
*"Not Reportable"*

**CASE NO.: LC 21/2011**

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**NATIONAL HOUSING ENTERPRISE** **Applicant**

**vs**

**MAUREEN HINDA-MBAZIIRA** **Respondent**

***CORAM*: UNENGU, AJ**

Heard on: 2011 March 17
Delivered on: 2011 April 1

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# JUDGMENT

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**UNENGU, AJ** [1] This is an application in which Applicant is seeking an order in the following terms:

> '1. Dispensing with the forms and service provided for in the rules of Court and hearing this application as one of urgency;

2. Directing and ordering that the execution of the arbitration award in favour of Respondent, under case number CRWK361/10 handed down on 9 February 2011, be stayed / suspended pending finalisation of the appeal noted by applicant against the award;

3. Granting to applicant such further and/or alternative relief as this Honourable Court may deem fit.'

Meanwhile, Respondent has filed a Notice of Intention to oppose the application.

[2] The application is a result of an arbitration award granted in favour of the Respondent by an arbitrator in the office of the Labour Commissioner on 9 February 2011 in which the Applicant was ordered as follows:

"(a)

- that the Respondent reinstates the Applicant as of the 1 March 2011;
- that the Respondent gives a 6 months written warning to Mrs Hind-Mbazira;
- that the Respondent also reprimand Ms Alex and Mr Shimuafeni on the issue of the Loan to Ms Kavejandja;
- that Respondent pays to the Applicant an amount equal to her 4 months' salary; i.e. N$186.390.12 and
- that the Respondent sends the Applicant on a refreshing training on matters that the Respondent feels Applicant needs help.

*Or alternatively*

(b) that the Respondent pays the Applicant salary from 16 September 2009 to 28 February 2011 i.e. N$46 597.53 x 17 = N$792 158.01;

- plus an amount equal to 12 months for early termination and compensation for the dismissal i.e. N$46.597.53 x 12 = N$559.170.36.

If there have been increments to this position during the period the Applicant has been dismissed, the calculations should be adjusted to such increment."

[3] On 18 February 2011 applicant through its legal representative sent a letter to Employment Solutions Consultants the representative of the respondent in the following terms:

"Our Ref: RM/fas/57608 18 February 2011
Your Ref:

Employment Solutions Consultants
Windhoek

Att: Podewiltz Telefax: 309653

Dear Sir,

**ARBITRATION AWARD – NHE // HINDA**

We are instructed to inform you that our client's intend appealing against the arbitration award.

Further, in the event of our client being successful in such appeal, our client herewith wishes to inform that it intends to choose the alternative order indicated in such award, under (b) thereof.

In as far as enforcement of the award is concerned, please inform whether your client is prepared to consent to a stay of the execution of the award pending finalization of the appeal.

In the event that your client is not consenting to a stay, kindly indicate what security your client can provide for repayment of the amount as per the award, with interest, so that our client can consider such security. If our client is satisfied that such security is sufficient, our client could than pay over the amount as per the award, to be repaid in the event of our client being successful with the appeal. It is for that purpose that sufficient and proper security is to be provided by your client, to our client's satisfaction.

Alternatively our client could pay the amount as per the award into our trust account, for investment in an interest bearing account, pending finalization of the appeal.

In as far as the reinstatement order is concerned, please inform if your client insist on such portion of the award.

Your soonest reply is awaited.

Yours faithfully

**KOEP & PARTNERS**
**R T D MUELLER**"

[4] Employment Solutions Consultants did not reply and as a result another letter dated 24 February 2011 was addressed to the same Employment Solutions Consultants for the attention of Mr Podewiltz, the legal representative of Respondent: The contents of this letter read as follow:

"Our Ref: RM/fas/57608 24 February 2011
Your Ref:

Employment Solutions Consultants
Windhoek

Att: Podewiltz Telefax: 309653

Dear Sir,

**ARBITRATION AWARD – NHE // HINDA**

Our letter of 18 February 2011 refers.

We have not received a response thereto. Unless we receive a reply to the contrary, also properly addressing the issues raised in our previous letter, by close of business tomorrow, we will accept that your client consents to the stay of enforcement of the award, pending finalization of the appeal, in all aspects.

Yours faithfully

**KOEP & PARTNERS**

**R T D MUELLER**
(Windhoek office)"

[5] In his letter to the legal representative of the applicant, Mr Podewiltz of Employment Solutions Consultant, informed the applicant that the arbitration award was made an order of the High Court of Namibia under case number LC 21/11 in accordance with the provisions of section 87(1)(b) of the above Act 2007, (Act 11 of 2007) and attached a copy of the order for the applicant's record. In addition, Mr Podewiltz, on behalf of his client requested compliance of the award by the applicant. He indicated that the respondent will seek enforcement of the award if not complied with soon by the applicant.

[6] Thereafter, further correspondence were exchanged between the two legal practitioners, but they failed to reach an agreement on the issues of security and the stay of the execution of the arbitration award pending the appeal.

[7] Consequently, the applicant filed its Notice to appeal the arbitration award on 4 March 2011, four days after the arbitration award was converted into an order of the Labour Court in terms of section 87(1)(b) of the Labour Act, supra.

[8] Upon receipt of the Notice of Appeal by the applicant, Mr Podewiltz, the legal practitioner of the respondent addressed another letter dated 8 March 2011 for the attention of Mr Mueller, the legal practitioner of applicant and marked it "EXTREMELY URGENT". In this letter Mr Podewiltz, in paragraph 2 thereof wrote as follows: I quote verbatim

> "To date hereof no application to stay the award was made. Our client, in view of the provisions of section 89(6)(b) of the Labour Act, still insist on compliance with the High Court order. We have already reminded you that your client is in contempt. It is our understanding that our client is intending to approach the Namibian Police in this week to lay a criminal charge but does not wish that this matter goes that far. We are also informed that the matter will be handed over to a Law firm for civil proceedings to be instituted against NHE to recover the amount due plus costs.
>
> In view of the above, kindly revert to us with regard to your stance on compliance within three (3) days from date hereof. In the event of failure to reply we will accept that the company does not wish to adhere to the High Court order and action will be taken without further notice to you."

[9] It would appear though that the applicant, after receiving this letter, realized that the respondent was serious and adamant to enforce the order. Seemingly, in view of the threats of the contempt of court, the laying of a criminal charge and the handing over of the matter to Law firm for civil proceedings, the applicant decided to approach the Court on an urgent basis to apply for the stay/suspension of the arbitration award pending the outcome of the appeal lodged.

[10] Mr Vinson Hailulu, the Chief Executive Officer of the applicant disposed to the founding affidavit of the applicant. The confirmatory affidavits were deposed to by Messrs Mueller and Alex Shimuafeni. Ms Maureen Hinda-Mbaziira deposed to the opposing affidavit. As indicated above, this application is being opposed and as such was set down for hearing on 17 March 2011 at 09h00. At the hearing, Mr Barnard appeared for the applicant and Mr Ueitele for the respondent. Both counsel submitted heads of argument which they amplified with oral submissions during the trial.

[11] At the commencement of the proceedings, Mr Barnard informed the Court that the application was filed late for a day or so, and that he was asking for condonation thereof. Mr Ueitele did not object to the application for condonation. Therefore, condonation was granted. Mr Barnard again informed the Court that the applicant would present its full case first whereafter the respondent would follow. The correct approach was to allow counsel for respondent to begin with his points *in limine* and thereafter to give the applicant the opportunity to reply. Be that as it may. Mr Barnard presented the case for applicant first and Mr Ueitele followed thereafter. In this judgment I shall start with the points *in limine* raised by counsel for respondent and then, if necessary, shall proceed to deal with the merits of the application itself. The respondent in her heads of argument raised the following points *in limine*:

> "The Respondents submits that the points, *in limine* below in that the application before this Honourable Court is not competent for the following two reasons:
>
> (i) It is against an award made an order of the Court;
>
> (ii) An appeal of an award made an order of the Labour Court is not competent unless the Labour Court Order is first withdrawn, rescinded, or set aside.
>
> Further, in paragraph 7 of the Heads of Argument, Respondent submits that making an award an order of this Court in accordance with section 87 give rise to certain legal consequences. Once an award has been made an order of Court, a change takes place in the legal status of the award. The award becomes an order of this Court like any other order of this Court."

[12] This argument was amplified by Mr Ueitele with oral submissions. He argued that, once an award of the arbitrator has been made an order of the Court, it becomes an order of the Court. Therefore, he contended, the right thing to do, is for the applicant first to apply for the rescission of the order of the Court, and, if successful, then to apply for the stay of the award. In support of his objection, Mr Ueitele referred the Court to South African Labour Court cases of *Potch Speed Den v Rajah* (1999) 20 ILJ 2676 (LC) and *Blue Marine (Pty) Ltd v CCMA* e-a, Case No. J 5372/2001. In the *Potch Speed Den* case supra, Zondo, J said the following about an award which was made an order of the Court.

> "In fact it is wrong to speak of award once an award has been made an order of Court. It is more accurate to speak of an order of this Court."

[13] On his part, Mr Barnard for the applicant applied for an amendment to the Notice of Application by insertion of an additional prayer in the following terms:

> "2.2In the alternative directing and ordering that the execution of the Court order of 25 February 2011 bearing Case No. 21/11 that reflected the award of 9 February 2011 in terms of the provisions of section 87(1)(a) of the Labour Act No. 11 of 2007, be stayed/suspended pending the finalization of the Appeal noted by the Applicant."

This was done on the authority of the matter between *Nedbank Namibia Limited versus Jacqueline Wanda Louw*, Case No. LC 66/2010 (Unreported) delivered on 30 November 2010. This is a Namibian Labour Court case by Henning, AJ (as he then was). Further, Mr Barnard submitted that South African Labour cases only have persuasive force, hence, he urged the Court to dismiss the point *in limine*.

[14] However, Mr Ueitele reiterated and said that no local authority does exist to assist the Court in disposing of the matter, and indicated that respondent objected to the proposed amendment to the Notice of Application by the applicant. He further said, that the facts of the *Nedbank* case cited by the applicant and those of the present matter differed, and stated that the point *in limine* stood well. He intimated that the applicant should apply for a rescission of the Court Order.

[15] I think there is substance in the points raised by the respondent. The problem the applicant has is the request to the Court in paragraph 2 to direct and order the execution of the arbitration award in favour of the respondent, under case number CRWK 361/10 handed down on 9 February 2011, to be stayed/suspended pending the finalisation of the appeal noted by applicant against that award. That award is no more an award of the arbitrator in the office of the Labour Commissioner, but an order of the Court as from 25 February 2011, when it was filed in terms of section 87(1)(b) of the Labour Act, (Act 11 of 2007). Section 87 of Act 11 of 2007 provides as follows:

> (1) An arbitration award made in terms of this Part –
>
> (a) .....
>
> (b) becomes order of the Labour Court on filing the award in the Court by –
>
> (i) any party affected by the award; or
>
> (ii) the Labour Commisioner.

> This is what happened in the present matter. Therefore, I am inclined to agree with the sentiments expressed in the Labour case of *Potch Speed Den v Rajah* (supra) cited by counsel for respondent where it states that it is wrong to speak of an award once the award has been made an order of the Court, that is more accurate to speak of an order of the Court.

[16] I note that in the heads of the respondent it is stated that the applicant was advised orally on 14 February 2011 that the respondent intended to make the arbitration award an order of Court. The oral notice to the applicant was improper and cannot be sufficient Notice for respondent to obtain an order from the Labour Court. This is an issue which the applicant can pursue. This happened, while the applicant and the respondent were busy exchanging letters between each other. Besides, Mr Podewiltz, at some stage, was absent from town, and also the fact that section 89(2) affords a right to the applicant the time to appeal against an arbitrator's award through subsection (1), by noting an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on it. In my view, the respondent was in a hurry to file the award for an order of Court. The applicant still had a few days left within which to note the appeal against the award when the award was made an order of the Court on the 25 February 2011.

[17] That I just said in passing. I cannot reverse the order even if I regard the order to have been obtained on an irregular basis. The applicant sought a relief against an arbitration award of the arbitrator in the office of the Labour Commissioner at the time when that award was already converted into an order of the Labour Court. In those circumstances this Court does not have a choice other than to upheld the points *in limine* raised by the respondent.

[18] Accordingly,

(1) the application is dismissed.

(2) There is no order as to costs made.

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**UNENGU, AJ**

**COUNSEL ON BEHALF OF THE APPLICANT:**

Adv. Barnard

**Instructed by:** Koep & Partners

**COUNSEL ON BEHALF OF THE RESPONDENT:**

Mr Ueitele

**Instructed by:** Ueitele & Hans Legal Practitioners