, there would be no way in which he could avoid the loss he would suffer through having to remain out of the premises until the ejectment order had been rescinded. According to paragraph 13 of the petition, his application for rescission "cannot be heard for some weeks by virtue of the Rules of the Magistrates' Court . . ."
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> For the purposes of this judgment, I shall accept that the ejectment order was unjustly granted, but, despite the forceful eloquence with which Mr Jagger presented his argument, I remain of the opinion that the relief sought by the petitioner, if granted, would constitute an unauthorised interference by this court with the proceedings in the magistrates' court. Mr Jagger was unable to refer me to any authority for such interference, and I have been unable to find any subsequently. For this reason alone, I would dismiss the application.'

[26] On whether the High Court, being a superior court, had the power to interfere in proceedings pending before the Magistrates' Court on the basis that the court had the inherent jurisdiction to remedy an injustice, the learned judge remarked at 27A-B as follows:

> 'I was of the opinion that, in this country, each court is a creature of statute, and its powers are created and defined by statute. The function of every civil court is to

> recognise what it believes to be the rights of the parties before it. Once a civil court has given such recognition, that recognition must be accepted by each of the other courts, whatever its relative position in the hierarchy of courts may be, unless authority to overrule such recognition has been conferred upon it by statute. If one court were to claim that it has some inherent power to overrule another court, instead of a power specifically created by statute, in effect it would be claiming the power to nullify the body of statute, which specifically relates to the establishment and powers of each of the civil courts in the country. . .'

I agree entirely with the above remarks which apply squarely to the facts of this case.

[27] The conclusion I reach is that a Labour Court has no inherent jurisdiction to intervene in the unterminated proceedings of the District Labour Court on the basis that such proceedings are frivolous and vexatious and obviously unsustainable.

[28] Inherent jurisdiction cannot possibly be invoked in proceedings that are not before the Labour Court and are in the province of another forum. The essence of inherent jurisdiction is that a superior court hearing a particular matter must be enabled to control the conduct of such proceedings before it. Such control cannot possibly apply to proceedings taking place in lower courts. The proceedings can only be subjected to scrutiny by a superior court if they are the subject of an appeal or review before such court.

Whether the Labour Act allows the exercise of inherent jurisdiction in proceedings in a lower court

[29] The appellant has cited various sections in the Labour Act as empowering the Labour Court to interfere in labour proceedings. In particular the appellant has referred to:

(a) Section 117(1)*(h)* of the Labour Act, 11 of 2007 which provides that the Labour Court may make any order which the circumstances may require in order to give effect to the objects of the Act.

(b) Section 117(1)*(i)* of the same Act which provides that the Labour Court may generally deal with all matters necessary or incidental to its functions under the Act, irrespective of the fact that such issues may be governed by the Labour Act, any other law or the common law.

(c) Section 119(3) which provides that the purpose of the rules of the court, is, *inter alia*, to achieve a fair disposal of the proceedings.

[30] My considered view is that the above cited sections must be read in context. The interpretation suggested by the appellant that the sections must be interpreted to mean that the Labour Court can do virtually anything to give effect to the objects of the Act, or to deal with all matters necessary or incidental to its functions under the Act, or to achieve a fair disposal of the proceedings including interference with proceedings pending in a lower court, is untenable. The Labour

Court remains a creature of statute and, unlike the High Court, can only do that which the law allows. The provisions cited by the appellant in my view relate to proceedings that are properly before the Labour Court itself. Those provisions cannot be authority for the proposition that the Labour Court can intervene at any stage in proceedings taking place before a subordinate court.

[31] I find therefore that the sections relied upon by the appellant do not confer jurisdiction on the Labour Court to intervene in the manner suggested by the appellant. Whilst it is clear that proceedings from the District Labour Court may, in appropriate circumstances, be the subject of an appeal or a review before the Labour Court, such proceedings cannot be subject to interference by the Labour Court on the basis contended for by the appellant in this case.

Security for costs

[32] It is common cause that the District Labour Court has no jurisdiction to order payment of security for costs on the basis that the proceedings before it are frivolous, vexatious or obviously unsustainable.

[33] Consequent upon the finding that the Labour Court has no inherent jurisdiction to interfere in proceedings before the District Labour Court on the basis that they are frivolous, vexatious or obviously unsustainable, it follows that the Labour Court has no authority to order the payment of security for costs in proceedings taking place in the District Labour Court.

Disposition

[34] The alternative relief must, like the main, fail.

[35] In the result the following order is made:

The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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GARWE AJA

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MAINGA JA

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ZIYAMBI AJA

APPEARANCES

APPELLANT:	T A Barnard Instructed by Koep & Partners
FIRST, FOURTH, TENTH and ELEVENTH RESPONDENTS:	S Rukoro Instructed by Diedericks Inc
SECOND, THIRD, FIFTH, SIXTH SEVENTH, EIGHTH AND NINTH RESPONDENTS:	S Rukoro Instructed by Director of Legal Aid