



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-MOT-GEN-2018/00079

In the matter between:

**TRANSNAMIB HOLDINGS LIMITED**

**APPLICANT**

and

**HIPPY TJIVIKUA**

**FIRST RESPONDENT**

**PHILIP MWANDINGI**

**SECOND RESPONDENT**

**THE LABOUR COMMISSIONER**

**THIRD RESPONDENT**

**Neutral citation:** *TransNamib Holdings Limited v Tjivikua* (HC-MD-LAB-MOT-GEN-2018/00079) [2019] NAHCMD19 (21 June 2019)

**Coram:** MASUKU, J

Heard: 6 May 2019

Delivered: 21 June 2019

**Flynote:** Principles governing postponements - Labour Court Rules – Rule 16(5) – Application for rescission – requirements to be met in application therefor - Rescission application of an arbitration award filed and made an order of court in terms of s. 87(1)(b) of the Labour Act – whether Rule 16(5) applies to rescission applications brought to set aside awards made orders of court in terms of s. 87(1)(b). Circumstances in which court may grant an order for costs – whether the manner in which a party litigates may influence the court to issue an order for costs notwithstanding the provisions of s. 118 of the Labour Act.

**Summary:** This is an opposed application for rescission of an arbitration award that was made an order of court before the rescission application was lodged. This application was brought in terms of Rule 16(5) of the Labour Court Rules. The question for determination was whether the court may rescind and set aside such an order in terms of rule 16(5).

*Held:* that an application for a postponement must be made timeously and that it is not granted merely for the asking. The court exercises a discretion whether or not to grant a postponement.

*Held that:* that rule 16 provides for two types of application for rescission, viz one in which the applicant applies for rescission of a judgment granted by default in terms of rule 7, provided that the application for rescission is brought within 14 days of the order or judgment coming to the knowledge of the party affected thereby. The second is where the applicant alleges that the order made was void from the beginning or was obtained as a result of fraud or mistake. Such application should be lodged within 1 year of the applicant becoming aware of the judgment.

*Held:* in the instant case, the applicant alleged that it was not aware of the order as it was not properly brought to its attention, thus amounting to the order being made as a result of a mistake.

*Held further that:* the applicant was entitled to rescission in so far as it relied on the voidness of the order for the reason that the relevant line Minister had not provided his concurrence to the remuneration of the applicant the order held he was entitled to.

*Held:* that the determination of the bonus the respondent was entitled to was erroneously made for the reason that it was based on a computation that did not take into account the respondent's performance on the one hand and the applicant's performance, on the other.

*Held that:* the applicant had, in the circumstances, shown that it was entitled to the rescission of the order, considering that the application was made within a year of the applicant being made aware of its issue.

*Held:* the applicant had litigated the matter in a manner that was clearly lackadaisical and dilatory and had by its delay exposed the respondent to costs that would have been clearly avoidable if the matter had been litigated with the requisite promptitude.

*Held that:* applications for postponements are not lightly granted nor merely for the asking. A party applying for a postponement must do so timeously and ensure that the other party is not unduly prejudiced thereby.

The application for rescission was accordingly granted with the applicant ordered to pay the costs thereof, s. 118 of the Labour Court notwithstanding.

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### **ORDER**

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1. The application for rescission in terms of Rule 16(5) is upheld.
2. The award issued by the second respondent dated 10 May 2017 is hereby rescinded and set aside.

3. The matter is referred back to the Office of the Labour Commissioner to commence de novo and if it reaches arbitration, it should be allocated to another Arbitrator.
  4. Applicant is ordered to pay the costs of the respondent as occasioned by the employment of one instructed and one instructing legal practitioner.
  5. The matter is removed from the roll and is regarded as finalised
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## JUDGMENT

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MASUKU, J:

### Introduction

[1] This is an opposed application for rescission of an order of this court obtained by the first respondent. The application for rescission is brought in terms of Rule 16(5) of the rules of this court.

### The parties

[2] The applicant is TransNamib Holding Limited, a company duly incorporated in terms of the laws of Namibia with its main place of business situated at TransNamib, corner of Bahnhof Street and Independence Avenue. For ease of reference, I will hereafter refer to TransNamib as “the applicant”.

[3] The first respondent is Mr. Hippy Tjivikua, an adult male person, currently employed by the applicant as Executive: Strategy and Stakeholder Management and residing in Windhoek, Republic of Namibia. It is important to mention that when the issues giving rise to the dispute arose, Mr. Tjivikua was the Acting Chief Executive Officer of the applicant. I will hereafter refer to Mr. Tjivikua as “the respondent”, for ease of reference. Where the context refers to another respondent than Mr. Tjivikua, same shall be clarified accordingly.

[4] The second respondent is Mr. Philip Mwandingi, an adult male person, the arbitrator in the main matter in terms of s 85(5) of the Labour Act, 11 of 2007 (“the Labour Act”), of the office of the Labour Commissioner, 32 Mercedes Street, Khomasdal, Windhoek. He shall be referred to in this judgment as “the arbitrator”.

[5] The third respondent is The Labour Commissioner, an adult male person, appointed as such in terms of s 120(1) of the Labour Act, 11 of 2007, of the Office of the Labour Commissioner, 32 Mercedes Street, Khomasdal, Windhoek.

[6] It should be stated for the record that only Mr. Tjivikua, the first respondent, opposed the application for rescission, which serves presently before me for determination. In that regard, he filed comprehensive papers that cover every blade of grass traversed by this matter.

#### Relief sought

[7] The applicant approached this court seeking the following relief:

‘1. Rescinding and setting aside the Court Order of this Honourable Court in terms of which an arbitration award of 21 April 2017 had been registered under section 87(1)(b) of the Labour Act, Act 11 of 2007.

2. Further and/alternative relief.’

#### Application for a postponement

[7] At the commencement of the hearing, Mr. Tjombe, for the applicant, moved an oral application for the postponement of the matter. He argued that it was in the interests of justice to grant the application as that would enable the applicant to place certain relevant facts to the attention of the court. This application was vigorously

opposed by Mr. Phatela. He placed reliance on the principles governing postponements as set out in the celebrated case of *Myburgh Transport v Botha t/a Truck Bodies*.<sup>1</sup>

[8] After considering all the relevant facts and circumstances of the matter, I refused the application and intimated that the reasons therefor would be delivered together with the main judgment. The reasons now follow as promised and these follow below.

[9] In *Myburgh*, the Supreme Court outlined the principles governing applications for postponements. I paraphrase those of them that are relevant to the present enquiry below:<sup>2</sup>

- (a) The trial judge has a discretion as to whether to grant or refuse an application for a postponement;
- (b) That discretion should be exercised judicially and not capriciously, whimsically or on a wrong principle;
- (c) A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and is not due to dilatory tactics on his or her part and where the demands of justice show that that party should have further time for the purpose of presenting his or her case;
- (d) An application for a postponement must be made timeously, as soon as the circumstances call for the need to make the application become known to the applicant. Where the demands of justice and fairness, however, call for the granting of a postponement, the court may grant such application even if it was not timeously made;
- (e) An application for a postponement must be *bona fide* and not resorted to as a tactical manoeuvre geared to gaining an advantage to which the applicant is not entitled;
- (f) Considerations of prejudice will ordinarily play a pivotal part in the direction the court's discretion will be exercised. In this regard, the court should consider whether prejudice suffered by the respondent cannot be cured or compensated by an appropriate order for costs;

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<sup>1</sup> 1991 NR 170 (SC).

<sup>2</sup> *Ibid* p.174D-175H.

- (g) The court should weigh the prejudice that will be occasioned to the respondent if the application is granted, against the prejudice that the applicant will suffer if the application is not granted;
- (h) Where the application has not been timeously made, or the applicant is otherwise to blame for the procedure adopted, but justice nevertheless calls for postponement to be granted in the peculiar circumstances, the court may, in its discretion, allow the postponement but direct the applicant to pay the wasted costs occasioned by the postponement on the scale between attorney and client. In this regard, the court may even order the applicant to make good on the costs order even before the applicant prosecutes the matter further.

[10] It must be mentioned that there are a few matters that the court took into account in refusing the postponement and I will enumerate these below. First, the applicant is the *dominis litis* in this matter and had previously applied for and been granted postponements on previous occasions. Secondly, the applicant had not complied with a number of court orders, which included the one relating to the filing of heads of argument, thus prejudicing both the respondent and the court in the further conduct of the matter. As a result, the matter was argued in partial darkness in so far as the applicant's heads of argument were not filed at all and the court granted the applicant an unusual dispensation in allowing the applicant to argue the matter the non-compliance notwithstanding.

[11] Thirdly, although the applicant knew that it would not proceed with the matter, it did not make the application for a postponement timeously. As matters turned out, the respondent, who had been dragged to court by the applicant, had to prepare and put his ducks in a row, so to speak. He came, with counsel in tow, ready for battle, only to be met with the application for the postponement at the commencement of the hearing. I must mention in this regard that even on the previous occasion, i.e. on 16 April, 2019, the applicant had made an application for a postponement, which was also opposed but the court granted it for different reasons, namely, that the judge who was to hear the matter was unavailable due to an emergency.

[12] Fourth, the matter had been pending for a long time and it clearly had deleterious effect of holding the clear direction and progression of the matter in abeyance. Whatever prejudice would have been suffered by the applicant, could not be compared to that of both the respondent and generally to the administration of justice, considering the overriding principles of judicial case management, encapsulated in rule 1(3) of the High Court rules, which apply *mutatis mutandis* to proceedings before the Labour Court, via rule 22 of the latter.

[13] I should also mention that the difficulty with applications for postponement moved orally from the bar, is that they take the court and the opponent by surprise in at least two respects. First, the fact of moving the application, leaving the respondent and the court to burn the midnight oil, as it were, in preparation, when the applicant has decided, for whatever reason, good or bad, that it will not proceed with the matter. Second, the reasons on which the application are predicated, remain unknown until the applicant opens his mouth and may not be investigated at that particular time.

[14] For that reason, the respondent would, in all probability, not be able to test the *ipse dixit* of the mover of the application, short of applying for a postponement or adjournment, to enable him or her, to take full instructions on the reasons advanced for the postponement. It is for that reason that oral applications should, as far as is possible and practicable, be steered from like a plague. The element of surprise that they leave in their wake becomes too much and comes too soon for the respondent and the court. Because of the lateness of the application, it becomes difficult in some cases to make a proper judgment call due to the lack of proper notice of the application.

[15] It was for the foregoing reasons that I dismissed the application and ordered the parties to proceed to deal with the application on the merits, namely, whether the applicant had a good case for rescission of the order complained of. It is to that matter that the court's attention now turns.



## Background

[16] The applicant and the respondent entered into an employment contract on 07 August 2014, for the position Executive: Strategy and Stakeholder Management. In an attempt to enforce the terms of this agreement, particularly those dealing with adjustment of the applicant's salary, he approached the Office of the Labour Commissioner, after unsuccessfully seeking internal remedies. The matter was set down for a conciliation hearing on 02 February 2017 and both parties were properly notified to this effect. However, it would appear that only applicant was present at those proceedings.

[17] Out of what could only be regarded as an abundance of caution, the arbitrator postponed the hearing without hearing same. The matter was postponed to 21 April 2017 at 10:00. On 21 April 2017, the respondent appeared and the applicant was absent. At 10:30, the arbitrator called the office of the applicant and spoke to a certain Erica at the applicant's Human Resources Department, in an attempt to establish if the applicant's representatives would be attending the hearing. The said Erica was unable to assist the arbitrator. He then called the office of a certain Mr. Nekomba, at the applicant's Industrial Relations division. There he spoke to a lady, who indicated she knew of the notice having been received. Having satisfied himself that the hearing was sent via facsimile and had been received by a certain Adeline, (he cautioned that the spelling of the name might be wrong as same was telephonically) at the applicant's Offices, he proceeded to hear the application.

[18] The arbitration award was issued on 10 May 2017, as per the date stamp on it. It was then registered with the registrar of this court in terms of rule 87(1)(b) and became an order of court with case number 91/17, on 09 June 2017. On 28 June 2017, the court order was then served on a certain, Ashipala who works in the Legal Department of the

applicant. A writ of execution was issued on 13 July 2017. Subsequently, seven vehicles of the applicant were attached by the deputy Sheriff and this was pursuant to the issue of a writ of execution.

[19] A sale in execution was scheduled for 07 October 2017 and before that sale in execution could materialise, on or about 25 September 2017, the applicant launched an application for rescission of the arbitration award with the Labour Commissioner. This application for rescission was not opposed but the applicant failed to pursue it further. The sale in execution did not proceed as the respondent's legal practitioners did not give the go-ahead. It was postponed to 25 November 2017.

[20] The applicant brought an urgent application on 24 November 2017 and this court granted an order staying the sale in execution, pending the hearing of an application for rescission that the applicant had to institute on or before 01 December 2017. On the return date of the rule nisi issued, the application for rescission had not been filed by 01 December 2017 and the rule was thus discharged. The applicant then lodged the present application serving before me on 09 May 2018.

#### The applicant's rendition of events and argument

[21] The applicant brought this application in terms of Rule 16(5) of the Labour Court rules. This is an application for rescission of this court's order made in terms of Rule 87(1)(b) of the Labour Court Rules, pursuant to the award issued by the arbitrator being registered with this court's registrar.

[22] According to the applicant, on 01 February 2017, it instructed Messrs. Tjombe-Elago Inc., a firm of legal practitioners, to represent it at the conciliation proceedings of 02 February 2017. Mr. Elago, from Tjombe-Elago Inc., attended the conciliation hearing. However, respondent objected to the applicant being represented by external legal practitioners. As the applicant's legal representatives had not received full instructions, the hearing was postponed. No subsequent date of the hearing was set at that point.

[23] On 21 April 2017, a few minutes before 10:00, Mr. Elago was instructed by the Chairperson of the applicant's Board of Directors that a hearing between the applicant and the respondent was scheduled for 21 April 2019 at 10:00. He proceeded to the Office of the Labour Commissioner and on arrival at around 10:20, he saw Mr. Tjivikua leaving the premises. He could not find the arbitrator and could therefore ascertain the status of the matter. He assumed that the hearing took place and at around 11:50, he informed Mr. Tjombe, of Tjombe-Elago Inc. to this effect. Mr. Tjombe also approached the Office of the Labour Commissioner and was informed that the arbitrator was in a hearing – in another matter.

[24] According to the applicant, around 28 March 2017 and 27 April 2017, the respondent created the impression in the mind of Mr. Tjombe its legal representative that he (the respondent) was still negotiating his claims with the applicant.

[25] On 28 April 2017, Mr. Tjombe wrote to the Office of the Labour Commissioner requesting information of the date for the conciliation or arbitration hearing of the dispute. No response was received. On 02 May 2017 and 08 May 2017, Mr. Mwandangi was not in the office and Mr. Tjombe could be apprised of the status of the dispute between the parties. It was only on 10 May 2017, that the applicant received a copy of the arbitration award.

[26] It is submitted that the applicant was not given at least 14 days' notice of the arbitration hearing on Form LC 28 as required in Rule 15 of the Rules Relating to Conduct of Conciliation and Arbitration before the Labour Commissioner. Furthermore, the facsimile number to which the notice was sent is not the correct facsimile number of the applicant's premises. It was further stated that the person who supposedly confirmed receipt of the notice via facsimile transmission at the applicant's office, allegedly a certain Adeline, is unknown to the applicant. None of its employees are named Adeline, the applicant retorted.

[27] Even if the name was spelled incorrectly, continued the applicant, those whose names come close enough are Eljolene Hamilton and Endeline Uiras. Both confirmed that they had not received such a notice. Mr. Nekomba, the Chief Industrial Relations Officer confirmed that either his department or the legal department would receive all legal notices related to labour disputes. He confirmed that no notice in respect of the hearing of 21 April was received by his department. Ms. Maria Shatika, an administrative assistant in the Industrial Relations department and who keeps a register of documents relating to labour matters, confirmed that a notice for the hearing of 21 April 2017 was not served on the applicant.

[28] It was further submitted that, in terms of an internal directive sent via email to all staff members on 17 November 2016, 'all legal cases being served onto TransNamib be delivered to the office of the CEO for correct action by the Acting CEO'. The respondent, it was pointed out, was acting CEO at the time and ought to have known of the directive.

[29] It was furthermore the evidence of the applicant that, the respondent, the former company secretary of TransNamib had not received the said notice. According to the applicant, the respondent was placed in possession of two sets of hearing notices, one for himself and the other for the applicant. According to applicant, the respondent made the arbitrator believe that there was proper service on the applicant so as to secure an award in his favour and that conduct of the respondent, amounted to fraudulent misrepresentation.

[30] It was the applicant's further contention that had the applicant been properly notified and had attended the hearing, the award would not have been issued in favour of the respondent for the reasons set out below as advanced by the applicant:

- a) The applicant is a State Owned Enterprise (SOE) and is subject to the State Owned Enterprises Governance Act, 2 of 2006. The respondent is the holder of an executive position and his salary is therefor governed by s 22(3) of this Act;

- b) Although applicant entered into the employment agreement with the respondent, the remuneration and service benefits contained therein have not been approved by the Minister of Works;
- c) The employment agreement was not approved by the applicant's Board of Directors.

[31] It was further submitted that, even if the State Enterprises Governance Act, does not apply, respondent is only entitled to one third of his performance bonus of N\$ 200 000. The remaining two thirds of the bonus is subject to assessment of the performance of the respondent and that of the applicant. Lastly, it was submitted that the respondent's claims dated back to December 2014. In terms of s 86(2)(b) of the Labour Act, 11 of 2007, a dispute must be referred within a year arising. Further that, in any event, if the notice was faxed to the fax number in the court order, then same was obtained by mistake, in which case the court order should be rescinded.

#### The respondent's argument

[32] It is argued on behalf of the respondent that, when the application is stripped to its bare bones, it is in fact an application for rescission on the basis that the applicant was not in willful default and further that the applicant has a *bona fide* defence to the first respondent's claim. It was on this score that it was argued on behalf of the respondent that the applicant's application was a back-door attempt to apply for rescission of judgment out of time. It was further argued that, the factual version advanced by the applicant does not stand up to scrutiny once closely considered in light of the applicable law.

[33] The respondent further submitted that rule 16(5) does not find application in light of the facts relied upon by the applicant. Mr. Phatela submitted that, an application for rescission cannot be made in terms of Rule 16(5), where an arbitration award was made an order of court.

[34] Mr. Phatela, argued that there are three instances where an arbitrator's award may be set aside. The first he submitted, was a rescission application to the arbitrator in terms of s 88 of the Labour Act, which provides that: 'An arbitrator who has made an award in terms of section 86(15) may vary or rescind the award, at the arbitrator's instance, within 30 days after service of the award, or on the application of any party made within 30 days after service of the award, if-

- (a) it was erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) it was made as a result of a mistake common to the parties to the proceedings'.

[35] The second, it was further submitted, is an appeal. In this regard, Mr. Phatela cited s 89(1)(a) and (b) of the Labour Act, which provides that: '(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78-

- (a) on any question of law alone; or
- (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.'

This option was, however, was not available to the applicant according to Mr. Phatela.

[36] According to Mr. Phatela, the third and best option for applicant, was a review of the arbitral award. In support of this argument, he referred to s 145 (1)(a) and (b) of the South African Relations Act, 66 of 1995 and s 89 (4) and (5) of the Namibian Labour Act.

[37] The Namibian Labour Act provides in s 89(4) and (5), the relevant portions thereof:

(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award-

- (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or

- (5) A defect referred to in subsection (4) means-
- (b) that the award has been improperly obtained'.

[38] The South African Act, on the other hand, provides that '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the award – . . .'

Subsection (2) describes a defect as meaning –

- (c) that the award has been improperly obtained.

[39] Mr. Phatela relied for his submissions on *Moloi v Euijen and Others*<sup>3</sup>, a decision by the South African Labour courts in respect of s 145 of the South African Labour Relations Act. In that matter the Court found that an award that is obtained as a consequence of fraudulent misrepresentation, is reviewable on the ground that same was improperly obtained. It was Mr. Phatela's contention therefor that the applicant, in the present matter, should have thus brought a review application, but according to Mr. Phatela, they did not as they were out of time and opted to approach the court on the basis of Rule 16(5). Mr. Phatela submitted further that this alternative approach adopted by the applicant served it no benefit as it, it so to speak ran into another insuperable hurdle.

[40] Mr. Phatela further submitted that in *Air Namibia v Sheelongo*<sup>4</sup>, Ueitele, J held that where an arbitration award became an order of court by simply being filed with the court in terms of s. 87(1)(b) of the Act, and not being the subject of an application therefor, an application for rescission thereof under rule 16 does not avail the applicant.

[41] As a parting shot, Mr. Phatela, submitted that the present application is fundamentally flawed, in that the arbitration award was made an order of court prior to the launching of this application. He submitted that, for the above reasons, and placing heavy reliance on *Sheelongo*, that the applicant is barking the wrong tree in the present

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<sup>3</sup> [1997] BLLR 1022 (LC).

<sup>4</sup> [2015] NALCMD (17 June 2015) para 28.

application and that the application must therefor be dismissed with costs of one instructed and one instructing legal practitioner.

#### Issues to be determined

[42] It is my considered view that before considering the merits, I need to determine whether this application for rescission is properly before this court. This is so in view of the compelling argument raised on behalf of the respondent. It is for that reason that I will first consider whether the applicant was correct to bring an application in terms of Rule 16(5).

#### Applicable legal principles

[43] Rule 16(5) provides as follows:

(1) Any party to an application or counter-application in which judgment by default is given in terms of rule 7 may apply to the court to rescind or vary such judgment or order, provided that the application is made within 14 days after such judgment or order has come to his or her knowledge.

(2) Every such application must be an application as contemplated by rule 6 (23), and supported by an affidavit setting out briefly the reasons for the applicant's absence or default, as the case may be, and, where appropriate, the grounds of opposition or defence to the application or counter-application.

(3) The court may on the hearing of any such application, unless it is proved that the applicant was in willful default and if good cause is shown rescind or vary any other judgment or order complained of and may give such directions as to the further conduct of the proceedings as it considers necessary in the interest of all the parties to the proceedings.

(4) If such application is dismissed, the judgment or order becomes final.

(5) Where rescission or variation of a judgement or order is sought on the ground that it is void from the beginning or was obtained by fraud or mistake, application may be made not later than one year after the applicant first had knowledge of such voidness, fraud or mistake.



(6) Any judgment or order of the court may, on application of any person affected thereby who was not a party to the application or matter made within 30 days after he or she has knowledge thereof, be so rescinded or varied by the court.'

[44] Section 87(1)(b) of the Labour Act, on the other hand, provides the following:

'1. An arbitration award made in terms of this Part-

- (a) is binding unless the award is advisory;
- (b) becomes an order of the Labour Court on filing the award in the Court by-
  - (i) any party affected by the award; or
  - (ii) the Labour Commissioner.'

[45] I am of the considered view that rule 16 makes provisions for two different classes of applications for rescission. I am of the further view that the circumstances in which each of these types of rescission applications apply differ. The first is to be found in rule 16(1). This avenue is open to a party against which a default judgment in terms of rule 7 has been granted. That party, may apply for the rescission or variation of the order complained of. In this connection, the said application should be moved within 14 days after the said judgment or order has come to the said party's knowledge.

[46] The second scenario, provided by subrule (5), is where a party seeks a rescission or variation of an order or judgment of the court on the grounds (a) that the said order or judgment is void from the beginning or (b) was obtained by fraud or mistake. This application, must, in terms of the said rule, be brought within 1 year of the judgment or order coming to the attention of the potential applicant. In the present case, the applicant claims that its case falls in both categories of the subrule, namely, that it is based on the order being void ab initio and also based on fraudulent misrepresentation or mistake.

[47] I will now consider the grounds upon which the respondent claims that in bringing the application under rule 16(5), the applicant has barked the wrong tree. Essentially, a determination of this issue, will revolve around the finding relied on by the respondent in *Sheelongo*.

[48] My venerable Brother Ueitele J held as follows in *Sheelongo*:<sup>5</sup>

'It is common cause that the arbitration award became an order of court not in pursuance of any application by a party or the Labour Commissioner to this court, but by the simple filing of the award with this court. I am thus of the view that Rule 16 does not apply to circumstances where a party wishes to rescind an order which became an order of court pursuant to s. 87(1)(b).' (Emphasis supplied).

[49] The import of the underlined statement, is that a party seeking rescission of an order or judgment filed either by a party or the Labour Commissioner with this court, may not approach this court for the rescission or the setting aside of the said order or judgment under rule 16. This means the application cannot be in terms of either subrule (1) or (5) of the rule 16. The impression one gathers from the above statement of the law, is that an application for rescission may be moved in terms of the rule where the award became an order of court as a result of an application, presumably made by one of the parties, and not as a result of the mere filing thereof in terms of rule 87(1)(b), quoted earlier above.

[50] I have ruminated and agonised over this statement and have considered all the possible permutations. I am unfortunately unable, with respect, to agree with my learned Brother in his conclusion on the parameters of rule 16. I say so for the reason that when one reads the scheme of the Act, it becomes abundantly clear that an award issued by an arbitrator, appointed by the Labour Commissioner, may only become an order of court in one of two ways. First, one of the parties thereto may file the said award, or secondly, the Labour Commissioner may have the same registered. No other manner is provided by the law-giver.

[51] It would appear in this regard that the registration process is imbued with some enzymes of metamorphosis. I say so for the reason that the award comes to the desk of the registrar as such, namely, an award. Immediately it is registered, it changes form

<sup>5</sup> *Ibid* para 28.

and character. It becomes translated instantaneously from being an award to becoming a fully-fledged order of the Labour Court - no more or less.

[52] According to my research, there is no other mode or method by which an award from the Office of the Labour Commissioner may be 'converted' into an order of the Labour Court, save having same registered. The registration process is provided for only in s. 87(1)(b), quoted above. The section does not provide or envisage a situation where a party would make an application, in the conventional sense, namely, by application with a notice of motion, accompanied by an affidavit in order to have the award become an order of court.

[53] It is for the following reasons that I hold the respectful view that other than s. 87(1), there is no other mode provided in the scheme of the Labour Act for the translating of awards into fully fledged orders of this court.

[54] In this regard, one may refer to the case of *Potch Speed Den v Rajah*<sup>6</sup> where Zondo JA stated the following: 'a litigant who finds himself in a position where he seeks to appeal an arbitration award which has been made an order of Court should first seek to have the order of this Court making the award an order of Court rescinded or set aside and then appeal to this Court or apply to this Court to review and set aside the award or as the case, may be.'

It must be noted that in that case, the learned Judge was dealing with a matter brought to the labour court on all appeal and not for rescission as in the current matter. In view of that consideration, hence reasoning does not apply in the instant case in my considered view.

[55] Such scenario, where one would first have to apply to set aside the order making the award an order of court before dealing with the merits, is in my view, not applicable to the present case. It is clear that the our Legislature did not create another route by which awards from the Labour Commissioner, could by a process of metamorphosis become orders of court, save s. 87.

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<sup>6</sup> (1999) 20 ILJ 2676 (LC).

[56] I am of the considered view that there was a policy reason for our Legislature, in its manifold wisdom, not to have done so. This, in my considered view, lies in and informed by the time and expense that the process of application for the award to be made an order of court might have required, particularly from employees, who in many cases would have been dismissed and rendered impecunious thereby.

[57] There is a further twist in this tale and it is this – where the award is made an order of court pursuant to an application, it would mean that a party who wishes to rescind the order, after it has been made an order of court, would have to first move an application to set aside the order making the award an order of court. It would only be after succeeding in that initial application that the party could then challenge the propriety of the order proper, namely by alleging that it was granted in circumstances that render it liable to rescission in terms of rule 16. These multiple applications would not have been envisaged by the Legislature, as they would be circuitous, time consuming and expensive, hence the convenient, cheap and effective manner of registering the award with the registrar of this court provided by rule 87(1)(b) above.

[58] The possible situation where an application, and where the reasoning of my learned Brother could possibly apply, would be cases of private mediation which are provided for in Part D of the Labour Act and regulated by rule 13 of the Labour Court rules. In such cases, it is clear that the arbitration in question, would have been taken outside the realms of the Office of the Labour Commissioner, meaning that it would not have been submitted to the Office of the Labour Commissioner for purposes of arbitration. In that scenario, there is no other manner in which the award may be made an order of court, coming as it does, outside the framework of the Office of the Labour Commissioner and at the express behest of the parties themselves.

[59] For that reason, an application would then be necessary to make the award born out of a private arbitration an order of court and the entire process would then be explained in an affidavit. This process makes sense to me for the reason that persons

who would opt out of the mechanisms provided by the Office of the Labour Commissioner, would be people with the means as they can be able to afford the services of a private arbitrator, which normally does not come cheaply. For that reason, they would easily afford making an application for their 'externally created award' to be formally made an order of court through an application.

[60] In the premises, I come to the conclusion that there is nothing in the wording of the provisions of rule 16, whether subrule (1) or (5), that would serve to exclude a party from approaching this court if the order they seek to rescind or set aside had been made an order of court via registration by either one of the parties or the Labour Commissioner as provided in s. 87(1)(b) of the Act.

[61] For the foregoing considerations, I am of the considered that there is nothing untoward in the applicant bringing this application in terms of rule 16 merely by reason that the order sought to be rescinded and set aside, was registered with the court and thereby underwent a translation from being an award to being an order of court.

[62] I am acutely aware that the respondent, for its position relied on the reasoning in *Sheelongo* for its argument but find that the situation canvassed in *Sheelongo* may only apply to cases of private arbitration but cannot serve to constitute a bar to a party seeking rescission in terms of rule 16, as long as the jurisdictional facts bringing the matter within the purview of the said rule are met. I am accordingly of the view that this court is properly clothed by the Legislature with the jurisdiction to deal with the application for rescission in terms of rule 16(5).

[63] I am fortified in this conclusion by a judgment of Angula DJP, which is hot from the oven, as it were.<sup>7</sup> In that case, the Minister of Urban and Rural Development approached the High Court to set aside an award that had been registered in terms of the Labour Act. The learned DJP, in his erudite judgment, held that the Minister was

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<sup>7</sup> *Minister of Urban and Rural Development v The Town Council of the Municipality of Grootfontein* (HC-MD-CIV-MOT-GEN-2019/00100) [2019] NAHCMD 204 (18 June 2019)

barking the wrong tree in approaching the High Court in terms of rule 103 of the High Court rules. It was his view that the Minister should have had recourse to rule 16 of the Labour Court rules in order to rescind the order in question. Like in the present case, the Minister had argued that the order was void from the beginning and ought to be rescinded.

[64] From the applicant's founding affidavit in the present matter, the award came to its knowledge on 10 May 2017. This is so despite the fact that the return of service filed on the court file and marked as annexure "HT2", indicates that the applicant had only been served with the award on 28 June 2017. The award was subsequently registered with the Registrar of this Court on 09 June 2017. The applicant then instituted these proceedings on 09 May 2018.

[65] Having regard to the foregoing, it appears to me that this application for rescission was therefore brought within one year of the applicant becoming aware of the defects mentioned in Rule 16(5). Therefore, while I agree with Mr. Phatela, that other avenues were also available to the applicant to challenge the decision of the arbitrator and ultimately the court order, the applicant cannot be faulted for opting for the avenue they chose, namely, rule 16(5).

#### The merits

[66] I now turn to deal with the application on its merits, namely, to consider whether the applicant is entitled to the order it seeks. This is after finding that the applicant was not offside in bringing the matter under the rubric of rule 16(5). I proceed to do so presently.

#### *Notice of the hearing of 21 April 2017*

[67] In the court order, the arbitrator narrates the attempts he made to ascertain whether any representative of the applicant was going to attend the hearing. He was

apparently satisfied that the notice of hearing was sent via facsimile transmission to the applicant to the facsimile number 061-298-2227 and that a staff member of the Labour Commissioner received confirmation of receipt of the said transmission by a certain Adeline at the offices of the applicant. He further states that he made phone calls and a lady whose identity he does not disclose, indicated to him that the notice in question was received and that she had no knowledge as to who would be appearing. He was thus satisfied that the notice was received and, armed with that information and assurances, proceeded to hear the matter and granted the relief sought by the respondent.

[68] The applicant explains that none of its employees received the notice and that the facsimile number referred to in the court order does not belong to the applicant's facsimile machine on the applicant's premises. Further, the applicant states that on the day of the hearing, the Chairperson of the Board was informed that the hearing between the parties was scheduled for that day and the latter instructed, which legal practitioners went to the office of the Labour Commissioner. Upon arrival at the Offices of the Labour Commissioner, the legal practitioners were unable to get hold of the arbitrator and as a result did not attend the hearing.

[69] It is the applicant's case that in terms of a resolution taken by the applicant's Board, and which resolution was circulated to all staff members via email, 'all legal cases being served onto TransNamib be delivered to the office of the CEO for correct action by the CEO, in consultation with Director Elize Angula'. It is the applicant's case that in the instant case, the terms of the resolution was not complied with.

[70] In response, the respondent in his answering affidavit paras. 14.1.1 to 14.1.3 explains that in March 2017, he was called to collect his notice for the hearing of 12 April 2017. Upon receipt of his notice, he made a copy and in the presence of Messrs. Ihuhua and Moetie (who deposed to confirmatory affidavits in this regard) gave same to Ms. Tjaronda. She according to him, hurriedly took the notice and left. At the time, she

was applicant's company secretary. Needless to say, Ms. Tjaronda has denied receiving this notice.

[71] I am of the considered view that because the applicant did not file its replying affidavit, the disputes that arise in this connection, in this matter, and which are factual, should be determined in favour of the respondent in line with the *Plascon Evan's* rule and the further authorities Mr. Phatela referred to in his additional heads of argument. I accordingly cannot be satisfied that the applicant did not receive the notice as it claims in the light of the responses by the respondent in this matter, which remain unanswered by the applicant and should therefor stand.

#### *Ministerial consent/approval*

[72] Section 22(3) of the State Owned Enterprises Governance Act, 2 of 2006 provides that –

'(3) The remuneration and other service benefits of the chief executive officer and other management staff of a State-owned enterprise must be determined by the board of the State-owned enterprise with the concurrence of the portfolio Minister, with due regard to any directives laid down by the Council under section 4.'

[73] It is the applicant's case that, although applicant entered into an employment contract with the respondent, the remuneration and service benefits agreed to therein were not agreed to by the Minister of Works and Transport. As a result such remuneration and service benefits are ultra vires the State Owned Enterprises Governance Act and thus null and void from the instance.

[74] The respondent's evidence was that his contract of employment was signed on 07 August 2014. That, even if the State Owned Enterprises Act applied to him, the applicant only raised the issue of ministerial approval after the matter was referred to the Labour Commissioner. The employment contract was signed by the Chief Executive Officer and therefore there is nothing sinister about the signatories to the contract.



[75] Although the respondent may be correct in his views, and I make no judgment thereon, the statutory requirement of Ministerial approval cannot be ousted by an agreement between the parties. In *Minister of Regional and Local Government, Housing and Rural Development v Northland Development Project Ltd and others* (I 1119-2009) [2013] NAHCMD 145 (31 May 2013), the Court held as follows:

‘There are, however, certain recognised exceptions to the general rule in our law. One of those exemptions is that non-compliance with a statutory requirement, may render invalid not only the underlying agreement but also the real agreement. Whether this is so or not in any given case depends on the intention of the legislature.’

[76] In terms of s 22 of the State Owned Enterprises Governance Act, the remuneration of the respondent was to be determined by the Board with the concurrence of the Minister of Works and Transport. It would appear from para. 30.2 that the Board determined the remuneration and service benefits, but same were not done ‘with the concurrence of the portfolio Minister’. The non-compliance with s 22 of the State Owned Enterprises Governance Act, would ultimately go to the question of the validity of the agreement, the very agreement, the terms of which were seemingly enforced by the Court Order.

[77] In *Luderitz Town Council v Shipepe*,<sup>8</sup> Smuts J was faced with a situation where legislation requiring the Minister’s approval but had not been obtained. He reasoned thus:

‘The legislature made a choice in requiring the ministerial approval as a requisite for the validity of the terms and conditions of employees of local authorities. Effect must be given to that legislative choice in providing for ministerial approval for the validity and conditions of employment (and in this instance benefits), given by local authorities. Terms and conditions (and in this instance benefits), given by local authority councils without ministerial approval which is a prerequisite for their approval, would in the absence of that approval be to that extent

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<sup>8</sup> 2013 (4) NR 1039 (HC) para 22.

be invalid and unenforceable as being in clear conflict with the wording of s 27 of the Local Authorities Act.'

[78] On the above authorities, I am of the considered view that the legislature made certain prerequisites for the validity of remuneration of the respondent. It appears that in granting what the arbitrator found was due to respondent, ministerial approval had not been obtained. For that reason, it would appear to me that this court must not part company with such authoritative and compelling authorities on the proper approach to such issues in this jurisdiction. In the premises, the award, subsequently made an order of court was, on the authorities thus void from the beginning and thus unenforceable. It is accordingly consigned, in my respectful view, to the pigeonhole of invalid awards from the instance. This is within the meaning of rule 16(5) as canvassed earlier.

[79] Whatever compunctions the court may have, it would be precipitous and in particular, a violation of the doctrine of separation of powers for the court to recognise and give effect to an act that appears to have been done in contravention of a legislative enactment. The Minister's imprimatur of some sort, is required for the validity of the remuneration of the respondent. Since it appears that same was not obtained, it appears to me that a case has been made out for the rescission of the arbitrator's award, and by extension, the court's order, for non-compliance with what appear to be a clear legislative requirement in this matter. A case for rescission on the basis of the act being invalid from the instance has clearly been made out in my considered opinion.

#### *The respondent's bonus*

[80] In this connection, it was argued that the respondent was not entitled as of right to the payment of the amount of N\$ 200 000 that the arbitrator awarded in respect of the bonus. This amount was provided for in clause 7.7 of the employment agreement. In this regard, Mr. Tjombe argued that the amount due was in a sense discretionary and was dependent on the applicant's performance, which the arbitrator would not have known of and the company's performance as well. The payment was also subject to the

Board's approval, having had all the relevant information before it. There is no evidence that these considerations were taken into account by the arbitrator in arriving at the award in respect of the bonus.

[81] It becomes clear in my view, that the award made in respect of the bonus was not properly made and would thus fall within the rubric of one granted by mistake. It is the applicant's board which does the assessment, both of the applicant's performance and the company's performance to decide on the amount of bonus the respondent would be entitled to. What he was entitled to as of right, Mr. Tjombe, argued, was only a third of the amount awarded, namely, N\$ 66 000. To this extent, I am in agreement that the award was in this regard also made as a result of a mistake on the part of the arbitrator. Had the applicant been properly alerted of the arbitration, these are matters the arbitrator may have been made wise about.

[82] I am acutely aware that the respondent correctly argued that the applicant did not file a replying affidavit and that as such, the version of the respondent must stand. I agree generally speaking that the position contended for is correct. The issues that have led to the decision, especially regarding the applicability of the State Owned Enterprises Act to the applicant and the terms of his employment are legal issues and not factual ones. As such, the failure to file an affidavit does not affect them in my considered view.

### Conclusion

[83] In view of all the matters that I have stated above, I am of the view that the applicant has made out a good case for rescission at two the levels of voidness from the instance and mistake. These, as seen above, are legal issues and not necessarily factual ones. I accordingly find that the applicant is entitled to the order for rescission that it seeks in this application.

### Costs

[84] Ordinarily, this court does not make an order as to costs. This is because of the provisions of s 118 of the Labour Act, which provide that: 'Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'

[85] The conduct of this matter by the applicant has been deplorable, incautious and insensitive, both to the court and the respondent. This indictment, must not be seen as a reflection on the legal representatives of the applicant but a pointer to problems within the applicant, as Mr. Tjombe also threw his hands in despair when he moved the failed application for a postponement discussed earlier in this judgment.

[86] In this regard, the respondent, who was dragged to court on this matter, has been left in the lurch with a favourable order that he has not been able to enjoy for many months because of proceedings launched against him which the applicant appears to have developed some inertia in pursuing with the requisite haste. The non-compliance with court orders and numerous postponements, which would be expected to have hit the applicant hard in the pocket as he has retained counsel, should not be shied away from and merely viewed as being part of the game. To do so would be unjust and unfair as the respondent is entitled to have his rights accorded due respect and not treated with levity, and this is so regardless of whether he is successful or not at the end.

[87] It must be mentioned in this regard that the applicant, although promising to do so, failed to file its replying affidavit since June 2018, resulting in the matter being postponed to enable the applicant to do so. This never materialised. Furthermore, an application that had been launched by the applicant for rescission, eventually never saw the light of day after the rule nisi issued in connection therewith was discharged as a result of non-activity in the matter by the applicant.

[88] In order to mark this court's disapproval of the applicant's conduct of this matter, it appears condign that the applicant must be ordered to pay the costs incurred by the

first respondent. Perchance, entities in the place of the applicant will learn that labour matters, which bring about a large degree of consternation and uncertainty to an individual, should, regardless of the merits or demerits, be litigated humanely, justly and fairly.

#### Order

1. The application for rescission in terms of Rule 16(5) is upheld.
2. The award issued by the second respondent dated 10 May 2017 is hereby rescinded and set aside.
3. The matter is referred back to the Office of the Labour Commissioner to commence de novo and if it reaches arbitration, it should be allocated to another Arbitrator.
4. Applicant is ordered to pay the costs of the respondent as occasioned by the employment of one instructed and one instructing legal practitioner.
5. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku  
Judge

## APPEARANCES:

APPLICANT: N. Tjombe  
Of Tjombe Elago Law Firm Inc.

1<sup>st</sup> RESPONDENT: T.C. Phatela  
Instructed by: Katjaerua Legal Practitioners