

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-LAB-MOT-GEN-2023/00050**

In the matter between:

NAMIBIAN STANDARDS INSTITUTION

APPLICANT

and

GETRUDE HAUKONGO

FIRST RESPONDENT

NDATEELA HAMUKWAYA

SECOND

RESPONDENT

THE OFFICE OF THE LABOUR COMMISSIONER

THIRD

RESPONDENT

Neutral citation: *Namibian Standards Institution v Haukongo* (HC-MD-LAB-MOT-GEN-2023/00050) [2023] NALCMD 17 (5 April 2023)

Coram: Schimming-Chase J

Heard: 13 March 2023

Delivered: 5 April 2023

Flynote: Practice — Labour Court — Application to stay execution of arbitration award pending finalisation of appeal – Section 89 (6) and (7) of

Labour Act — Irreparable harm — Balance of irreparable harm favoured the first respondent.

Practice — Urgent applications for the stay of execution of arbitration award pending appeal — Applications of this nature are inherently urgent, provided the execution is reasonably imminent and the applicant is not guilty of any blameable conduct in not bringing the application timeously.

Labour Court — Application for a stay of execution of award pending appeal — Principles restated — Applicant bears the onus to prove reasonable prospects of success on appeal — Written record of proceedings not available at time of hearing — Applicant failing to discharge onus.

Summary: The first respondent was employed for 12 years as an executive assistant at the applicant. At the time of her employment, the applicant enjoyed full knowledge that the first respondent did not possess grade 12 qualifications. In 2019, the applicant informed the first respondent of its concerns with her work performance. The first respondent was informed that an attachment to other executive assistants would be forthcoming and she was advised to complete Grade 12 part-time, alternatively obtain a tertiary secretarial qualification. Before the first respondent could undertake her development, she was suspended in 2019, and ultimately dismissed in 2020 for poor work performance.

The first respondent referred a labour complaint to the Labour Commissioner. After conciliation failed the parties proceeded to arbitration. The arbitrator considered the complaint and made an award, in the absence of the applicant, in terms of the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner, due to the non-appearance of the applicant. The arbitrator ordered reinstatement of the first respondent as well as a compensatory award. The contents of the ruling showed that the arbitrator called the applicant's offices and informed its Human Resource Manager that the arbitration would proceed in 45 minutes. There was no appearance by the applicant. The arbitrator also ruled that the applicant had been properly served with the notice of set down.

The applicant applied for rescission of the award on the grounds that it had not been served with the notice of set down. The arbitrator considered the rescission application, on the papers filed in the absence of the parties, and dismissed the rescission application. The applicant then noted an appeal to this court against the arbitrator's award and the arbitrator's ruling dismissing the rescission application.

Upon the first respondent's attempts to execute the award, and a failure of settlement negotiations, the applicant launched an urgent application to this court for an order staying the effect of the arbitration award pending finalisation of the appeal.

Held: applications to stay executions of arbitration awards pending finalisation of an appeal are governed by s 89 of the Labour Act, and are by their nature inherently urgent, provided the execution is reasonably imminent and the applicant is not guilty of any blameable conduct in not bringing the application timeously. The applicant presented facts demonstrating that execution was reasonably imminent and that it had not committed blameworthy conduct. The matter was accordingly heard as urgent.

Held: the factors to be taken into consideration when dealing with an application for a stay of execution of an arbitration award pending finalisation of an appeal include (a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted; (b) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused; (c) the prospect of success on appeal, including the question as to whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention to reverse the judgment but for some indirect purpose, e.g. to gain time or to harass the other party; (d) where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience, as the case may be.

Held: on the facts of the case the balance of irreparable harm favoured the first respondent who had lost everything, fallen significantly into debt and became

unable to care for her children. She now stood to lose her immovable property and vehicle if the execution of the award was stayed. If paid compensation and reinstated in terms of the award, the first respondent would be able to continue making payments on her home and vehicle, and same would not be repossessed. Section 89(7)(b) is accordingly applicable.

Held: in any event, prospects of success were at best for the applicant, evenly balanced-especially in the absence of a proper record. Application dismissed.

ORDER

1. The applicant's non-compliance with the forms, notices and services provided for in the rules of the Honourable Court is condoned, and the matter is heard as urgent, as contemplated in terms of rule 6(24) of the rules of the Labour Court Rules.
2. The first respondent's points *in limine* are dismissed.
3. The application for a stay of execution of the arbitration award in favour of the first respondent pending finalisation of the labour appeal is dismissed.
4. There shall be no order as to costs.
5. The matter is finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

[1] This is an urgent application in terms of section 89(7) of the Labour Act

11 of 2007, hereinafter (“the Act”) for an order suspending the operation of an arbitration award made on 29 August 2022, under case number CRWK 841-20 in terms of s 89(6)(b) of the Act. These orders are sought pending the final determination of an appeal noted by the applicant against the arbitration award on 15 February 2023, under case number HC-MD-LAB-APP-AAA-2023/00015, in this Court.

[2] The applicant is the Namibian Standards Institution, a statutory body incorporated in terms of the Standards Act 18 of 2005.

[3] The first respondent is Getrude Haukongo, an erstwhile employee of the applicant and the referring party in an arbitration proceeding between herself and the applicant.

[4] The second respondent is Ndateela Hamukwaya (“the arbitrator”), cited in her capacity as arbitrator and designated as such by the Labour Commissioner, to preside over the dispute in CRWK 841-20.

[5] The arbitrator made an award on 29 August 2022, and ruled against the applicant in an application for the rescission of her award, on 30 January 2023.

[6] The third respondent is the Labour Commissioner, in his official capacity, with his offices situated at 32 Mercedes Street, Khomasdal, Windhoek. The second and third respondents have not opposed this application.

[7] I will herein refer to the first respondent as “the respondent”, as none of the other respondents have opposed this application.

[8] Mr Quickfall appears for the applicant. Mr Muhongo, together with Mr Shimakeleni, appears for the respondent.

[9] The respondent was employed by the applicant as an executive assistant, reporting to the General Manager since 2008. She earned a net salary of N\$19 000 per month. At the time of her employment with the applicant, the

respondent was not in possession of a Grade 12 certificate, and the applicant was aware of this.

[10] During May 2019, the respondent was called into a meeting by the General Manager and she was informed that she has an English Language barrier, that she would be attached to other Executive Assistants for a period of three months, and that she would be afforded an opportunity, during 2020, to improve her skills and obtain a Grade 12 qualification, alternatively complete a tertiary qualification on secretarial work.

[11] On 27 May 2020, the respondent was served with a notice to attend a poor work performance hearing on 4 June 2020. She was suspended on 24 June 2020.

[12] Following a disciplinary hearing and on 29 June 2020, the chairperson recommended that the parties enter into a 'disengagement agreement' within seven days of the recommendation, and that should no agreement be reached, the applicant may formally terminate the respondent's services and issue her with a neutral certificate of service.

[13] The parties could not reach agreement. On 8 July 2020, the applicant issued the respondent with a formal termination notice in terms of the chairperson's recommendations.

[14] The respondent launched an appeal against the dismissal on 16 July 2020, and the applicant appointed an external appeal chairperson. The appeal hearing was held on 22 July 2020. The chairperson found that the respondent had been given sufficient time to improve on her poor work performance and had failed to do so. The appeal was dismissed. The respondent then referred the dispute to the office of the Labour Commissioner.

[15] The arbitrator heard the claim of the respondent in the absence of the applicant, and following the hearing issued an award on 29 August 2022.

[16] In her award, the arbitrator ordered the reinstatement of the respondent effective 1 October 2022, and ordered the applicant to pay the amount of N\$228,000, as compensation for a period of 12 months.

[17] The findings of the arbitrator relating to the applicant's absence are set out below for ease of reference:

[2] The conciliation hearing was held on 16 December 2020 and was not successful therefore, the parties agreed that the matter be arbitrated. The arbitration hearing was scheduled on 16 April 2021 both parties were served the notice of set down on 09 February 2021.'

[18] On 16 February 2021, the respondent failed to show up, the respondent was called on that day and the Human Resources Officer promised to send someone but did not send anybody. There is sufficient evidence that the respondent duly served with the notice of set down to appear at the arbitration hearing and failed to show up with no grounds of justification provided, therefore, in terms of Rule 27(2)(b) of Rules Relating to Conduct of Conciliation and Arbitration, I have decided to proceed with the matter.'

[19] On 29 September 2022, the applicant applied to rescind the award made in its absence. The arbitrator dismissed the application for rescission of her award on 30 January 2023.

[20] On 8 February 2023, the respondent registered the arbitration award as an order of court, and subsequently served the Notice of Registration of the arbitration award as an order of court by 10 February 2023.

[21] On 15 February 2023, the applicant noted an appeal to this court against the dismissal of the rescission application as well as the arbitrator's initial award in favour of the respondent made on 29 August 2022. The appeal is on what the applicant describes as pertinent questions of law.

[22] The grounds of appeal against the dismissal of the rescission application

are that the arbitrator decided the rescission application in direct contradiction of the rules of natural justice, and article 12(1)(a) of the Namibian Constitution, in that:

- a) The arbitrator failed to give the applicant *audi*, orally or in writing, despite two written requests for a date;
- b) The arbitrator relied solely on her version of events, without affording the applicant an opportunity to disabuse her of the version;
- c) The arbitrator failed to apply the proper legal test for the determination of rescission application by failing to apply the test of good cause;
- d) The arbitrator failed to make a ruling on the respondent's condonation application for the late filing of her answering affidavit in the rescission application. In the circumstances, this would have determined whether the rescission application was heard unopposed or not.

[23] In this regard, the applicant also took issue with the contents of the same affidavit that was filed late, stating that the respondent made defamatory remarks towards her supervisor, which defamatory remarks 'materially broke down any hope of a harmonious and respectful relationship'. The applicant noted that the arbitrator made no mention of these remarks in her ruling. The alleged defamatory remarks are the following:

'The applicant ... is quick to judge those who are victims of the past.

The Chief Executive Officer and the General Manager of Corporate Communication and Human Resources are not able to sympathise and understand respondent as a Namibian woman.¹

¹ Underlining supplied by the applicant.

[24] On 6 February 2023, the respondent's legal practitioner of record directed correspondence to the applicant's legal practitioners demanding compliance with the arbitration award on behalf of the respondent. In response the applicant's legal practitioners advised it intended on appealing the ruling, and that fairness in the circumstances dictated that the applicant be allowed the courtesy of the thirty-day time period to lodge the appeal before any steps are taken in execution of the award.

[25] The applicant further advised the respondent that it was in the process of crafting a settlement proposal on the demand made in respect of the award, and that the same would be communicated by 17 February 2023. After an exchange between the legal practitioners, the applicant communicated its settlement proposal to the first respondent on 22 February 2023, providing the first respondent until 24 February 2023 to respond to the proposal.

[26] The proposal as disclosed by both parties was that in respect of the appeal settlement, the applicant would pay the monthly salary of the respondent and the compensatory award into the trust account of its legal practitioner's, pending the finalisation of the appeal. Needless to say, no settlement was reached.

[27] The applicant states that in light of its prospects of success on appeal, it would suffer prejudice if the full monetary amount of the award is paid over to the respondent, as the respondent would not be in a position to repay the compensatory award in the event of a successful appeal. The applicant states it became evident on 24 February 2023 that the settlement negotiations would not be fruitful. The applicant then launched this application on 1 March 2023.

[28] The applicant pointed out that applications for a stay of execution are inherently urgent, and that notwithstanding, the letter of demand and the threat of legal action that execution of the award may properly be considered imminent. Further, it would not be afforded sufficient redress should this matter be heard in the ordinary course, as an application for the stay of execution is ordinarily granted on an urgent basis pending the finalisation of the main matter

(the appeal, in this instance), and that in the ordinary course, the application may only be heard three to four months after being lodged. This would defeat the purpose of the stay pending the appeal as the respondent is at liberty to take the enforcement proceedings against the applicant at any moment.

[29] The applicant averred that the reinstatement of the respondent in the circumstances of the alleged defamatory remarks by the respondent where she insulted her supervisor as well as the previous CEO, is unlikely to foster a harmonious and respectful relationship, which would not be fair to either party in the circumstances.

[30] In respect of the appeal, the applicant averred that it raised several misdirections of law by the arbitrator. According to the applicant, the arbitrator committed serious errors of law by failing to apply the proper legal test, and the arbitrator failed to make any finding whatsoever in relation to a *bona fide* defence as alleged by the applicant. The arbitrator did not refer to any affidavits before her, but relied on her version of events.

[31] The applicant submitted that the dismissal of the respondent was procedurally and substantively fair, and that the applicant lodged the appeal in order to be afforded the opportunity to defend the claim of the respondent – and it intends to test the correctness of the ruling. The applicant's grounds of appeal state that the basis of the dismissal of the respondent relate to her continued lack of command of the English language, syntax, grammar, minute taking, memoranda drafting, and other administrative duties. The applicant stated that there were numerous and different forms of progressive assessments before the dismissal.

[32] The applicant submitted that it has a clear right by virtue of its right to appeal the award and the dismissal of the rescission application in terms of s 89(1), and the right to bring the present application in terms of s 89(7) of the Act. The prospects of success it enjoys and immediate prejudice suffered should the effect of the award not be varied, entitles it to the relief sought. It tendered payment of the compensatory award into an interest-bearing account pending the outcome of the appeal, and stated that such moneys will be paid to the

respondent should the appeal fail. Further, the applicant stated that the potential prejudice to the respondent is only a temporary injunction until the appeal is finalised.

[33] The respondent takes legal points to the application of the applicant.

[34] Her first point is that the urgency was self-created through the actions of the applicant. The respondent avers that the applicant filed its application a month after the ruling of the rescission application. The award was made an order of court on 8 February 2023, and the applicant was served with the order on 10 February 2023. From the onset, she demanded under the hand of her legal representative, that the applicant comply with the order. She states, if there is any urgency, it was self-created.

[35] Secondly, the respondent submitted that the applicant has approached court with unclean hands and in contempt of a court order, in that the rescission application was dismissed on 30 January 2023, and the present application filed on 1 March 2023, a month after the ruling. The applicant did not comply with the award and has been in contempt since 8 February 2023 when the award was made an order of court, and 10 February 2023, when it was served with the award, yet the applicant seeks the assistance of the court.

[36] Thirdly, the respondent raises the point that the application is moot, on the basis that the Deputy Sheriff of Windhoek served the writ of execution on the applicant on 2 March 2023 already. She submitted that once the writ has been served it has been executed and the only outstanding issue is payment in terms of the writ by the Deputy Sheriff.

[37] On the merits, the respondent pointed out that she was employed with the applicant since 2008 as an executive assistant, earning a net salary of N\$19,000 per month. At the time of her employment, she did not have a grade 12 qualification, to the knowledge of the applicant. She is a racially disadvantaged woman as contemplated in ss 17, 18, and 23 of the Affirmative Action Act, 29 of 1988.

[38] During her employment history with the applicant, she was never issued with any warning for poor performance until 15 May 2019, when a meeting was held with the applicant's General Manager, who indicated then that her English language barrier affects her work output. It was suggested that she enrol for grade 12 during the year 2020, or a short course at a tertiary institution for a qualification in the secretarial field with an NQF level three. It was also decided she would be attached to other Executive Assistants with the applicant, in Windhoek, for a period of three months, with no change in remuneration.

[39] The respondent stated that none of the aforementioned decisions were implemented and after a hearing on 4 June 2020, the chairperson recommended her dismissal, after which she referred a dispute of unfair dismissal to the office of the Labour Commissioner.

[40] According to the respondent, the arbitration was held before the arbitrator on 22 February 2022, and the applicant failed to attend after being called to do so as evidenced in the arbitrator's ruling. Therefore, the arbitrator proceeded with the hearing in the absence of the applicant, and delivered her ruling on 29 August 2022.

[41] It is the position of the respondent that the appeal pertains to both the arbitration award of 29 August 2022, and the dismissal of the rescission application of 30 January 2023. She pointed out that the appeal against the award is about five months out of time, and the applicant has not sought condonation for the appeal being filed out of time. In the absence of a proper and timeous appeal, the arbitration award remains extant, and the applicant may only be heard on the appeal in respect of the rescission application, which was dismissed.

[42] The respondent denied that the remarks she made in her answering affidavit in the rescission application were defamatory and asserted that they were fair comment, viewed objectively in the circumstances. She averred that the applicant is attempting to paint a picture that the relationship broke down

between her and her supervisor which is not true, and that it is not uncommon for employees to have issues amongst themselves that could result in a breakdown claimed by the applicant. She stated and that it cannot be said that an issue between two employees in the company resulted in a breakdown that required one of them to leave the employment.

[43] The respondent's stance is that the complaint of the applicant that it was not heard in the rescission application is not genuine, as the arbitrator determined the application on the papers filed by the parties. Apart from not attaching the founding affidavit in the rescission application to its papers in the application, the respondent pointed out that the applicant did not provide information as to what it would submit in addition to its founding papers, and whether such submissions would have influenced the outcome of the rescission application ruling.

[44] In this regard, the arbitrator specifically stated that the notice of set down was sent to email addresses provided by the applicant for purposes of service. In addition, and more importantly, the applicant was called and informed that the matter (arbitration) was set down and that someone needed to attend, yet, no appearance was made.

[45] The failure to appear after being called by the arbitrator was not addressed by the applicant in its founding papers in the rescission application, nor in the papers before court in its application for a stay of execution, save that the applicant denies service receipt of the notice of set down. The respondent denies the applicant has prospects of success on appeal in these circumstances.

[46] The respondent submitted that the balance of irreparable harm favours her. She is a 47-year-old female married out community of property, and resident in Windhoek. Her husband is resident in Walvis Bay, employed as a sergeant in the Namibian Navy and earns a net salary of N\$6,233.21. Before their marriage, each of them owned their own immovable property, and that remains the case. She has five children, three of whom are minors and resident

with her. The other children reside with their fat her. The minors are reliant on her for a range of basic necessities, which at present she cannot provide.

[47] Since her dismissal, she has not be able to cover the costs of her water supply with the City of Windhoek, and she is currently in arrears of N\$16,303.70. She lives in anxiety of her water being disconnected. She owes an amount of N\$8,629.28 on her credit card with Standard Bank Namibia and as a result, she has been blacklisted on ITC. The study policies taken out for her children with Momentum Namibia and Old Mutual have been cancelled due to non-payment. She pays life cover in the amount of N\$1,132 per month. Her vehicle insurance with Outsurance has lapsed due to non-payment. The respondent stated that she owns immovable property financed with Standard Bank Namibia. The bond over the property is presently in arrears of N\$15,238.32.

[48] The respondent stated that at present, she does not have sufficient income to ensure that the minor children enjoy a balanced diet. Although her husband provides financial support averaging N\$1,800 per month, he also has to service the bond on his property, cover his household expenses, and take care of the children resident with him, while earning a net pay of N\$6,233.21. The respondent maintains that if the status quo persists she runs the risk of having her water supply being disconnected and her house being repossessed by the bank. Once this happens, she would have suffered irreparable harm.

[49] The respondent averred that, she owns a motor vehicle valued at about N\$140,000. The immovable property is valued at about N\$1,4 million with an outstanding bond of N\$885,560.02. Should the appeal be upheld without the stay of the execution of the award, she will have the ability to pay and manage her debt and will have the ability repay the compensatory award, even in instalments if necessary, and the applicant would ultimately recover the full award. As such it cannot be said that the applicant would suffer irreparable harm.

[50] The respondent stated that since her dismissal she has lost her self-worth and dignity and has now resorted to begging, spending sleepless nights

with anxiety. She has been seeking professional psychological help.

[51] She submitted that should the application succeed, her home will in all likelihood be repossessed and sold on auction. In these circumstances, she will not be able to recover the property, which would be sold on auction and fetch a lower price than its worth.

[52] She pointed out that the applicant failed to indicate what prejudice it faces if it has to comply with the court order, especially in light of the applicant's tender to pay the award into the trust account of its legal practitioner, whereas her prejudice is far outweighed, as she needs the money to live.

[53] Having considered the pleaded cases of the parties, I deal with the points *in limine*.

[54] As regards the issue of urgency, I find guidance on this issue in the recently decided matter of *Bateleur Helicopters CC v Heimstadt JNR*,² where Ndauendapo J, in an application for the stay of an execution of an arbitration award held that applications of this nature are inherently urgent, provided the execution is reasonably imminent and applicant is not guilty of any blameworthy conduct in not bringing the application timeously.

[55] I hold the view that although the applicant may have been misguided to make attempts to settle after the execution of the award given that it had already been made an order of court. However, after the dismissal of the rescission application, the disclosure of the respondent that a writ had been executed a day after the application was launched indicates that there were ill-considered actions on both sides. A successful settlement of the issue would have negated this application. Also, no argument was led that the applicant was *mala fide*, as such, I exercise my discretion on the facts of this matter to hear the matter as urgent.

² *Bateleur Helicopters CC v Heimstadt JNR* (HC-MD-LAB-MOT-GEN-2022/00092) [2022] NALCMD 36 (16 June 2022).

[56] As regards the issue of unclean hands there is no evidence presented showing that the applicant was dishonest or fraudulent or *mala fide*. The Supreme Court in *Shaanika and Others v The Windhoek City Police and Others*,³ succinctly outlined the application of the doctrine of unclean hands in our jurisdiction, and with respect, I can do no better than refer to the position as elucidated in the judgment:

[27] The doctrine of unclean hands appears to have originated as an equitable doctrine in England.⁴ As noted in a recent decision of this Court, *Minister of Mine and Energy and Another v Black Range Mining (Pty) Ltd*,⁵ the doctrine has largely found application in the area of unlawful competition law where its effect is that an applicant is prevented from obtaining relief where he or she has behaved dishonestly.⁶ Accordingly, in *Black Range Mining*, this Court refused to uphold a challenge based on the doctrine of unclean hands in the absence of any evidence showing that the appellant had acted dishonestly or fraudulently. Although the Court in *Black Range Mining* did not expressly say so, I have no doubt that in using the words 'dishonestly or fraudulently', it would have considered bad faith or mala fides in the conduct of litigation to be included within its formulation.⁷ (Emphasis supplied)

[57] As regards the issue that the application before court is moot, the point is premised on the respondent averring that the Deputy Sheriff executed the writ of execution on 2 March 2023 and all that remains is the payment of the monies. I am not convinced that the service of the writ makes the relief sought moot. No authority on this point was tendered. This point must, too, accordingly fail.

³ *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC).

⁴ See the discussion in the South African cases *Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd* 1976 (4) SA 218 (C) at 220 – 221 and *Mgoqi v City of Cape Town & Another* 2006 (4) SA 355 (C) at para 140, where the Court held that an applicant will be denied relief where there has been “fraud, dishonesty or mala fides” (At para 140).

⁵ 2011 (1) NR 31 (SC).

⁶ *Id.* at para 46. See also *Mgoqi*, cited above, para 140 and *Cambridge Plan AG and Another v Moore & Others* 1987 (4) SA 821 (D) at 842F–H.

⁷ 3 South African courts have on several occasions made plain that bad faith or mala fides in the conduct of litigation will also bring the doctrine of unclean hands into play: see *Mgoqi*, cited above n 10, at para 140; *Socratous v Grindstone Investments* 2011 (60) 325 (SCA) at para 16, (where a litigant had failed to inform a court of other litigation on related subject matter);

[58] I now deal with the merits of the application.

[59] Both parties are in agreement on the applicable legal principles at play in the determination of this matter.

[60] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,⁸ it was held that in determining an application of this nature, a consideration of what is just and equitable was necessary, and regard should be had to the following factors:

- (a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (b) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (c) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party;
- (d) where there is the potentiality of irreparable harm or prejudice to both the appellant and respondent, the balance of hardship or convenience, as the case may be.

[61] In consideration of the potentiality of irreparable harm, I am alive to the

⁸ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545D-G; *Hardap Regional Council v Sankwasa and Another* (LC 15/2009) [2009] NALC 4 (28 May 2009) para 9.

applicant's allegations that it is a state-owned entity and not in a position to pay the large amount of the compensatory award. Yet, it was prepared to pay this amount into its legal practitioner's trust accounts. On the other hand, there is the respondent who detailed the financial and emotional hardship suffered since she lost her job, and the fact that if reinstated and paid the compensatory amount she would be able to pay her debt and be in a position to foot the legal bill should the appeal be upheld. If she can pay her debt in the meantime, she will be able to keep her house and at the very least, that would be adequate security given the value of the house. To my mind, it is clear that the respondent suffers significantly more prejudice and irreparable harm in the event that the execution of the arbitration award is stayed.

[62] In *Hardap Regional Council v Sankwasa and Another*,⁹ Parker AJ held that:

[9] It was held in *Wood NO v Edwards & Another* 1966 (3) SA 443 (R) that where no question of irreparable harm arises from execution, the question whether execution should be ordered will depend on whether there are reasonable prospects of success on appeal; but if the entire object of the appeal would be nugatory if execution were to proceed, the Court has no right to deal with the matter on the basis of whether there are reasonable prospects of success on appeal. It would then be that the question before the Court "must be resolved on the respective potentiality for irreparable harm or prejudice being sustained by the applicant and the respondent respectively." (*Tuckers Land and Development Corporation v Soja* 1980 (1) SA 691 (W) at 696E-F). This proposition is predicated on "the purpose of the (common law) rule as to the suspension of a judgment on a noting of an appeal is to prevent irreparable damage from being done to the intending appellant ..." (*Soja supra* at 696G, approving *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545B-C).'

[63] Read with the provisions of s 89(6) of the Act, the matter must be determined in favour of the respondent employee.

⁹ *Hardap Regional Council v Sankwasa and Another* (LC 15/2009) [2009] NALC 4 (28 May 2009) para 9.

[64] In any event, and as regards the prospects of success, courts have determined matters on the papers alone before. It is however not evident whether the applicant was served with the notice of set down, because while the arbitration award indicates it was duly served, the applicant takes issue with the fact that part of the rescission application covers the non-service of the notice of set down. A dispute of fact between the applicant and the arbitrator exists on this aspect. This question is better suited for the appeal court. Whether the appeal is vexatious or sought for some indirect purpose is also not clear, absent the record.

[65] It is important to note that the applicant failed to explain why it did not send a representative to the arbitration after being called to do so, and there is no denial on the papers that the representative was called as stated in the ruling. In fact, no explanation is provided by the applicant for this state of affairs anywhere in its papers.

[66] As regards the basis of the dismissal, that the respondent's lack of command of the English language, syntax, grammar, and minute taking, the applicant stated that there were numerous and different forms of progressive assessments. The respondent says otherwise. From her version, she was informed of this issue some ten years after she was employed, and she was not provided any training as promised, or provided with an opportunity to enrol in 2020 for her grade 12 qualification. Added to this is the fact that according to the respondent, the applicant employed her in 2008 in full knowledge of the absence of a grade 12 qualification.

[67] It is certainly not clear from the papers before court that the applicant engaged in a proper assessment of the respondent's skills, or that it provided the training promised, or that she was provided with an opportunity to undertake her grade 12 qualification. No evidence of a proper inquiry or assessment and engagement with the respondent on the quality of her work is present on the papers.¹⁰ As no record has been filed, the court is unable to properly assess the

¹⁰ *Tow-In Specialist Cc v Urinavi* 2016 (3) NR 829 (LC) at 841; *LLD Diamonds Namibia (Pty) Ltd v Tobias* 2009 (1) NR 346 (LC)

prospects.¹¹

[68] The foregoing, together with my finding above on where the irreparable harm lies leads me to the conclusion that the applicant has not made out a case for the stay of the execution of the arbitration award in the circumstances.

[69] On the issue of costs, the respondent seeks a cost order against the applicant from date of delivery of her heads of argument. It is her contention that the applicant, in the conduct of this application is frivolous and vexatious, because the applicant made an offer that was in principle accepted and the offer was later withdrawn, some 12 hours before the hearing of this application. Although this conduct stands to be deprecated, I do not consider the applicant as frivolous or vexatious in its conduct in launching this application to warrant a costs order in terms of s 118 of the Act.

[70] In the circumstances, I make the following order:

1. The applicant's non-compliance with the forms, notices and services provided for in the rules of the Honourable Court is condoned, and the matter is heard as urgent, as contemplated in terms of rule 6(24) of the rules of the Labour Court Rules.
2. The first respondent's points *in limine* are dismissed.
3. The application for a stay of execution of the arbitration award in favour of the first respondent pending finalisation of the labour appeal is dismissed.
4. There shall be no order as to costs.
5. The matter is finalised and removed from the roll.

¹¹ *Cymot (Pty) Ltd v Cloete and Another* 2007 (1) NR 320 (LC).

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:

D Quickfall

Instructed by Köpplinger Boltman, Windhoek

FIRST RESPONDENT:

T Muhongo, with him A Shimakeleni

Instructed by Appolos Shimakeleni Lawyers

Windhoek