

REPUBLIC OF NAMIBIA



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

CASE NO: HC-MD-LAB-MOT-REV-2018/00096

In the matter between:

NAMIBIA TOURISM BOARD

APPLICANT

and

NDAPEWA KANKONDI

1ST RESPONDENT

P. MWANDINGI N.O.

2ND RESPONDENT

Neutral Citation: *Namibia Tourism Board v Kankondi (HC-MD-LAB-MOT-REV-2018/00096) [2018] NALCMD 22 (17 August 2018)*

CORAM: MASUKU J

Heard: 1 August 2018

Delivered: 17 August 2018.

Flynote: Labour Law - Urgent application – for setting aside of an arbitration award – applicant disobeying court order issued by the arbitrator and registered and endorsed by the Labour Court with amendments – Labour Act – whether the court may, notwithstanding s. 118, issue an order for costs in a case of deliberate disobedience of an order of court - Civil Procedure –

whether applicant should be heard by the court notwithstanding the disobedience of a court order - Exceptions to the rule that a party may not be heard when in violation of an order of court discussed. Result – court held that the exceptions that apply in matters where applicants seek relief from the court notwithstanding their disobedience of court orders are not applicable in this case.

Summary: The applicant was on the wrong end of an arbitral award in which its employee had approached the office of the Labour Commissioner claiming unfair dismissal. The Arbitrator held that the employee had indeed been unfairly dismissed and the award was registered and made an order of the Labour Court, with some amendments. In the award, the court ordered that the employee be reinstated and paid part of her compensation, pending the appeal the applicant had lodged. The applicant did neither, in violation of the court order. The applicant later approached the Labour Court seeking an order setting aside the award for the reason that the record of arbitration proceedings was not available as the recording device malfunctioned during the arbitration proceedings. The respondent objected to the court entertaining the application without the applicant purging its contempt of the court orders.

Held – that the decision to bar a party from approaching the court when it is in disobedience of a court order at the time that it launches the application is not absolute, as there may be exceptions which require the court, the disobedience notwithstanding, to hear the said party.

Held further – that the exceptional circumstance raised by the applicant for the appeal that it be heard was not sufficient and was actually a situation in which the applicant sought to benefit from its disobedience of an order of court.

Held – that in such cases, although the court levies a premium on the right to access the courts in terms of the Constitution, equally important is the right to equality under the law and the requisites of the rule of law, which require citizens to ensure that the independence, respect, dignity and repute of the

courts are not wantonly assailed with impunity. In this regard, the court has to carefully weigh the balance.

Held further – that the exceptions recognised in case law, which require that a party which is in disobedience of an order of court should still be heard are absent, indicating that this is a proper case in which the applicant should be barred pending it purging its contempt of the court order.

Held – that in this case, the applicant not only disobeyed the court order by not implementing its requirements but the applicant actually acted in violation of the court order by not only refusing to reinstate the employee but it went further and employed a person into the position where the employee in question should have been reinstated. This conduct, which is not merely a negative act of non-compliance with an order of court, but a positive act in defiance of a court order, could not be tolerated in democratic State such as Namibia.

Held further – that court orders are not merely suggestions or pleas to those to whom they are directed. They are compulsive, peremptory and expressly binding and may not be overlooked, ignored or be the subject of negotiations regarding compliance. In that regard, it was further held that a party, which does not comply with an order of court must be dealt with firmly and decisively.

Held – that the decision to bar a party from approaching the court is not a permanent one meant to deny that party access to the courts forever, but it is a temporary decision to afford the errant party an opportunity to purge its contempt before accessing the courts.

Held further – that the provisions of s. 118 of the Labour Act do not apply in matters where a party sets the law in defiance and the court, may, in order to stem the tide of disobedience of court orders, issue an appropriate order as to costs.

In the result, the applicant was found not to have established any exception to it being barred from being heard in view of its violation of an order of court. The matter was struck from the roll with costs, to grant the applicant an opportunity granted to the applicant to purge its contempt.

ORDER

1. The application is struck from the roll.
 2. The Applicant is granted leave to renew this application on the same papers, duly amplified, as may be necessary, once it has purged its default to comply with this Court's order dated 31 May 2018, issued by the Hon. Mr. Justice Parker.
 3. The Applicant is ordered to pay the costs of this application.
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JUDGMENT

MASUKU J:

Introduction

[1] This application is one, in a series of applications filed by the applicant before this court and the Supreme Court. Before me, there were, at the filing of this application, two other applications for determination, instituted by the applicant against the 1st respondent. There was also one before Mr. Justice Parker, for leave to appeal, and also an application before the Supreme Court for the review of Mr. Justice Parker's order.

[2] In this present application, the applicant approached the court seeking the following relief:

'1. Condoning the applicant's non-compliance with the Rules of this Honourable Court and hearing the application for the interim relief set out below on an urgent basis as provided for in Rule 6(24) of the Labour Court Rules and in particular, but not limited to, condoning the abridgment of time periods and dispensing, as far as may be necessary, with the forms and service provided for in the Rules of this Honourable Court.

2. An order setting aside the arbitration award issued by the 2nd Respondent on 15 May 2018 and in favour of the 1st Respondent;

3. An order referring the dispute between the Applicant and the 1st Respondent back to the office of the Labour Commissioner for arbitration proceedings to start *de novo* before a different arbitrator; and

5. Cost of suit in the event of this application being opposed.'

Background

[3] The applicant, Namibia Tourism Board, (the 'applicant'), a body established in terms of the Namibia Tourism Board Act,¹ and having its principal place of business situate at c/o Sam Nujoma Drive and Haddy Street, Windhoek West, employed Ms. Ndapewa Kankondi, (the '1st respondent'), in the position of Head of Finance.

[4] Following a disciplinary hearing involving allegations of impropriety by the 1st respondent, the applicant dismissed her from its employ. The 1st respondent did not take a supine position to the dismissal. She lodged a dispute with the Office of the Labour Commissioner, which culminated in arbitration proceedings presided over by the 2nd respondent, Mr. P. Mwandingi.

[5] In his award, the 2nd respondent found in favour of the 1st respondent and ordered her to be reinstated from the date of her dismissal, namely, 1 March 2016, with a full salary and benefits, as if she was never dismissed.

¹ Act No. 21 of 2000.

The reinstatement was to be with effect from 1 June 2018. The 2nd respondent further ordered compensation to the 1st respondent in the amount of N\$ 1 912 340.30, which amount was to be paid to the Labour Commissioner by not later than 31 May 2018. Finally, the arbitrator declared the award to be final and binding on both parties.

[6] In due course, the award was registered with this court in terms of s. 87(1)(b) (i) of the Labour Act,² and was duly made an order of this court by Parker A.J. on 31 May 2018. In particular, Parker A.J. ordered that:

‘2. Section 2 of the award (dated 15 May 2018) be not suspended, and applicant must reinstate the first respondent in the position she previously occupied, from the date of dismissal, namely 1 March 2016, to date of reinstatement, with full salary and benefits as if she was never dismissed. Such reinstatement is with effect from 1st June 2018.

3. Payment of 50 per cent of the amount of compensation in section 3 of the said award is hereby suspended, pending the finalisation of the appeal noted by the applicant.

4. Section 4 of the award is not suspended.

5. Section 5 of the award is not suspended.’

[7] It would appear that the applicant is desirous of appealing against the order made by Parker A.J. and to this end, it would further appear, that the applicant made or was in the process of making an application before this court for leave to appeal to the Supreme Court, with a view to setting aside Parker A.J.’s aforesaid order. I am not aware of how this application has progressed, if at all.

[8] The applicant, in the present application seeks the relief set out above on the grounds, so it contends, that the record of proceedings before the 2nd respondent is not available and that it would seem the recording device used

² Act No. 11 of 2007.

during the arbitration proceedings malfunctioned. The applicant's legal practitioner of record, Mr. Mueller, deposes in a confirmatory affidavit that he went to see the 2nd respondent, who confirmed that the recording device indeed malfunctioned.

[9] It is the applicant's contention that in the absence of the record of proceedings, the review of the 2nd respondent's decision that it had launched, and which was also allocated to me, could not be properly determined in the absence of the record of the arbitration proceedings. That being the case, so the applicant contended, the court had two options at its disposal, first, to stay the proceedings and refer the matter back to the 2nd respondent for purposes of reconstructing the record or to set the award aside and order the arbitration proceedings to start *de novo* before a different arbitrator. The applicant posits that in the present case, it appears that the first option is not possible, thus leaving the court with the only option of setting aside the award and referring the matter back to be dealt with by another arbitrator.

[10] In her answering papers, the 1st respondent has taken issue with all the allegations made by the applicant, pound for pound. She is contesting every blade of grass on the turf as it were. The main thrust of her legal argument, in the present proceedings though, is that the court should not entertain the application by the applicant for the reason that it stands in contempt of the order issued by Mr. Justice Parker. For that reason, it is the 1st respondent's case that the applicant should first purge its contempt before being allowed to access the pure and undefiled fountains of justice as it were. By agreement of the parties, that is the issue that the court is called upon to determine in this judgment and I proceed to do so hereunder.

Should the applicant be heard in the light of its contempt?

[11] I should mention this early in the judgment, that it is common cause between the parties that the applicant did not comply with the order of Parker A.J., whose contents were recorded above. In this regard, the applicant not only did not reinstate the 1st respondent but it went ahead to employ

somebody else in the position that had previously been occupied by the 1st respondent and this was done after the award had been registered and made a court order. Secondly, the applicant did not pay to the 1st respondent the amounts stipulated by the order of Mr. Justice Parker, which it would seem, were modified from the initial arbitral award. This, it would seem, Mr. Justice Parker did in appreciation of the noting of the appeal by the applicant.

[12] In fairness, Mr. Rukoro, in his heads of argument, in recognition of the fact that his client did not comply with the court order, stated as follows:³

‘There is at present a Labour Court order that the applicant has not complied with and which order directed the Applicant to reinstate the 1st Respondent and to pay to her an amount equal to 50% of the amount awarded at the arbitration proceedings which amount is almost One Million Namibia Dollars.’

[13] Mr. Namandje, in his forceful and blistering attack of the behaviour of the applicant, urged this court not to lend an ear to the applicant before it has purged its contempt and that if the court were to lend its ear to the applicant in these sorry circumstances, the rule of law and the esteem and repute of the courts would be dealt a shattering blow.

[14] For his part, Mr. Rukoro, whilst acknowledging the non-compliance by his client, nonetheless implored the court not to deny the applicant access to the pure fountains of justice. It was part of his argument, doggedly submitted, I may add, that the rule calling upon a non-compliant party to purge its contempt first, was not a hard and fast rule. It was his contention that where there are special circumstances attendant to a case, the court may allow the party to be heard and thus prevent an injustice from being perpetrated.

[15] Mr. Rukoro, argued, with all the powers of persuasion at his command, that in the instant case, there are special circumstances attendant, which rendered it improper or ill-advised for the court to adopt the very serious step of denying the applicant access. In this regard, he submitted that the applicant

³ At para 8 of the Applicant's heads of argument.

had lodged an appeal against the award and had also initiated a review before the Supreme Court.

[16] It was his further contention in that regard, that if the appeal or reviews initiated succeeded and the applicant had already paid the 1st respondent in compliance with the court order, the latter may be unable to repay the money and the applicant would be dealt a serious and irreparable financial blow. He proceeded to harp very hard upon the contention that the money that is to be paid to the 1st respondent in terms of the order, consists of public funds and for which the applicant has to account and handle with a great sense of stewardship. These, he argued were the issues that constituted special circumstances and should for that reason, dissuade the court from denying the applicant access to the court before it purged its contempt. Is Mr. Rukoro correct in his submissions?

The legal argument

[17] In dealing with this issue, Mr. Rukoro placed heavy reliance on the case of the *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd.*⁴ In his argument, Mr. Rukoro submitted that the doctrine of 'unclean hands' ' . . . has largely found application in the area of unlawful competition law where an applicant is prevented from obtaining relief where he or she has behaved dishonestly'. It was accordingly his submission that in the *Black Range Mining* case, the court refused to uphold the challenge based on the doctrine of unclean hands in the absence of evidence showing that that the applicant acted dishonestly or fraudulently, elements which are not present in the instant case.

[18] Mr. Rukoro, further referred to the case of *Hamutenya v Hamutenya*,⁵ where Maritz J, stated that the rule of unclean hands is not absolute, making

⁴ 2009 (1) NR 140 (HC).

⁵ 2005 NR 76 (HC).

reference in the process to the case of *Di Bona v Di Bona*.⁶ In dealing with the issue, the learned Judge said the following in *Hamutenya*:

‘The rule however, that a person in contempt of Court will not be heard is not an absolute rule. This appears clearly from the judgments of Romer LJ and Denning LJ in the *Hadkinson’s* case and in this regard those judgments have been adopted by our Courts in *Kotze’s* case *supra*. *Clement’s* case *supra*, and in the decision in *Byliefedt v Redpath* 1982 (1) SA 703 (A). In *Hadkinson’s* case Romer LJ mentioned a number of exceptions to which he said the consequence of refusal to hear a person in contempt is undoubtedly subject.’

[19] Mr. Rukoro, also submitted that the right to be heard, is one of the rights guaranteed by the Constitution of Namibia and it is the only means by which the people can be able to effectively enforce their rights. It was accordingly his contention that closing the doors of justice to an applicant, who has a legitimate interest and a right worthy of protection by an independent and impartial court, should not be easily allowed, particularly in a case such as this, where public funds are at the centre of the case.

[20] Mr. Namandje’s submissions were a different kettle of fish altogether. It was his submission that the applicant has behaved in a most disrespectful manner in disobeying different aspects of a court order. In this regard, he submitted that the applicant, being a Government entity, should be exemplary in its behaviour, by adhering very strictly to court orders.

[21] In this regard, Counsel referred the court to the celebrated case of *Sikunda v Government of the Republic of Namibia and Another*,⁷ where this court remarked as follows:

‘A deliberate non-compliance or disobedience of an order of a Court by the State through its officials amounts to a breach of that constitutional duty. Such conduct impacts negatively upon the dignity and effectiveness of the Courts. An effective judiciary is an indispensable part of any democratic government.’

⁶ 1993 (2) SA 682 (C).

⁷ 2001 (2) NR 86 (HC).

[22] Mr. Namandje, further referred the court to the judgment of Angula DJP in *Willem George Titus v The National Housing Board and Others*,⁸ where this court expressed its dissatisfaction with the appointment of a chief executive officer while the issue of the propriety of the appointment of a person holding that position was subject to a determination of the court and in respect of which judgment had been reserved.

Determination

[23] I am of the view that the case law on the subject appears to be relatively settled. In this regard, I am bound, and do accept that the question of whether a person in contempt of a court order should not be heard, is not a hard and fast rule.

[24] In *Hadkinson (supra)*, Romer LJ, stated that the following exceptions may apply and lead the court to hear a party, even though it is in contempt of an order of court, namely: (a) a person can be heard for purposes of him or her purging the contempt; (b) a person can appeal to set aside the order upon which the contempt finding is predicated; (c) regard had to the true meaning of the order alleged to have been disobeyed, the party's actions did not constitute a breach or considered as a whole, the party should not be regarded as being in contempt; (d) when some application is made against the disobeying party, that party may defend itself against the proceeding launched. In regard to the last exception, the bar applies to voluntary applications by the errant person but not when he or she is seeking to be heard in respect of the defence.

[25] For his part, Lord Denning stated the following in regard to the issue under scrutiny:

'Applying the principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his

⁸ (A9/2016) [2016] NAHCMD 225 (29 July 2016).

disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may, in its discretion refuse to hear him until the impediment is removed or good reason is shown why its should not be removed'

[26] In dealing with this matter, I am of the considered view that the court will have to determine whether the applicant's actions do fall under any of the exceptions mentioned by Their Lordships in the *Hadkinson's* case. If not, the applicant, subject to what is recorded below, may, figuratively speaking, have its back against the wall.

[27] In this regard, I am of the considered view that the issue of access to the court is a cardinal principle, which is foundational to the rule of law. In this regard, courts should not lightly deny a litigant the right to approach the court to seek redress in a constitutional State. That notwithstanding, it would appear to me, that there are certain circumstances, where in the absence of countervailing exceptions, on account of the unbecoming behaviour of a party, and the attendant deleterious consequences thereof on the rule of law, respect and dignity of the court, and its effectiveness in properly and effectively fulfilling its constitutional mandate as an arbiter and whose decisions must be respected and complied with, the right of a party to approach the court may have to be suspended on condition that the said party has duly complied with the court's order.

[28] In this regard, I am of the view that although the decision to bar a party from approaching the court should not be lightly taken, in reverence to the right to access the courts as enshrined in the Constitution, there are certain circumstances where this important principle may be departed from. In this regard, the nature and seriousness of the non-compliance and its effect on the authority, esteem and ability of the court to carry out its constitutional function, must be weighed in, particularly where the disobedience renders it difficult for the court to enforce its orders or impedes the course of justice.

[29] Where the non-compliance is serious and flagrant, repeated or shows a sign of contumacious disregard of the court's authority, and renders the court impotent and portrays its hands as withered to enforce its orders, the court may have to send a clear signal that the offending party's behaviour will not be accepted or tolerated in a democratic State. In this regard, it must be mentioned that the decision not to allow the party access, is not a permanent denial but a mere suspension of that party's right to access the courts, until it shows its preparedness to respect and subject itself to the authority of the court, which is the solemn duty of all citizens in this Republic – natural and juristic, governmental and private, without distinction.

[30] In exercising its discretion in this connection, I am of the considered view that the court may have to take into account any exceptions mentioned above that may weigh in the offending party's favour and which may, notwithstanding the pernicious behaviour of the party in question, suggest that the party should nonetheless be heard and have his or her day in court.

[31] In this regard, it would seem to me, the court has to play a balancing act, namely, one that has full regard for the right of parties to access the courts and to obtain relief therefrom. On the other hand, signs of complete disregard and serious disrespect of court orders and with impunity, rendering the court unable to enforce its orders, should not be allowed to take root and to mushroom like a bad rash on the body politic of this Republic, resulting in parties feeling at ease to disrespect the authority of the courts with full knowledge that they will not be called to account therefor but can simply, without any questions being asked, access the court and get relief as if nothing at all untoward happened. Such behaviour, must, at some stage meet its comeuppance.

[32] In deciding on whether the court will exercise its discretion in this matter, it is important, in my view, to deal with the exceptional circumstance alleged by the applicant. In his spirited address, Mr. Rukoro, referred to the fact that the case involves the payment of what he referred to as 'public funds' and that if the applicant was to later be successful on review or appeal, as the

case may well be, the 1st respondent would not be able to pay back the money to the applicant, and by extension, the public and the applicant thus suffering a shattering blow in the circumstances.

[33] Is this argument sustainable in view of all the attendant facts of the case? Does it serve as an exceptional circumstance that should allow the court to look away as its authority and dignity is being assailed by the applicant? I think not. My reasons for so holding appear below.

[34] If the applicant's argument were to be upheld, it would mean that the court is encouraging parties to wilfully violate its orders and then turn around and use the very violation of the court order as a basis for arguing that the matter is exceptional, by saying that if they complied with a duly issued court order, it would be unjust and they would suffer irreparable harm if they did so. I am of the view that if this approach were to be countenanced, no one could comply with a court order because every court order comes with a measure of pain, discomfort and inconvenience. Parties, in many cases, comply with court orders with tears flowing down their cheeks, not because they like it but because it is the right thing to do.

[35] In the instant case, in attempting to raise the issue of exceptional circumstances, the applicant only confines itself to the payment ordered by the court. It does not at all deal with the order for the reinstatement of the 1st respondent, in respect of which no large amount would have to be paid in compliance, thus depreciating the public funds at the centre of the non-compliance.

[36] I should mention that if the applicant was desirous of 'saving' the money but not be seen to be violating the court order at the same time, it may have paid the money ordered as security or have it by agreement placed in an interest-bearing account pending the resolution of the appeal or review as the case may be. For a party to refuse to comply with an order of court in such a blatant and daring manner, is seriously disconcerting to say the least.

[37] I say so for the reason that there were avenues open in terms of which the applicant could have complied with the order for payment but without suffering the harm that it alleged is irreparable in its papers. That money is to be paid from public funds in compliance with an order of court, does not render it a proper ground to disobey court order. If that were the case, Government and her agencies would have a long and limitless licence to disobey court orders willy-nilly. All parties must be and be seen to be and treated equally before the law - Government and all her subsidiaries expressly included.

[38] It should be stated without equivocation that the behaviour of the applicant in this matter is a double-pronged transgression. I say so for the reason that the applicant not only failed to comply with an order of court to pay the 1st respondent but it also refused to reinstate her to her previous position. This is not all.

[39] On 1 June 2018, when the 1st respondent presented herself for duty, in compliance with the court order, the applicant asked her to stay away for 'now until we get requisite legal advice'. The applicant was 'still in consultation with our lawyers concerning the matter of reinstatement.'⁹ The letter further requested the 1st respondent 'not to report for duty for now until we get the requisite legal advice concerning the point mentioned in number 2 above, and required consultations have been concluded.' The applicant ended the letter on a saintly note and said, 'It is with no intention that NTB does not want to comply with the judgment ruling; but we need to conduct proper consultations and apply our minds as to the way forward in handling this matter.'

[40] The result? Another person, Mr. Freddie Scholtz, was, on 11 June 2018, employed by the applicant to fill the position of the 1st respondent as Head of Finance and ICT. This was done in the face of an order of court to the contrary and this was done while her hopes were being deliberately raised and her feelings expertly massaged.

⁹ Letter from the Applicant's Chief Executive Officer to the 1st Respondent, dated 1 June 2018, marked 'NK2' and annexed to the answering affidavit.

[41] As a result, the applicant not only did not comply with the court order – which is a type of inaction or a negative arms–folding enterprise. It positively took steps to violate the order of court – a positive step taken in direct violation of the terms of a court order, by employing someone in the position of the applicant, fully aware of the imperative nature, extent and requirements of the court order. I view this particular action in a very serious light.

[42] Had the applicant at the least reinstated the 1st respondent, as ordered by the court, she would have been entitled to a salary at the end of the first month and the ensuing months. This would have been a good ground to ensure that whilst the applicant pursues its other legal avenues open to it, including that of placing the amount in an interest-bearing account, (if that would have been agreed and one – which in all the circumstances appears reasonable), the 1st respondent's dire circumstances, of being without a salary for a period close to two years, would have been greatly ameliorated. As such, it would seem to me that the applicant was bent on eating its cake and have it too, a situation that can only happen in a Utopia, much removed from the happenings in a constitutional State such as Namibia.

[43] In this melee, and as these events unfolded, the applicant was not without any warning – yellow lights, in due time, turned to red, but the applicant would not be moved in its resolve. The 1st respondent's legal practitioners wrote a letter dated 1 June 2018, to the 1st respondent's legal practitioners, warning them against the dangers of their contemptuous actions. The letter read as follows in part:

'We specifically record herein that your client's conducts are (*sic*) in violation of both the court order, and the arbitration award. The order of Justice Parker is clear that your client MUST reinstate our client with effect from 1 June 2018. In the absence of any agreement between the parties, your client is not at liberty to consider if to reinstate or when to reinstate, as per point 2 of your client's letter, but must act in accordance with the court order.

Your client must also make good of the benefits payable to our client, such as pension fund contributions and medical aid for the time that our client was out of work, and those have not yet been addressed, including our client's remuneration going forward.

In addition, your client has not yet paid our client an amount equal to 50% (fifty percent) of the award amount as ordered, which were due for payments on 31 May 2018.

As such, your client has violated both the court order and the arbitration award wilfully.

Therefore we hold instructions to demand as we hereby do that our client be reinstated accordingly, and that all her benefits be reinstated with immediate effect, and that the 50% compensation amount as contained in the arbitration award be paid on or before Monday 4 June 2018.'

[44] I am of the considered view that the behaviour of the applicant, even in view of the warnings about its pernicious behaviour, was most unacceptable and sought to challenge what is clearly legitimate power and authority vested in the courts by the Constitution of this Republic. Should a party, who acts in such a manner be allowed to use the disobedience of the court order as a circumstance that should work in his or her favour, particularly when they have deliberately acted in direct contradiction and in violation of an order of court? I think not. A party should not be allowed to sow, reap and eat the fruits of his or her disobedience of an order of court. That would be totally wrong in my view.

[45] In all the circumstances of this case, I am of the considered view that the applicant has failed to meet the threshold in respect of any of the exceptions mentioned in the *Hadkinson* case, which are reproduced above. What it claims is an exceptional circumstance, is actually inflammatory conduct on its part. I accordingly find that the applicant's behaviour has not only impeded the course of justice, as far as the 1st respondent is concerned,

but it has made it extremely difficult, if not impossible for this court to enforce its orders already made or those that it may make in this matter.

[46] The road that is set before me to travel, is already well traversed. As indicated earlier, it was travelled by Mr. Justice Maritz in *Hamutenya (supra)* and much later, by Ueitele J in *Air Namibia (Pty) Ltd v Jonas Shilongo*.¹⁰ In both cases, the learned Judges, found that there were no exceptional circumstances averred that would have prevented them from calling for compliance with the court orders on the pain, if necessary, of barring the errant parties from accessing the courts until they had purged their contempt.

[47] In reaching the decision that he did in the *Air Namibia* case, Ueitele J premised his reasoning on the provisions of Art. 12 (1) (a) of the Constitution of Namibia, which deal with the right to a fair and public trial, before an independent, impartial and public Court or Tribunal, established by law. In dealing with the need to comply with arbitration awards issued by tribunals established in terms of the Art. 12, the learned Judge issued the following condign admonition at para [40]:

'It thus follow (*sic*) that disobedience of an arbitration award with impunity constitutes a practice that is not only inconsistent with the rule of law but amounts to a practice that subverts the rule of law. I am aware of the fact that the barring of a litigant to seek redress in a Court of law, simply because he or she has failed to comply with an earlier order of Court is not an absolute one.'

[48] The disobedience of court orders is a practice that is pernicious and should not be allowed to take root in a democratic country like Namibia. As much, was stated by Mainga J in *Sikunda (supra)*. Fairly recently, the Constitutional Court of South Africa, threw its weight behind the need to comply with court orders, failing which a party may be barred from accessing the courts in *SS v VV*.¹¹

¹⁰ (Case No. LCA 13-2014) NALCMD 14 (17 June 2015).

¹¹ (CCT 247/16) [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (1 March 2018).

[49] In a matter involving the interests of a minor child and in which the parent was in default of paying maintenance for years, in violation of a court order, the Constitutional Court remarked as follows at para [23]:

‘All court orders must be complied with, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all. Those interests include the protection of the rights of children and the collective ability of our nation to “free the potential of each person”, including children which ring quite powerfully true in this context.’

[50] I find these remarks very pertinent even in the instant case, although they relate to the interests of a minor child. They do, however, resonate well with the interests of employees, which our Legislature, in its wisdom, regards as vulnerable, to some extent. This is borne by the fact for instance that the Labour Act in s. 89(6)(b) provides that an appeal of an award operates to suspend the award if it is adverse to the interests of an employer but does not serve to suspend same if the award is adverse to an employee’s interests. If that legislative imperative is followed, it would, in my view, serve to enable the court to ‘free the potential of each person’, in this case, the employee, whose status is literally frozen by the applicant refusing to comply with an order of court. She is presently an employee who is unemployed.

[51] In closing, I am in duty bound to repeat words that recently fell from the lips of the Court of Appeal of Kenya regarding the need to comply with court orders. One may mistake that court to have had this very case in mind, regard had to the instructive remarks the court made. The court said:¹²

‘When courts issue orders, they do not do so as suggestions or pleas to the persons at whom they are directed. Court orders issued *ex cathrada*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner

¹² Dr. Fred Mutiang’i, The Secretary to Cabinet, Ministry of Interior And Co-Ordination of National Government v Miguna and Others Civil Application No.1 of 2017 (UR1/2018).

of compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, the upholding of the rule of law are not mere platitudes but present realities.'

[52] Having regard to all the issues that I have referred to in this judgment, I am of the considered view that the behaviour of the applicant is well deserving of some kind of stern censure. In this regard, and to borrow from the Kenyan Court of Appeal judgment cited above, this is a proper case in which this court must deal 'firmly and decisively' with the applicant's recalcitrant behaviour in this case. This will be a demonstration of the court's commitment to upholding the rule of law, equality before the law, on the one hand, and also preserving its own dignity, reputation and authority, which should not be allowed to be wantonly assailed and treated with levity, with no demonstrable consequence ensuing.

Costs

[53] In terms of the provisions of s. 118 of the Act, the normal practice required of this court, is not to grant costs in labour matters, save in a few circumscribed circumstances. The present case, is however, an exceptional one, where the applicant has set the law in defiance and has deliberately denigrated the esteem, dignity and repute of the court, thus spelling disaster to important constitutional imperatives, such as the independence of the judiciary, the rule of law and equality before the law, which are the glue that holds the Namibian society together. To negate these imperatives, is to strike at the very heart of a democratic dispensation, which should not be allowed or tolerated, particularly by a Government entity, which should be exemplary in its words, actions and behaviour.

[54] It is no small wonder that Mr. Namandje, in his heads of argument, cited the timeless words that fell from the lips of Mr. Justice Brandeis of the

United States Supreme Court in *Olmstead v United States*.¹³ The learned Justice remarked as follows about the need for the Government to set a good example by not violating the law, even for what it may parochially consider to be good or necessary:

‘In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a law- breaker, it breeds contempt for the law: it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.’

[55] A sanction for such unbecoming behaviour in all other cases that come before the courts, that should, in my view, also be available to the Labour Court, in order to stem the tide of disrespect of court orders, and to hopefully drive the message home, is to issue an order for costs, which is in my view not in the category covered by s. 118. The costs order in this case, addresses a special malady that must be nipped in the bud, which the Legislature may not, in its manifold wisdom, have contemplated in enacting s. 118.

[56] In considering the appropriate scale of costs to impose, one may justifiably argue that an order on the punitive scale is condign, regard had to the nature, extent and temerity of the applicant’s non-compliance. Considering, however, that costs should ordinarily not be granted in labour matters, I am of the considered view that a costs order, even on the ordinary scale, is enough retribution and rebuke, considering the usual order in labour matters.

¹³ 227 U. S. 438 (1928) at 485.

[57] In the premises, I am of the considered view, having had regard to all the circumstances herein and the relevant authorities cited by the parties, that the following order is called for, namely that:

1. The application is struck from the roll.
2. The Applicant is granted leave to renew this application on the same papers, duly amplified as may be necessary, once it has purged its contempt of the order issued on 31 May 2018, by the Hon. Mr. Justice Parker.
3. The Applicant is ordered to pay the costs of this application.

T. S. Masuku
Judge

APPEARANCE:

APPLICANT

S. Rukoro

Instructed by:

RESPONDENT

S. Namandje

Of Sisa Namandje & Co. Inc.