CASE NO.: LC 66/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

NEDBANK NAMIBIA LIMITED **APPLICANT**

and

JACQUELINE WANDA LOUW **RESPONDENT**

CORAM: **HENNING, AJ**

Heard on: 22 November 2010

Delivered on: 30 November 2010

JUDGMENT

HENNING, AJ:

[1] On 11 August 2010 an arbitrator issued the following award in favour of the respondent, (the applicant before the

arbitrator).

"*1. the respondent, Nedbank Ltd, must reinstate the applicant, Ms Jacqueline Wanda Louw, in the position previous occupied by her, with effect from 1st September 2010,*

2. the respondent must pay all salaries and allowances that were due to the applicant, from the date she was constructively dismissed, being the 16th October 2009, up to the date this Award is issued, and an amount of N$ 8400.00 x 9 = 75 600.00. I will however deduct the amount of N$ 8276.00 which the respondent has already paid to her, and the amount

to be paid will thus be: N$ 67 324.00, only.

3. payment to be made at the office of the Labour Commissioner by not later than the 30th August 2010, alternatively, a legally acceptable proof that such payment was made directly to the applicant must be produced to the Labour Commissioner/Arbitrator by not later than that date, the 30th August 2010.

4. this award will be made an order of the Labour Court in terms of Section 87 (1) (b) (i),

5. the award is final and thus binding on both parties."

The present applicant seems to have filed a notice of appeal on 31 August 2010. On 6 September 2010 it applied for a stay of the award. On 23 September 2010 the award was made an order of this Court.

[2] The respondent's participation in the appeal requires consideration. The respondent elected not to file an answering affidavit. The result of such an election was considered in *O'Linn v. Minister of Agriculture, Water and Forestry,* 2008 (2) NR 792 at 795 - F-G. The Court held:

> "*By electing not to answer the allegations made by the applicant in his founding affidavit by way of an answering affidavit, it follows that the facts raised in applicant'sfounding affidavit were not placed in dispute and should be accepted. This was in fact conceded by Mr Marcus.*"

The respondent's counsel filed heads of argument one Court day prior to the hearing, instead of the prescribed five days. There was no application for condonation. Counsel simply appeared at the hearing. When his attention was directed to rule 15 which for condonation requires an application - notice of motion and affidavit - he conceded the absence of an application. The reason for the

lateness, he said, was pressure of work and he apologised. Now although the apology seems to express good manners, it is not a basis for condonation. The pressure of work in the life of a legal practitioner is nothing new. In *A Barrister's History of the Bar* R G Hamilton quotes a letter which *Cicero*[1] wrote to his brother in late August of the year 54 BC:[2]

> "*When you get a letter from me in the hand of one of my secretaries, you can reckon that I didn't have a minute to spare; when you get one in my own, that I did have oneminute! For let me tell you I have never in my life been more inundated with briefs and trials, and in a heat-wave at that, in the most oppressive time of the year. But I must put up with it.*"

Hamilton refers[3] to a letter written by a barrister to a friend in 1793. In reads:

> *"Lincoln's Inn November 22, 1793*
>
> *Dear Dumont,*
>
> *You would perhaps set some value on this letter, if you knew*

1 Hamilton, op cit, 8 says of Cicero that "in his day he was far and away the best advocate."
2 At 123
3 At 123

how many things I have to do at the moment I write it. And what excuses I must make tomorrow to some stupid attorney for having devoted to you the time which I ought to employ upon an appeal in Chancery."

The art of legal practice is in the words of Cicero to put up with pressure, and to perform within the rules, not to ignore them. It seems to have become a fashion to disregard procedural stipulations and to rely on condonation as an entitlement, even worse, to equate an apology with condonation. If legal practitioners are so driven by professional egoism and/or financial rapacity that they neglect briefs such practitioners and their clients will incur misfortune. In the circumstances the appearance of counsel for the respondent is held to be irregular.

[3] The relief sought by the applicant reads:

"*[1.1] That the award by the arbitrator Philip Mwandingi made on 11 August 2010 in case number CRWK 767-09 be stayed pending finalization of the appeal.*"

Application has now been made to add the following to the relief:

"*[1.2] That the order by the Labour Court, the award in 1.1 above having become an order of the honourable court upon filing on 23 September 2010, be stayed pending the*

finalization of the appeal."

[4] It will be noticed that the relief referred to above reveals a duality. The original prayer [1.1] is premised on the notion that when an appeal has been noted, the employer may apply for the award to be suspended. The proposed prayer [1.2] invokes thefact that the award had been filed and accordingly became an order of this Court. If the applicant were dependent on the proposed prayer [1.2] it encounters the problem that the application for suspension was filed some fifteen days before the award was filed and became an order of Court. (See paragraph 1 above). The premature lodging of the application would *prima facie* be a nullity incapable of culminating in relief.

[5] The procedure prescribed by the Labour Act, 11 of 2007 ("the Act")[4] relevant to this issue will now be referred to.

[6] Section 89 (1) of the Labour Act, 11 of 2007 ("Act") provides:

"*A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86.--*

Section 89 (2) states:

"*A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an*

4 All further references to legislation are to the Act.

appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party."

In terms of section 89 (6) when a appeal is noted, the appeal

"*(a) operates to suspend any part of the award that is adverse to the interest of an employee; and*

(b) does not operate to suspend any part of the award that is adverse to the interest of an employer."

The effect of section 89 (6) is qualified by section 89 (7) which reads:

"*An employer against whom an adverse award has been made may apply to the Labour Court for an order varying the effect of subsection (6), and the Court may make an appropriate order*".

In addition section 89 (9) (a) states:

"*The Labour Court may -*

(a) order that all or any part of the award be suspended;"

In terms of section 87 (1) (b) (i) an arbitration award

"*(b) becomes an order of the Labour Court on filing of the award in the Court by -*

(i) any party affected by the award."

[7] On a purposive interpretation[5] of the Act, it appears that the application is not dependent on the proposed prayer [1.2]. The structure of the Act indicates that this Court has jurisdiction to entertain an appeal.

Section 89 (1), (2), and (3).

Upon the noting of an appeal a suspension follows if the award is against the employee. To obtain the same position, the employer has to apply to this Court and comply with onerous conditions.

Section 89 (6) and (9) (a).

The above-mentioned procedure is not dependent on the filing of the award. The filing of the award is aimed at elevating it into an order of this Court, which seems to have as its purpose expediting enforcement, particularly where there is no appeal pending. In view of the consideration mentioned in paragraph 4 above, the additional relief referred to in paragraph 3 above is not granted.

5 Bertie van Zyl (Pty) Ltd and Another v. Minister for safety and Security and Others, 2010 (2) SA 181 (CC), at 192-193, par 21

[8] On the issue of the stay of the award, reference must be made to the following statements in the founding affidavit deposed to on behalf of the applicant.

> "*The respondent had resigned on 16 October 2009, with immediate effect. The complaint was lodged on 19 April 2010 only, after the expiry of a period of six months. This issue was not raised at the arbitration proceedings but even so, I am advised and submit to the honourable court that the arbitrator was precluded from dealing with the matter.*"

And:

> "*As stated above, the complaint entails a dismissal and was not lodged within six months. Even though this issue was not raised at the arbitration proceedings, the arbitrator should not have heard the matter.*"

As mentioned earlier, there was no response to these statements which now stand uncontested.

[9[Section 86 (2) provides:

> "*(2) A party may refer a dispute in terms of subsection (1) only-*
>
> 1. *within six months after the date of dismissal, if the*

dispute concerns a dismissal, or

within one year after the dispute arising, in any other case."

In her referral of the dispute the respondent indicated that she relied on an unfair labour practice and on constructive dismissal (both without particularity). It was the constructive dismissal issue which culminated in the relief mentioned in paragraph 1 above. In his judgment the arbitrator found "*on a balance of probabilities*" that the respondent was denied representation at the disciplinary hearing which, he said,

"*amounted to an unfair labour practice.*"

As indicated above, no relief flowed from this.

[10] On the basis of section 86 (2) (a) above and the uncontested facts, it seems as if the arbitrator should not have entertained the dismissal dispute. The consideration of the issue was *ultra vires* his authority and accordingly a nullity - *ex nihilo nihil fit* (out of nothing flows nothing). On this basis the award is a nullity. In view of the fact that this application concerns *interim* relief only, a suspension of the award must follow to protect the situation of the employer. Section (89 (8) would then not apply.

[11] Section 89 (8) reads:

"*(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 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 employee conclusively, determine the matter in favour of the employee."

On the basis of the applicability of this section, the applicant relied on the following uncontested facts.

"*17. In the investigation report, on page 4, it was found that the respondent does part time fashion designing and earns money from clothes she sells. These facts were not disclosed by the respondent to the arbitrator. These facts had to be disclosed as the respondent had to lay a foundation and present facts for the calculation of a proper award. Although this investigation report was available to the respondent and her legal representatives, nothing was stated to refute this fact. The income so earned can therefore sustain the respondent pending the appeal.*

18. The respondent has previously been found to be

dishonest. She was previously found guilty of forgery and uttering. She also owed the applicant N$ 14 915.94 at the time of the internal investigation. She is not a person of means and has no immovable property or investments.

19. The respondent was requested to indicate, should the amount of the award be paid, whether she would be able to provide security for the repayment once the appeal succeeds. A copy of a letter by Koep and Partners to this effect is attached hereto as annexure ***"STAY7".*** *The Namibian Financial Institutions Union responded to this request by indicating that a stay would not be agreed to and that the respondent was not prepared to provide security. A copy of this letter is attached hereto as annexure* ***"STAY8".***

20. It is submitted that the respondent will not be able to repay the amount of the award once the appeal succeeds.

21. The applicant will place the funds of the respondent in a separate investment account for the benefit of the respondent pending finalization of the appeal.

22. If the respondent is reinstated pending finalization of this appeal, the applicant will have to suspend the respondent again and proceed with the disciplinary hearing on the

charges. The charges will not go away. This will be costly and relate to duplication in procedure which can be avoided if matters are held in abeyance pending finalization of the appeal. Once the appeal succeeds, all the steps taken relating to the disciplinary hearing and the costs involved will be wasted.

23. The applicant will have to deal with a further anomaly to allow a person facing such serious charges into a position of trust where she deals with cash money in automatic teller machines. It is most harmful for the applicant to have its workforce see such an irresponsible action."

[12] The concept of irreparable harm appears to be somewhat elusive and the cases are not entirely consistent on this issue. Regarding the dismissal reference may be made to *Cymot (Pty) Ltd v. McLoud,* 2002 NR 391 at 393 J to 394 G where it is said:

"In a case such as the present one where the applicant (now respondent) tendered his resignation but thereafter alleged that, in substance, he was constructively dismissed, the following three-stage enquiry arises:

1. whether, in resigning, the applicant did not intend to terminate the employment relationship. The onus rests on the applicant. If the court finds that the applicant did have

that intention, the enquiry is at an end: Jooste v.Transnet Ltd t/a SA Airways (1995) 16 ILF 629 (LCA) at 638B. But if the onus is discharged, the next stage of the enquiry is:

2. whether the employer did constructively discharge the applicant. The onus is on the applicant to establish that there was constructive dismissal: Halgreen v Natal Building Society (1986) 7 ILF 769(IC) at 775D-7761; Jooste v Transnet Ltd t/a SA Airways (supra at 638D).

In order to make out a case of constructive dismissal, it is incumbent upon an employee who has resigned, as in casu, to show that he was subject to such duress, pressure, force or the threat thereof, or that the work environment created by the employer had become so unbearable, that he was left with no option but to resign. See Dalgleish v Ampar (Pty) Ltd t/a Sel Energy (1995) 11 BLLR 9 (IC); Braun v August Laepple (Pty) Ltd (1996) 6 BLLR 724 (IC).

However, even if the court finds that constructive dismissal took place, such finding does not necessarily mean that the dismissal was unfair.

This is so because constructive dismissal is treated in the same way as any other dismissal. This then gives rise to the third stage of the enquiry, to wit:

3. whether the circumstances that prompted the employee

to resign were fair or unfair: Jonker v Amalgamated Beverages Industries (1993) 14 ILF 199 (IC) at 211H. This means that constructive dismissal will not be deemed to be inherently unfair: McMillan v ARD & P of Noordhoek Development Trust(1991) 2 (3) SALLR 1."

It does not seem as if the arbitrator applied the three-stage - enquiry.

The applicant alleges that a disciplinary enquiry was scheduled for Monday 19 October 2009. However, on 16 October 2009 the respondent - through her attorney - resigned "*simply to avoid the disciplinary hearing.*" This was not answered.

[13] Even if the somewhat onerous criteria required for an *interim* interdict, referred to in *Samicor Diamond Mining Limited v. Phylicia Hercules,* Case No. LC 77/2009, 30/10/2009, at page 13 are applied, the uncontested facts would justify a suspension of the award.

[14] In prayer 1.1 referred to in paragraph 1 above, the case number is wrongly reflected as CRWK 767/2009, it should be 303/2010. It will be corrected in the order.

It is ordered as follows:

1. The award of the arbitrator Mr Philip Mwandingi made on 11

August 2010 in case Number CRWK 303/2010 is suspended pending finalization of the appeal noted on 31 August 2010.

2. The applicant shall place the amount of N$67 324.00 in an investment account which amount plus interest would become payable to the respondent should the appeal be dismissed.

HENNING, AJ

ON BEHALF OF APPELLANT:	Adv. P. Barnard instructed by Koep & Partners
ON BEHALF OF RESPONDENTS: Nixon Marcus Law	Mr. N. Marcus Office