IN THE HIGH COURT OF NAMIBIA, WINDHOEK, NAMIBIA

EX TEMPORE JUDGMENT

Case Title: PUPKEWITZ AND SONS (PTY) LTD v ISASKAR MUUNDJUA JOSEPHINA SHEEPO N.O	**Case No:** HC-MD-CIV-MOT-GEN-2022/00274
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	**Date of hearing:** 6 December 2022
	Ex tempore delivered: 6 December 2022 **Ex tempore typed reasons released**: 21 December 2022

Neutral citation **:** *Pupkewitz and Sons (Pty) Ltd v Muundjua* (HC-MD-CIV-MOT-GEN-2022/00274) NAHCMD 690 (21 December 2022)

Results on merits:

Merits considered.

The order:

1. The applicant's non-compliance with the rules of this Court is condoned, and the application is heard on an urgent basis as provided for in Labour Court Rule 6(24) and in particular the 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. The effect of section 89(6) of the Labour Act, 11 of 2007, is hereby varied and the operation of the arbitration award delivered on 25 October 2022 in arbitration CRWK 348-20, is hereby suspended, pending the final determination of applicant's

appeal against the award.

3. Any enforcement order, which the first respondent may obtain under the award in terms of section 90 of the Labour Act, 11 of 2007, is hereby suspended pending the final determination of the applicant's appeal against the award.
4. The operation of any writs of execution, which the applicant may obtain under the arbitration award in terms of section 90 of the Labour Act, 11 of 2007, including those issued under case number HC-MD-LAB-AA-2022/00230, is hereby suspended pending the applicant's appeal against the award.
5. There shall be no order as to costs.

The matter is removed from the roll: Judgment Delivered.

Reasons for decision:

The Parties

[1] The Parties relevant to the current application are M Pupkewitz and Sons (Pty) Ltd, a private company duly registered in the companies laws applicable in Namibia and Mr Isaskar Muundjua, a major male and erstwhile employee of the applicant. The second respondent Josephina Sheepo NO is cited in her official capacity as Labour Commissioner appointed in terms of the Labour Act 11 of 2007 (the Act).

Background

[2] The matter came before me as an urgent application in terms of which the applicant seeks an order pursuant to s 89(7) read with s 89(9)(*a*) of the 'Act for the stay of the execution of the arbitration award of the second respondent dated 14 October 2022 and a second award which varied the first award, dated 25 October 2022, under case number CRWK 348-20.

[3] The award granted by Mr Kahitire Kenneth Humu was in favour of the first respondent in the amount of N$583 756, which is equal to 35 months of salary.

[4] In the application brought by the application on notice of motion the applicant

further seeks an order dispensing with the forms and service and compliance with the timelines prescribed by the rules of court.

[5] The purpose of the application before this court is to seek an order:

a) Varying the effect of section 89(6) of the Labour Act, 11 of 2007, and suspending the operation of the arbitration award delivered on 25 October 2022 in arbitration CRWK 348-20, pending the final determination of the applicant's appeal against the award;
b) Suspending the operation of any enforcement order which the first respondent may obtain under the award in terms of section 90 of the Labour Act, 11 of 2007, pending the final determination of the applicant's appeal against the award;
c) Suspending the operation of any writs of execution which the applicant may obtain under the arbitration award in terms of section 90 of the Labour Act, 11 of 2007, including those issued under case number HC-MD-LAB-AA-2022/00230, pending the applicant's appeal against the award.

[6] The first respondent raised two points in limine in his answering papers:

a) Firstly, the issue of urgency is not explained at all and secondly that there is no valid appeal before the court.

[7] I intend to deal with the preliminary issues first.

[8] On the issue of urgency: It was contended by the first respondent and argued by Mr Rukoro that the requirements of urgency were not addressed at all in the papers of the applicant.

[9] The First respondent directed the court to rule 2(26) of the Rules of the Labour Court, which must have been a typo as it is actually rule 6(26). I have read the papers and considered this argument advanced by Mr Rukoro and disagree for reasons I will discuss hereunder.

[10] The view of our courts is that an application for the stay of execution is by its very nature urgent.

[11] In *Hardap Regional Council v Sankwasa James Sankwasa and Another,* an unreported judgment of this Court in Case no. LC 15/2009 delivered on 28 May 2009 Parker J on p. 6 para. 4 expressed himself on this issue as follows:

'*I accept that by its very nature application for stay of execution is an urgent matter to be brought and heard on an urgent basis; but with this qualification, that is, provided for example, execution is reasonably imminent and the applicant is not guilty of any blameable conduct in not bringing the application timeously.'*

[12] This view taken by Parker J was referred with approval in the matters of *Shoprite Namibia (Pty) Ltd v Paulo and Another* (1) (LC 7 of 2010) [2010] NAHC 29 (26 March 2010) as well as *Bateleur Helicopters CC v Heimstadt JNR* (HC-MD-LAB-MOT-GEN-2022/00092) [2022] NALCMD 36 (16 June 2022).

[13] What is clear for the Hardap Regional Council matter is that urgency has a qualification and that the court may refuse an application to stay execution of award, pending finalization of appeal, if satisfied appeal is frivolous or vexatious or appeal has not been brought with the bona fide intention to test correctness of award but for some indirect purpose.

[14] However, if the court is satisfied that the appeal has been brought with the bona fide intention to seek reversal of an award, the Court must examine potentiality of irreparable harm to the applicant and respondent, respectively, and find where the balance lies.

[15] The learned authors *Van Winsen et al, Herbstein & Van Winsen*,[1] opine that:

'another relevant factor which the court must consider in the exercise of its discretion as to whether to grant or refuse an application of this nature is whether the appeal is frivolous or vexatious or that the appeal has been noted not with a genuine intention of seeking to reverse the judgment or order or award but for some indirect purpose e.g. as a delaying tactic and as a means of staving off evil day.'

[1] Van Winsen et al, Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed 1977 at p 895.

[16] In the current instance the applicant duly noted its appeal against the award of the arbitrator on 24 October 2022 under case number HC-MD-LAB-APP-AAA-2022/00070, this stands undisputed. What is in issue is the second point in limine raised on the issue of whether a valid appeal is filed or not and I will deal with that issue in due course.

[17] The first respondent filed the arbitrator's award with the Registrar on 19 October 2022 under case number HC-MD-LAB-AA-2022/00230, this was the first award. A varied arbitration award in terms of s 88(*b*) of the Act was registered on 26 October 2022 thereby becoming an order of this court.

[18] On 29 November 2022, a writ of execution was issued by the offices of the Registrar on the instructions of the first respondent. I do not think that there can be any doubt of the immanency of the execution of the award in question.

[19] I am satisfied that there is no blameworthy conduct or inordinate delay/self-created urgency on the part of the applicant in bringing this application and I am further of the view that the matter should be treated as urgent.

[20] The second point in limine was raised regarding the validity of the appeal filed by the applicant.

[21] From the onset, I must point out that the point of the departure of the first respondent's opposition and averments regarding the applicant's appeal was a wrong one. The first respondent avers that the applicant did not comply with the provisions of rule 17 of the Rules of the Labour Court as the applicant failed to set out concisely its grounds of appeal in Form 11. I must point out that this point raised on behalf of the first respondent was more comprehensively dealt with in correspondence between the first respondent's legal practitioners and of the applicant, than in the answering affidavit.

[22] The first respondent referred the court to Form 11 of the rules and annexed an example thereto for the attention of the court.

[23] This Form 11 referred to relates to the outdated repealed Rules of the Labour

court that were published in the government gazette dated 22 April 1994 and still refers to the applicable rule as rule 15(3). Rule 23 of the current Rules of the Labour Court deals with the repeal of Labour Court Rules published in Government Notice 63 of 22 April 1994.

[24] The requirement of an appeal filed in terms of s 89 of the Act is clearly dealt with in terms of rule 17(1)(*c*) read with rule 17(3) and further read with the Rules relating to the Conduct of Conciliation and Arbitration Labour Act 2007.

[25] Mr Burger correctly set out the position in his argument of how the rules direct an appeal to be filed.

[26] Mr Rukoro did not take this argument any further, and I must assume he concedes that the position as stated by Mr Burger is correct.

[27] Mr Rukoro did however make a further submission that the LC 41 of the applicant is not in compliance with the Labour Court Rules as it does not state against what the applicant appeals, be it a part of the award or the entirety of the award and submits that the first respondent has to guess what the grounds are.

[28] I must, with due respect to Mr Rukoro, disagree with that statement as the LC 41 (which was duly filed with Form 11) is comprehensive and clear and there can be no doubt in the mind of the first respondent or the arbitrator what the grounds of appeal are and with what exactly the applicant takes issue with in its appeal.

[29] This point in limine in my view has no merits.

[30] The issue of the duly stamped documents was not taken any further by the first respondent, and I need not address it.

[31] Having held that the application is urgent and that there is a valid appeal before the court, it is then necessary to consider if the appeal has merits.

[32] Mr Rukoro addressed the court stating that there can be no prospects of success

on appeal in this matter. Counsel pertinently addressed the issue of dishonesty and that the arbitrator made correct findings that the respondent cannot be held to be dishonest if he used the supervisor's password with the said supervisor's permission.

[33] Having considered the founding affidavit and the arbitrator's award I am of the view that there might be a misunderstanding regarding the applicant's case and the finding of the arbitrator. The issue of dishonesty did not extend to the use of another employee's password but in fact related to the denial of the fact that he indeed used De Waal's password when confronted by Mr Barnard. This appears to be the crux of the applicant's allegation of dishonesty and not in the use of the password that related to the failure to comply with operational standards and directions, if I understand it correct.

[34] An issue was also raised by the applicant that the monetary award was made without any evidence presented to the arbitrator in support of this award.

[35] The applicant listed a Form LC consisting of four pages of issues regarding findings, failures and the subsequent award and also set out the questions of law and ground of appeal out by enumerating each of them. Having regard to the papers before me, I am satisfied that the appeal filed by the applicant was its bona fide intention to test the correctness of the award. I am of the view that there may be prospects for the applicant to be successful on appeal.

[36] The remaining issue to consider is the issue of irreparable harm. Section 89 of the Labour Act provides:

'(8) When considering an application in terms of subsection (7), the labour court must-

(a) Consider any irreparable harm that would result to the employee and the employer respectively if the award, or any part of it, were suspended, or were not suspended.

(b) If the balance of irreparable harm favours neither the employer nor the employee conclusively, determine the matter in favour of the employee.'

[37] In *Samicor Diamond Mining Ltd v Hercules*[2] the court spelt out the factors to be

[2] *Samicor Diamond Mining Ltd v Hercules* NR (2010) 304 (HC) at para 31.

taken into consideration when dealing with applications of this nature, which are[3]:

'(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 more particularly 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; and
(d) where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent ,the balance off hardship or convenience, as the case may be.'

[38] The applicant pertinently deals with the risk of irreparable harm and submits that in the event that the execution of the award is allowed to proceed and the applicant is ultimately successful in its appeal there will be no way that the first respondent will be able to compensate the applicant in the amount of N$583 656. Mr Burger argued that the first respondent is a man of straw and will not be able to repay such a large amount causing the applicant to risk losing almost N$600 000. Mr Burger also pointed out the first respondent did not respond to the applicant's repeated demand for security.

[39] Mr Rukoro argued that in its papers, the applicant made bold allegations regarding irreparable harm and that the applicant is speculating. Counsel further submits that if the appeal goes in the favour of the applicant, then it has a court order that it can enforce. However, in the answering papers of the first respondent, he elects not to address the issue of irreparable harm at all and in response to the applicant's averments in this regard merely states that he denies that the applicant would suffer any irreparable harm but does not elaborate on the issue.

[40] What is clear is that the first respondent, as the matter stands now before me, does not have the means to repay the amount of N$583 656 and that is clear from the address by Mr Rukoro that if the court grants the application by the applicant then the first respondent would not be able to make ends meet. In fact, counsel went as far as requesting that the court order that a portion of the money be paid out to the first

[3] With reference to *Transnamib Holdings Ltd v Carstens* 2003 NR 213 (LC) at 216F - 217B where the court referred to South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 545D - G

respondent.

[41] I am thus of the view that the applicant will suffer irreparable harm if the arbitral award is implemented. I have no doubt that today's order will cause hardship to the first respondent, but in my view, the consequences for the first respondent will even be more far-reaching if this court allows the execution of the award and the applicant succeeds in its appeal.

Conclusion

[42] I am satisfied that the applicant made out a case for the relief sought. More specifically in respect of prayers 1 and 4.1, 4.2 and 4.3 of the Notice of Motion thereby staying the execution and the operation of the arbitral awards dated 19 October and 25 October 2022 pending the finalization of the applicant's appeal against the said award(s).

[43] Lastly, on the issue of costs, neither of the parties addressed the issue of costs. I, therefore, make no order as to costs.

Judge's signature	**Note to the parties:**
	Not applicable
Counsel:	
Applicant	**Respondent**
P Burger Of Kinghorn Associates, Windhoek	R Rukoro Instructed by Jerhome Tjizo & Co Inc, Windhoek