REPUBLIC OF NAMIBIA **REPORTABLE**

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 103/2012

In the matter between:

NAMIBIA ESTATE AGENTS BOARD **APPLICANT**

and

PHELEM MANYANDO LIKE **FIRST RESPONDENT**

TUULIKE MWAFUFYA-SHIKONGO N.O. **SECOND RESPONDENT**

Neutral citation: *Namibia Estate Agents Board v Like* (LC 103/2012) [2013] NALCMD 36 (30 October 2013)

Coram: GEIER J

Heard: **04 October 2013**

Delivered: **30 October 2013**

Flynote: Applicant, who had appealed an arbitration award granted in favour of first respondent by second respondent, had also – simultaneously - sought the setting aside of that same award by way of review. The appeal was heard before the review. The court in the appeal set aside the arbitration award *in toto*. The court did not order that the matter be referred back to be arbitrated upon *de novo* before a different arbitrator. In the review, which remained pending, the applicant now sought a costs order *de bonis propriis* against the second respondent. The first

respondent, contending that the appeal judgment had not rendered the matter *res judicata,* now applied, in the review, for the referral back of the matter to be arbitrated upon afresh before another arbitrator. The first respondent also pursued a costs order *de bonis propriis* against second respondent.

AD THE REFERRAL BACK

The court found that it had only became *functus officio* in regard to its appeal judgment handed down on 21 June 2013 and the resultant orders made there – which had in the interim become final - the first respondent was thus precluded from seeking a referral back in the appeal. It had always been open to the first respondent to have noted an appeal in regard to that judgment and in the context of that appeal have contended for a referral back. This remedy had not been utilised.

The *funtus officio* principles would or could not become applicable in another case serving before the same judge, even if related to the same subject matter.

No final judgment had as yet been given in the review, which remained pending.

A referral back through the pending review was however precluded by two considerations:

a) The first would be posed by the fact that the setting aside of the second respondent arbitration award, in the appeal, had rendered that issue, between the applicant and first respondent, *res judicata,* in the review. Once the court had set aside that award on appeal there was nothing left to set aside in the review. A referral back would always have been linked to such setting aside. As there was nothing left to set aside in the review, to which a referral back could be linked, no referral back could/can occur in the review.

b) It was secondly beyond doubt that the only remaining issue between the parties in the review was the issue of costs. The first respondent had clearly been appraised of this fact through correspondence. No referral back could be

mounted on that remaining issue of costs as the merits of the review had already become moot. Also on this basis no referral back can occur.

Application for a referral back in the review accordingly refused.

AD COSTS DE BONIS PROPRIIS

In this regard it had to be determined whether or not the second respondent, an arbitrator, designated in terms of the Labour Act 2007, had lost the protection from civil liability, as afforded to her by Section 134 of the Labour Act 2007 through her conduct in the arbitration, and if so, whether in the circumstances, her conduct, in opposing the adverse costs order sought against her by applicant and first respondent, in turn, could be labeled as 'vexatious' or 'frivolous' opening her up to a costs order, *de bonis propriis*, in terms of Section 118 of the Labour Act 2007.

In opposition to the punitive costs order sought against her, the second respondent – who had initially not opposed the review – now filed an affidavit on the merits in which she denied the serious allegations made against her and in which she also raised three technical objections.

In that affidavit the second respondent did not dispute that after the closure of both parties' cases during the arbitration proceedings, she accepted further documentation of which the applicant was unaware and in respect of which the applicant was not given the opportunity to be heard before she delivered her award in favour of first respondent.

The court then finding that such undisputed conduct disclosed bias on the part of the second respondent in favour of first respondent.

The court held further:

a) that bias constituted a valid basis for the granting of a *de bonis propriis* costs order; and

b) that bias also constituted a valid basis for finding that the second respondent's actions, in the performance of her functions in terms of this Labour Act, were not performed 'in good faith';

c) that a finding of bias therefore also removed the shield of immunity as conferred by Section 134 of the Labour Act 2007 from the second respondent;

d) that the word "frivolous", as used in section 118 of the Labour Act 2007, also encompassed a situation where proceedings in a Labour Court are opposed 'without sufficient ground';

e) that given the second respondent's telling failure to deny material allegations in her answering papers, the second respondent had not disclosed such 'sufficient grounds' – Her opposition to the adverse costs order accordingly deemed 'frivolous' within the meaning of section 118 of the Labour Act;

f) that the second respondent's conduct in the arbitration and her frivolous opposition to costs in the review thus formed a valid basis for the sought award of a costs order *de bonis propriis* against her.

In the result the second respondent was ordered to pay the applicant's and first respondent's costs in the review *de bonis propriis* on a scale as between attorney and client.

Summary: See flynote above –

ORDER

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1. The first respondent's application to have the matter referred back to arbitration is refused.

2. The second respondent is ordered to pay the applicant's and first respondent's costs in the review *de bonis propriis* on a scale as between attorney and client.

JUDGMENT

GEIER J:

[1] Following disciplinary proceedings in terms of the applicant's policies and procedures, the applicant dismissed the first respondent from his position as applicant's Manager after he was found guilty of theft and fraud by an independent chairperson.

[2] The first respondent, as a result, referred a dispute to conciliation or arbitration by way of Form LC21 dated 9 November 2011.

[3] The arbitration was heard by the second respondent on 9 and 10 May 2012.

[4] On 9 July 2012 the second respondent made the following award, namely:

"That Respondent [Applicant] reinstates Applicant [First Respondent] as a Manager of NEAB with:

- Back pay of his full salary plus all the increases and all the benefits from the date of dismissal to the date of reinstatement less any payment already made, if any.
- Payment of any proven loss due to delayed payments and bank charges suffered.

- The payment of the entire total amount due to Applicant [First Respondent] must be made within a period of one month as from the date of issue of this Award, failure to which a monthly interest shall be charged in accordance with the prevailing interest rate.
- Respondent [Applicant] to advise the NEAB's appointing authority to adhere to the provisions of the Namibian Estate Agents Act."

[5] The applicant appealed the above award.

[6] The appeal became unopposed due to the first respondent having been barred in terms of Case Management Rule 37(16)(ii), following the non-condonation of his failure to comply with the court's case management order of 22 January 2013.

[7] The appeal was upheld.

[8] On 21 June 2013 this court made the following order in the appeal under Case: LCA 38/2012:

> "1. The appeal is upheld.
> 2. The arbitration award made by Ms Tuulike Mwafufya-Shikongo, on 9 July 2012, is hereby set aside.
> 3. The conduct of Ms Tuulike Mwafufya-Shikongo in this matter is referred to the Honourable Minister of Labour and Social Services and the Labour Commissioner for investigation and further action, if necessary."

[9] The first respondent did not appeal that judgment which therefore became a final judgment in such circumstances.

[10] At the time of noting the aforesaid appeal the applicant had also, simultaneously, brought an application to review that same award. This review had in the meantime been set down for hearing on 31 July 2013.

[11] The applicant in the review - obviously now encouraged by the outcome of the appeal - amended its Notice of Motion on 8 July 2013, indicating thereby that it would now seek an adverse costs order against the second respondent.

[12] Subsequent to the delivery of the amended notice of motion the below mentioned exchange of letters occurred between the involved legal practitioners.

[13] On 8 July 2013 the applicant's legal practitioners, GF Köpplinger Legal Practitioners, addressed a letter to the second respondent as follows:

"We refer to the above matter and confirm that we act herein on instructions of the Namibia Estate Agents Board ('our client').

As you are aware, a review application as well as an appeal was lodged by our client against the award made by you on 9 July 2012, in the arbitration hearing between the abovementioned parties under case number CRWK974-11.

I wish to advise that the appeal was heard on 21 July 2013 and the Honourable Judge Geier made the following order:

1. The appeal is upheld;
2. The arbitration award made by Ms Tuulike Mwafufya-Shikongo, on 9 July 2012, is hereby set aside;
3. The conduct of Ms Tuulike Mwafufya-Shikongo in this matter is referred to the Honourable Minister of Labour and Social Services and the Labour Commissioner for investigation and further action, if necessary.

In light of the above, we have been instructed by our client to also proceed with the review application under case number LC 103/2012 and to amend our notice of motion for review to include a prayer for costs against you in your personal capacity *de bonis propriis* as arbitrator, on a scale as between attorney and client.

With the above being said, kindly find attached hereto a copy of the amended notice of motion. The amended portions are typed in bold italics. I confirm that a copy of same will also be served on your offices in due course."

[14] The amended Notice of Motion was duly served on all parties and on 22 July 2013.

[15] The Government Attorney responded to GF Köpplinger Legal Practitioners' letter in the following terms:

"We notice that your client wishes to proceed with the review application under Case No LC 103/2012 and to amend the same with the full knowledge that the arbitration award sought to be set aside on review was set aside by the Labour Court in Case No 38/2012 which your client appealed against the same award. We find this perplexing, as the issue of the validity of the award is clearly now *res judicata*. The review application, which was clearly ill conceived as it had been the same object as the appeal and was filed subsequent to the appeal, has clearly been overtaken by events. Any attempt to pursue it, will bring into application the provisions of section 118 of the Labour Act, 11 of 2007, as proceeding with the matter in the light of the appeal decision will clearly constitute acting in a frivolous or vexatious manner. The original notice of motion was not opposed by second respondent as no order as sought against her.

If you proceed with review application our client will vigorously oppose the same on the basis of *res judicata* and seek a punitive cost order against the legal practitioner advising and representing the applicant."

[16] On 25 July 2013 applicant's legal practitioner replied by stating:

'We confirm that the review application in the above matter remains on the roll for 31 July 2013. This was done, firstly, in the event of an appeal against the Labour Court judgment by Mr Like. To date hereof if has not been appealed. Be informed that, should no belated appeal be received from Mr Like by 31 July 2013, our client will take no further steps based on the merits of the review.

Secondly, the review remains on the roll in order to seek a cost order against your client on account of her duplicitous conduct, which the High Court, correctly with respect, has referred to the relevant authorities for investigation.

Your view that the review was ill conceived is clearly confused. Even a cursory perusal and comparison of the appeal and the review grounds will reveal this.

In the above circumstances our client's approach is neither frivolous nor vexatious.'

[17] The second respondent, who had so become the target of an adverse costs order, responded on 19 July 2013 by filing a Notice to Oppose the review.

[18] On 26 July 2013 she also filed an answering affidavit in which she raised the following points:

'(a) "applicant's amended notice of motion is now *res judicata*";

(b) "the manner in which the second respondent acted in defending this application is not frivolous or vexatious";

(c) The amended notice of motion is not supported by an affidavit.'

[19] On the 29th of July 2013 the applicant's legal practitioners addressed the following further letter to the first respondent's legal practitioners advising them:

'In the light of the judgment of the Labour Court of 21 June 2013 in the appeal matter and the fact that such judgment was not appealed, it is our view that the merits of the review application are *res judicata*. The only outstanding issue is that of costs.

On the instructions of our client we have amended the notice of motion in the review application to seek costs *de bonis propriss* against the second respondent (Ms Tuulike Mwafufya-Shikingo). She has in the meantime opposed such relief and filed an opposing affidavit.

In light of the above, kindly be informed that the review application will, by necessary implication, not proceed on the merits on 31 July 2013. Only the issue of costs against the second respondent will be argued on such date.

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I trust that you find the above in order.'

[20] When the review was then called on 31 July 2013 Mr Boesak, who appeared on behalf of the first respondent indicated that he also received instructions to pursue an adverse costs order against the second respondent as his client had played no part in the fundamental irregularities perpetrated by the second respondent during the arbitration which had resulted in the setting aside of the award on appeal.

[21] As the court had not ordered that the matter be referred back to arbitration, Mr Boesak insisted that his client wanted to pursue such relief in the review, which remained pending.

[22] In the circumstances the court ordered that:

'1. The hearing of the review application is postponed to a date to be arranged with the managing judge.

2. The only issues outstanding and to be determined by the court are as follows:

2.2 whether the second respondent should be ordered to pay the costs of the review; and

2.3 whether or not it is competent for the court to refer the matter back to the arbitrator for hearing, especially in light of the appeal judgment granted by the court in the appeal and whether or not this issue is *res judicata*.'

[23] These outstanding issues thus came to be argued before me on 04 October 2013.

[24] For purposes of this hearing the parties filed supplementary heads of argument in which their submissions accordingly were divided into two categories namely; whether the reviewing court could competently refer the matter back for

arbitration in view of its appeal judgment and whether or not the second respondent should be ordered to pay the costs of the arbitration *de bonis propriis*.

AD THE REFERRAL BACK

[25] Mr Dicks who appeared on behalf of the applicant submitted in his written heads that the court, when it heard the appeal, would have been entitled to refer the matter back to a new arbitrator, to be designated in terms of Section 89(10) of the Labour Act – that the court had not done so – and correctly so - as a referral back would have served no purpose as the first respondent had failed to prove his losses.

[26] He also pointed out that the appeal judgment had become a final judgment and that the court had thus become *functus officio* – He referred in this regard to the leading authority on the point: *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F[1].

[27] With reference to the requirements pertaining to the defence of *res judicata* as set out in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-I [2], he argued that the appeal under case LCA 38/2012 was against the second respondent's award made on 9 July 2012 and that the review under case LC 103/2012 was aimed effectively against the same award.

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[1]'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has G ceased. See West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 AD 173 at pp. 176, 178, 186 - 7 and 192; Estate Garlick v Commissioner of Inland Revenue, 1934 AD 499 at p. 502.'

[2]'[2] The requirements for a successful reliance on the exceptio were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' (per Steyn, CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, 'on the same cause for the same relief' (per Van Winsen, AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A - B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664C - E); or which also comes to the same thing, whether the 'same issue' had been adjudicated upon (see Horowitz v Brock and Others 1988 (2) SA 160 (A) at 179A - H).'

[28] As the appeal decision set aside the award *in toto* that issue had been finally determined between the applicant and the first respondent and had thus become *res judicata*.

[29] During oral argument Mr Dicks emphasised that in the interim, and by way of the exchanged correspondence, as quoted above – it should have become clear that the applicant could not - and was not proceeding to seek any relief on the merits of the review and that the review merely remained pending on the issue of costs only. Also for that reason it was not competent to refer the matter back in the review, the merits of which had, in such circumstances, become moot.

[30] Mr Boesak, on the other hand, submitted in his written heads on behalf of the first respondent, that he accepted that the issue pertaining to the setting aside of the arbitration award had effectively been extinguished by the appeal ruling.[3] However, as the appeal court had not referred the matter back for re-hearing such issue remained alive in the review.

[31] In respect of this submission he pointed out that the arbitration award had been set aside on the basis of a fundamental irregularity and that therefore not all the issues between the parties had been finally determined. He referred in this regard to some of the issues in the arbitration such as, for example, the issue as to whether or not the sanction imposed on the first respondent's, the dismissal, was appropriate, or whether or not he should have been re-instated etc.

[32] With reference to the general powers that a court can exercise on review – which would also entail the taking into account of what would be just and equitable[4], he submitted that there would be nothing inherently unfair in the court referring the matter back to be heard afresh by another arbitrator.

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[3] *Silvergate, MV: Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax* 1999 (4) SA 405 (SCA) at [53].

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *City of Johannesburg and Another v Ad Outpost (Pty) Ltd* 2012 (4) SA 325 (SCA).

[33] He also reminded the court of its jurisdiction as set out in Section 117(1)(b) and (c) and urged the court to refer the matter back in the interests of justice.[5]

[34] In this regard he re-iterated during oral argument that the first respondent had become the victim of the second respondent's irregular conduct and that it was thus more than equitable to refer the matter back. He submitted that the court had not become *functus officio* in the review which was alive due to the applicant seeking costs and that the court could and should thus exercise these powers in the review.

[35] Upon reflection of the conflicting arguments raised on behalf of the parties to this issue it became clear that the court only became *functus officio* in regard to its appeal judgment handed down on 21 June 2013 and the resultant orders made there – which had in the interim become final. This conclusion would be in line with the general principles set out in the *Firestone South Africa (Pty) Ltd v Gentiruco AG* case[6]. Also the exceptions to the general rule[7] as listed in that case cannot be of assistance to the first respondent herein as they would only pertain to the supplementation of the appeal judgment. It is also common cause that the first respondent was now essentially precluded from seeking any such relief in the appeal. In any event it had always been open to the first respondent to have noted an appeal in regard to that judgment and in the context of that appeal have contended for a referral back. This remedy was also not utilised by first respondent.

[36] I know of no authority - and none has been cited - that the *funtus officio* principles would or could become applicable in another case serving before the same judge, even if related to the same subject matter.

[37] At the same time it was also be clear that no final judgment had as yet been given in the review, which remained pending.

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[5] *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA), *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) ([2007] 1 All SA 393) *Commissioner of Customs & Excise v Container Logistics (Pty) Ltd; Commissioner of Customs & Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) (1999 (8) BCLR 833).

[6] At 306F

[7] see *Firestone South Africa (Pty) Ltd v Gentiruco AG at 306H to 307H.*

[38] It was thus not surprising that the first respondent tried to achieve a referral back through the pending review which he must have considered as the only remaining avenue possibly left open to him in such scenario.

[39] In my view there are however two insurmountable obstacles to the first respondent's quest in this regard:

c) The first would be posed by the fact that the setting aside of the second respondent arbitration award, in the appeal, had rendered that issue, between the applicant and first respondent, *res judicata,* in the review. The concession made in this regard by Mr Boesak was correctly and properly made. Put differently - once this court had set aside that award on appeal there was nothing to set aside in the review. A referral back would always have been linked to such setting aside. As there was nothing left to set aside in the review, to which a referral back could be linked, no referral back could occur in the review.

d) It is secondly beyond doubt that the only remaining issue between the parties in the review was the issue of costs. The first respondent had clearly been appraised of this fact through the abovementioned correspondence. No referral back could be mounted on that remaining issue, as the merits, of the review, had already become moot. Also on this basis no referral back can occur.

[40] I conclude therefore that this issue thus cannot be determined in favour of the first respondent.

THE ISSUE OF COSTS

[41] In support of the sought *de bonis propriis* costs order the applicant relied on the gross irregularities perpetrated by the second respondent during the arbitration in the course of which:

'She received additional documentation after the conclusion of the arbitration and considered same in arriving at her award and where she during a short adjournment in the proceedings on 15 May 2012 attempted to assist the first respondent in the conduct of his case by attempting to advise his legal representatives to address certain allegations which had not been dealt with by them. She furthermore requested such legal representatives not to disclose her conduct to the other party. When the first respondent's legal representative then requested the second respondent to recuse herself from the matter as her conduct was highly improper and effectively disqualified her from further presiding over the matter, she refused to do so.'

[42] It was submitted that such conduct had necessitated the bringing of the review. It was emphasised that the court had already adversely commented on the second respondent's conduct and had referred same to the necessary authorities for further investigation regarding the suitability of the second respondent executing her duties as arbitrator any further.

[43] It was acknowledged that the civil liability of certain persons is limited under Section 134 of the Labour Act 2007.[8] It was however pointed out that such persons - which includes arbitrators appointed under the Act - such as the second respondent - would lose the shield of immunity from personal civil liability should they 'do something, or fail to do something, not in good faith in the performance of their functions in terms of this Act '.

[44] It was further acknowledged that a court, in terms of Section 118, was precluded from making a costs order against a party unless that party has acted in a frivolous and vexatious manner by instituting, proceeding, with or defending those proceedings.

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[8] 134 **Limitation of liability**

The following individuals do not incur any personal civil liability if, acting in terms of any provision of this Act, they did something, or failed to do something, in good faith in the performance of their functions in terms of this Act-

(a) the Permanent Secretary;
(b) the Labour Commissioner and Deputy Labour Commissioner;
(c) a conciliator, arbitrator or labour inspector appointed in terms this Act; and
(d) any individual in the employ of the Ministry.

[45] Given these pre-conditions it would thus not have been competent for the court to make any costs order against the second respondent if the second respondent had not defended these proceedings. By opposing the present proceedings now – at this late stage - she had brought herself squarely within the ambit of section 118. This move at the same time also allowed for the scrutiny of the second respondent's actions in order to determine whether or not the second respondent actions in the arbitration where done in 'good faith' and whether or not she should be shielded from an adverse costs order or had lost the protection afforded by the section.

[46] As, according to counsel, her conduct in the arbitration was deplorable and as she had not acted in good faith in the performance of her functions a costs order against her, *de bonis propriis,* was warranted.

[47] The first respondent's counsel associated himself with these submissions. In addition it was submitted on first respondent's behalf that it should be taken into account that the first respondent now finds himself on the receiving end of the 'impugned conduct' of the second respondent – The seriousness of the second respondent's misconduct could not be 'gainsaid' – which entailed clear breaches of the second respondent's duties under the Labour Act and the administration of justice as a result of which a punitive costs order was clearly warranted.

[48] It must also be mentioned at this juncture that in opposition to the punitive costs order the second respondent had also filed an affidavit on the merits in which she denied the serious allegations made against her and in which she also raised the aforementioned three technical objections.

[49] At the hearing of this matter, Mr Ntinda, who appeared together with Mr Nkiwane on behalf of the second respondent, abandoned the technical objection raised in regard to the manner in which the notice of motion in the review had been amended.

[50] In their heads of argument it was however contended that the entire matter was *res judicata* and that the court – for purposes of determining the costs issue - should also look at the merits of the review. As such review was sought by way of motion proceedings any disputes of fact had to be resolved with reference to the so-called *Plascon-Evans* principle, where the respondent's version would prevail in so far as material disputes of fact would be concerned. It was submitted further:

'The material allegation made by the deponent on behalf of the applicant, in so far as the second relief is concerned, is contained in annexure "EH5" of the applicant's founding affidavit. It is respectfully submitted that annexure "EH5" is pure hearsay evidence. Ms Elliot Jacqueline Hoff (deponent on behalf of the applicant) is relating allegations heard by one Ms Mondo, told to one Mr Markus and then told to the applicant's legal practitioners.

The allegations contained in annexure "EH5" of the applicant's founding affidavit are clearly denied by the second respondent in her opposing affidavit (paragraph 24) and as contained in her letter attached to the applicant's founding affidavit marked annexure "EH6".

In the authoritative work Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa, 4ed at page 368-9, the following general rule is put forth: "As a general rule hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed, this is very often done. Alternatively, when a deponent includes in her affidavit facts in respect of which she does not have first-hand knowledge she may annex a verifying affidavit by a person who does have knowledge of those facts.

It is respectfully submitted that there is no affidavit by Ms Mondo confirming the allegations contained in annexure "EH5" of the applicant's founding affidavit and no reply to the second respondent's affidavit was filed. Clearly the factual evidence before this Honourable Court does not justify the order sought.'

[51] Reliance was also placed on a decision made by Heathcote AJ on a similar provision of the 1992 Labour Act and where the court found that the Labour Court cannot give a costs order against a respondent in an unopposed matter particularly

in circumstances where the unlawful conduct had ceased by the time the matter was called in open court.[9]

[52] In any event it was contended that the second respondent had not opposed the costs order in a frivolous and vexatious manner – The court was also referred in this regard to what was said in *National Housing Enterprise vs. Beukes and Others*[10] where the Labour Court, in interpreting section 20 of the Labour Act, 6 of 1992, (which in effect is similar to section 118 of the Labour Act, 11 of 2007), considered the meaning of the concepts 'frivolous' and 'vexatious' as used in Section 20 of the 1992 Act :

'[20] Section 20 of the Labour Act provides that the court shall not make any order as to any costs incurred by any party in relation to any proceedings instituted in the court, except against a party which in the opinion of the court has, 'in instituting, opposing or continuing any such proceedings, acted frivolously or vexatiously'. The question arises: what does it mean to say that a party has 'acted frivolously or vexatiously'? In Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) Nicholas J, as he then was, while dealing with an application to stay proceedings which were alleged to be vexatious or an abuse of the process of the court, said this (at 1339F):

'In its legal sense, "vexatious" means

"frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant

(Shorter Oxford English Dictionary). Vexatious proceedings would also G no doubt include proceedings which, although properly instituted, are continued with the sole purpose

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[9] *Commercial Investment Corporation (Pty) Ltd v Namibian Food and Allied Workers Union and Others* 2007 (2) NR 467 (HC) at 468-469 where it was held: – " [10] … Section 20 of the Act specifically proscribes an order as to costs in circumstances where the respondent (as in this case) did not oppose the application and in fact ceased with its unlawful conduct by the time the matter was called in open court. That is indeed the end of the matter. I cannot use the peripheral jurisdictional provisions of s 18(1)(f) or (g) to override (impliedly so) the specific provisions of s 20 of the Act. The upshot of the matter is that a Labour Court cannot give a costs order against a respondent in an unopposed matter, particularly in circumstances where the unlawful conduct had ceased by the time the matter was called in open court …".

[10] 2009(1) NR 82 (LC)

of causing annoyance to the defendant; abuse connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive …' [11]

and where the court continued to hold:

'[21] It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'.[12]

[53] It was then submitted that the second respondent did not act mala fide or with manifest bias during the arbitration proceedings under review and further that the second respondent did not act frivolously in defending this review application, particularly as there were no apparent facts in the applicant's founding papers to justify a finding that the respondent acted mala fide or with manifest bias in the proceedings under review to justify a costs order. All the second respondent had done was to determine procedures which she deemed appropriate, to ensure that the dispute that was before her was resolved fairly.

{29} The court was then referred to the submissions made by counsel in *Maclean v Haasbroek NO and Others* 1957 (1) SA 464 (A) at 468H – 469A :

' … it is an accepted principle that when a public officer acts in a judicial or quasi-judicial capacity costs should not be awarded against him. That is no doubt the position when an order for costs is sought against a public officer acting in such a capacity; he is entitled to resist the order not only on the ground that he acted correctly but also on the ground that, even if he acted incorrectly, he acted in a judicial or quasi-judicial capacity. But where, as in the present case …'

[11] At p 87

[12] At p 88 – See also *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd* 2012 (1) NR 126 (LC) at para's [13] – [21]

and it was stated that it should be clear that the second respondent only opposed the introduction of the costs relief and that this did not make her a party to the actual review of the arbitration award, thus costs could not follow if the review should succeed.

[54] It was also argued that the present case should be distinguished from the case of *Regional Magistrate Du Preez v Walker* 1976(4) SA 849 (A).[13]

[55] Finally it was submitted in the written heads of argument that costs *de bonis propriis* would only be called for if it could be said – which it couldn't - that the second respondent had acted *mala fide* or with manifest bias. [14]

[56] Also during oral argument Mr Ntinda emphasied that a *de bonis propriis* costs order could only be made if malice or bias on the part of the second respondent had been proved. This was not the case as all the second respondent had done was to resist the granting of such order against her. In any event she had not lost the protection afforded to her by legislation under section 134.

[57] Mr Dicks pointed out in reply that the issue of the second respondent's conduct was not *res judicata* between the parties as the second respondent had not been a party to the appeal but that it was her opposition, to the relief now sought, which had brought her within the ambit of section 118, in which regard it had to be taken into account that she had disputed the merits of the serious allegations made against her.

[58] In further reply to Mr Ntinda's submissions made in regard to the approach to disputed facts in motion proceedings, where the second respondent's version would have to prevail, he pointed out that such rule would not avail the second respondent

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[13] I understood this submission to mean that the second respondent's actions had not been actuated by malice : see *Walker's* case at p855

[14] *Ntuli v Zulu* 2005 (3) SA 49 (N) at 53 in which Jappie J stated : 'Costs may be awarded against a judicial officer, acting in a judicial capacity, where his/her conduct can be described as mala fide, he/she has taken sides, where he/she has conducted himself/herself maliciously or where there has been a gross illegality in the case. In this regard see: *Geldenhuys v Resident Magistrate, Sutherland* 1914 CPD 62 at 64.'

who had disputed the applicant's version only with 'bald and blanket denials'. In view of the serious allegations levelled against her one would have expected more than a mere denial, which was therefore insufficient to create a material dispute of fact which would let the second respondents version prevail for purposes of considering the very converging positions adopted by the parties on the issue of costs. The court would therefore be in the position to determine the costs issue on the papers before it.

[59] In spite of the very converging positions also adopted by the parties to the costs issue it can immediately be said that the second respondent had indeed brought herself within the ambit of section 118 of the Labour Act 2007 though the delivery of her 'Notice to Oppose' and through the filing of an answering affidavit also disputing the merits, which had only become res judicata between applicant and first respondent.

[60] It is indeed understandable that she tried to oppose the adverse costs order with which she was seemingly confronted. Whether or not she was well advised by the Government Attorney in doing so becomes of course questionable, particularly as all counsel where agreed that the judgment of this court - in the *Commercial Investment Corporation* case - was correctly made – and although made under the previous labour dispensation would be applicable and govern the interpretation of section 118 of the 2007 Labour Act also in this case – and in terms of which the court would have been precluded to have made costs order against her, if she would not have opposed these proceedings.

[61] As the second respondent had so subjected herself to the costs regime imposed by section 118 of the Labour Act – the only remaining issues would be the determination of whether or not the second respondent's opposition to the costs order sought can be regarded as frivolous or vexatious and whether or not she had forfeited the protection afforded by Section 134.

[62] Central to these enquiry's would be a consideration of the merits of the review and the conduct of the second respondent which, in the appeal, had led to the setting aside of the entire award.

[63] Crucial in this determination, in turn, is the fact that second respondent admits receipt of the letter marked "EH5" in the review – that is the letter written by Mr Markus, an admitted legal practitioner, upon receiving the report from his candidate legal practitioner, Ms Mondo, who had informed him that the second respondent had asked her during a short adjournment of the arbitration proceedings on 15 May 2012 to tell Mr Markus that he should address certain allegations the applicant had raised and to deal with them and that the second respondent had requested Ms Mondo not to tell Mr markus that she had done so and that she should pretend as if she – Ms Mondo was making the suggestion in her own right.

[64] Properly - and correctly so - Mr Markus immediately addressed a letter to the second respondent advising her that such conduct disqualified the second respondent from further presiding in the arbitration.

[65] The second respondent was also pertinently informed that such conduct left the first respondent with no option but to ask for the second respondent's recusal. She was expressly requested to reconvene the arbitration proceedings for such purpose.

[66] It becomes clear from the second respondent response that she flatly refused to reconvene the arbitration proceedings.

[67] It is apposite for purposes hereof to quote her response in full:

'Dear Mr Marcus

RE: PHELEM MANYANDO LIKE // NAMIBIA ESTATE AGENTS BOARD

Your letter on the above matter received on the 18 May 2012, has reference.

Sir, I am certain and am glad that you certainly know that you are not telling the truth that "After the conclusion of the arbitration proceedings on 15 May 2012", your candidate legal practitioner, Ms. Mondo informed you that during the short adjournment of the proceedings on 15 May 2012, I asked her to tell you that you should address the allegations that the respondent had raised, as you had not dealt with them…..

As I have already indicated to you, my schedule is so full and I have no time to entertain this kind of arguments which are aimed at nothing, but to tarnish my name and my reputation.

I challenge you to prove your allegations against me, and I reserve my rights to sue you for character assassination etc. I wonder what you*(r)* motives for such action are.

Meanwhile, I would like to inform you that I am expecting the closing arguments to be submitted by the 02 June 2012 as was agreed upon at the closure of the proceedings.

I have no intention whatsoever, either to recuse myself from this case, or to reconvene the arbitration proceedings as per your conflicting request(s).

Till then!'

[68] It immediately becomes clear that the second respondent became obliged to hear the application for recusal. This she refused to do. In addition she allowed the first respondent - who had failed to prove his losses during the arbitration – a further opportunity to prove such losses behind the applicant's back - without affording the applicant the opportunity of dealing with such documentation. She then proceeded to deliver her award, which was in favour of the first respondent.

[69] This course of conduct – which incidentally also discloses the second respondents bias, towards the first respondent – then also reveals the further fundamental irregularities committed by second respondent – which clearly vitiated the entire arbitration proceedings.

[70] It is important to note in this regard that the second respondent – in her answering affidavit - did not deny - but merely noted - the applicant's allegations made in regard to her permitting the first respondent to amplify a defective case through the submission of further documentation behind the applicant's back without affording the applicant an appropriate opportunity to deal therewith.

[71] Such un-contradicted conduct then proves bias on the part of the second respondent even if one accepts, for the moment, that the content of Mr Markus' letter was not confirmed under oath and thus constitutes hearsay. It was however not denied that Mr Markus wrote the letter in question, placing certain highly irregular conduct on record, which should have necessitated the setting down, hearing and determination of a recusal application by the second respondent before she would be able to continue to preside at the arbitration and deliver any award.

[72] In this regard it is telling that she refused to entertain Mr Markus's request in a most arrogant fashion. Mr Markus had quite properly placed the alleged conduct of the second respondent on record – which would clearly not favour his client's case – but which he was duty bound to do as an - ethically correct – admitted legal practitioner.

[73] The second respondent's denials are indeed made in a bald fashion as submitted by Mr Dicks – In addition I have no reason to doubt that there was indeed substance in the contents of Mr Markus' letter particularly as a court would always be entitled to accept – and thus to place some evidential weight – on the unsworn word of a duly admitted legal practitioner, an officer of the court.

[74] All these factors then cast great doubt on the veracity of the second respondent's denials. As however neither Mr Markus nor Ms Mondo deposed to any confirmatory affidavits in the review I will not take this facet of the merits into account in the determination of whether or not the second respondent's opposition to the

costs order herein is frivolous or vexatious and whether or not her conduct during the arbitration was in 'good faith'.

[75] What has however emerged, so far, is that the second respondent did not dispute that after the closure of both parties' cases during the arbitration proceedings, she accepted further documentation of which the applicant was unaware and in respect of which the applicant was not given the opportunity to be heard before she delivered her award in favour of first respondent.

[76] As already mentioned above this conduct discloses bias on the part of the second respondent in favour of first respondent.

[77] Bias – as a form of gross misconduct – also being indicative of malice towards the one or other party – in my view constitutes a valid basis for the granting of a *de bonis propriis* costs order.[15]

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[15]The general position vis a vis judicial officers – also applicable to quasi- judicial officers such as arbitrators (see *Purity Manganese (Pty) Ltd v Katzao and Others* 2012 (1) NR 233 (LC) at [21] - is set out conveniently in *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 852H – 853H by Van Winsen AJA : "It is necessary to consider first the circumstances under which it would be open to a Court, in its discretion, to giant an order de bonis propriis against a judicial officer whose actions in the performance of his duties as such have been corrected or set aside on review. It is a well-recognised general rule that the Courts do not grant costs against a judicial officer in relation to the performance by him of such functions solely on the ground that he has acted incorrectly. To do otherwise could unduly, hamper him in the proper exercise of his judicial functions. The application of this rule is illustrated in numerous cases of which the following are but instances: *Kliprivier Licensing Board v Ebrahim*, 1911 AD 458 at p. 462; *MacLean v Haasbroek, N.O. and Others*, 1957 (1) SA 464 (AD) at p. 468; *Simango v Buitendag, N.O. and Another*, 1943 W.L.D. 85 at p. 93; *Coetzer v Magistrate of Hoopstad and Another*, 1929 OPD 86 at pp. 91 et seq.; *South African Motor Acceptances Corporation (Pty.) Ltd. v Venter*, 1963 (1) SA 214 (O) B at p. 222.

There are, however, exceptions to this rule. Thus if the judicial officer chooses to make himself a party to the merits of the proceedings instituted in order to correct his action and should his opposition to such proceedings fail, the Court may, in its discretion, grant an order for costs against him. See for instance *MacLean v Haasbroek, N.O. and Others*, supra at p. 469; *Nkonjera v District Commissioner at Chingola, N.O. and Another,* 1964 (1) P.H. F22 (F.S.C.). Cf. *Alexander and Others v Boksburg Municipality and Jones*, 1908 T.S. 413 at p. 419; *Transvaal Coal Owner's Association and Others v Board of Control*, 1921 T. P. D. 447 at p. 455.

It is also a recognised exception to the general rule that if it is established that the judicial officer's decision has been actuated by malice the Court setting aside or correcting such decision may grant costs against him even although he has not made himself a party to the merits of the proceedings. See, for instance, *Nonyake v Die Assistent Landdros, Bloemfontein en die Staat*, 1964 (3) SA 672 (O) at p. 679; S.A. *Motor Acceptances Corporation (Pty.) Ltd. v Venter*, supra; *Coetzer* E *v. Magistrate of Hoopstad and Another*, supra.

The Court a quo held that even although mala fides did not account for appellant's incorrect order with reference to respondent, nevertheless appellant's conduct was perverse and grossly illegal and merited an order against him in his official capacity. It would appear therefore that the Court a quo - rightly, in my view - accepted the position that if the evidence fell short of establishing mala fides on

[78] Bias also constitutes a valid basis for finding that the second respondent's actions, in the performance of her functions in terms of this Labour Act, were not performed 'in good faith'.

[79] This finding then also removes the shield of immunity as conferred by Section 134 of the Labour Act 2007 from the second respondent.

[80] The word "frivolous", as used in section 118 of the Act, also encompasses a situation where proceedings in a Labour Court are opposed 'without sufficient ground'.

[81] Given her telling failure to deny material facts - the opposing papers - of the second respondent - do not disclose such 'sufficient grounds' – Her opposition to the adverse costs order is accordingly deemed 'frivolous' within the meaning of section 118 of the Labour Act.

[82] Ultimately the second respondent's actions – that is her conduct in the arbitration – which, as I have found above - discloses bias – coupled to her 'frivolous' opposition of the costs order – thus form a valid basis for the sought award of a costs order *de bonis propriis* against her.

[83] In the result:

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the part of appellant, costs could not be awarded against him de bonis propriis. The judgment of SEARLE, J., in *Geldenhuys v Resident Magistrate, Sutherland*, 1914 CPD 62, would, prima facie, seem to suggest that something less than mala fides on the part of a judicial officer might persuade a Court to grant an order for costs de bonis propriis against him. The learned Judge is reported at p. 64 as having said in the course of what seems to be an extempore judgment that

'... it is not the custom of this Court to make a magistrate pay costs de bonis propriis in an action unless there has been perverse or malicious conduct or gross illegality in the case'.

No authority was relied upon for this somewhat broadly stated description of the circumstances under which orders de bonis propriis can be granted against judicial officers. I am not certain that the learned Judge by the use of the words 'Perverse' and 'gross illegality' intended any more than to describe what he considered to be examples of 'malicious conduct'. If I am wrong in so interpreting his words it is necessary to emphasise that it is the existence of mala fides on the part of the judicial officer that introduces the risk of an order of costs de bonis propriis being given against him." - See also : *MacLean v Haasbroek* NO 1957 (1) SA 464 (A) at 468 -469, *Geldenhuys v Resident Magistrate, Sutherland* 1914 CPD 62 at 64, *Nonyake v Die Assistent Landdros, Bloemfontein en die Staat* 1964 (3) SA 672 (O) at 679, *Du Toit v Voorsitter, Nasionale Vervoerkommissie* 1985 (3) SA 56 (SWA) at 66 – *Booysen v Kalokwe No and Others* 1991 NR 95 (HC) at 99C

(a) The first respondent's application to have the matter referred back to arbitration is refused.

(b) The second respondent is ordered to pay the applicant's and first respondent's costs in the review *de bonis propriis* on a scale as between attorney and client.

H GEIER

Judge

APPEARANCES

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APPELLANT:	G Dicks Instructed by GF Köpplinger Legal Practitioners, Windhoek.
First RESPONDENT:	A W Boesak Instructed by BD Basson Inc., Windhoek.
Second RESPONDENT:	S Ntinda (with him S Nikiwane) Government Attorney, Windhoek