

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING IN TERMS OF PRACTICE DIRECTION 61

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| Case Title: Lesilia Elias and Bank of Namibia Labour Commissioner | Case No.: INT-HC-VARJDGORD-2023/00267 HC-MD-LAB-APP-AAA-2020/00043 Division of Court: High Court (Main Division) Date of hearing: 3 November 2023 |
| Heard before: Honourable Lady Justice Rakow | Delivered on: 24 November 2023 |
| Neutral citation: <i>Elias v Bank of Namibia</i> (HC-MD-LAB-APP-AAA-2020/00043) [2023] NALCMD 56 (24 November 2023) | |
| IT IS ORDERED THAT: 1. The application is dismissed. 2. There is no order as to costs. 3. The matter is finalized and removed from the roll. | |
| Reasons for orders: | |
| RAKOW J: | |

Background

[1] Ms Elias, the applicant, was employed by the first respondent, Bank of Namibia. She started her employment on 15 April 2002 and was dismissed by the first respondent on 1 April 2016. She then, after her dismissal, referred a claim of unfair dismissal on 7 June 2016 to the second respondent for adjudication. She sought redress for compensation for loss of income and in addition, to be reinstated.

[2] On 28 April 2017, approximately 10 months after the referral of the dispute, the arbitrator issued her award on 28 April 2017. The arbitrator found that the first respondent's dismissal of Ms Elias was substantively and procedurally fair. Ms Elias noted an appeal on 02 March 2018 against this arbitration award. The appeal was noted out of time, however, the Court on 15 August 2018, condoned the late noting of the appeal and reinstated her appeal. The appeal was argued on 29 March 2019 and the Court upheld Ms Elias appeal, set aside the arbitration award and in addition found that the first respondent unfairly dismissed her.

[3] On 28 May 2019, the first respondent applied for leave to appeal to the Supreme Court. That application was however, only heard during the following year, 2020. On 15 October 2020, the first respondent was granted leave to appeal to the Supreme Court against the Court's order dated 19 May 2019. Ms Elias opposed the appeal.

[4] The first respondent's appeal then lapsed on 24 February 2021. Ms Elias thereafter approached the Registrar's office, who issued out a writ of execution against the movables of the first respondent. The first respondent subsequently filed an application to this Court to set aside the writ of execution. Ms Elias did not oppose such application; the writ of execution was set aside and the first respondent applied for condonation and reinstatement of its lapsed appeal in the Supreme Court. The condonation and reinstatement application were set down for argument on 8 May 2023.

[5] At the said hearing, the first respondent withdraw its application, and costs were awarded against it. Subsequent to the withdrawal of the appeal, Ms Elias brought a rule 103(1)(c) application to this Court in order for the Court to supplement the order of 19 May 2019.

The court order

[6] on 13 May 2019 this Honourable Court ordered that:

- '1. The Arbitration award issued by the arbitrator on 04 April 2017 is hereby set aside.
2. The appeal succeeds as the dismissal was unfair and without valid reasons.'

[7] The order that is now sought reads as follows:

'(a) That the order granted on 13 May 2019 by His Lordship Mr. Justice Cheda be amended with the insertion of the following order: 'That the Applicant be compensated for loss of income as from date of dismissal to 28 April 2017, less any monies that the Applicant received from the First Respondent.

(b) Alternatively, and in the event that the Honorable Court is not inclined to grant the Applicant compensation from date of dismissal to 28 April 2017, that the matter be referred back to the arbitrator, or alternatively that a new arbitrator be designated by the Second Respondent, to only arbitrate on the issue as to how much compensation the Applicant is entitled to receive from the First Respondent.'

Arguments by the parties

[8] On behalf of the applicant, the Court was requested to determine the dispute in a manner it considers appropriate and in this respect to award Ms Elias compensation for her loss of income from date of dismissal, being 1 April 2016 to 28 April 2017, which is the date of the arbitration award. Annexure "LE 7" to Ms Elias's replying affidavit sets out her monthly salary she received from the first respondent, which is N\$20 300.

[9] The only dispute between the parties relates to the issue as to whether the court did in fact exercise its powers in terms of s 89(10) of the Labour Act 11 of 2007 (the Act). It is argued by the applicant that the Court did not at all exercise any of the powers as set out in s 89(10) of the Act. The Court set aside the arbitration award on the basis that the arbitrator decision was based on the wrong facts, as the arbitrator failed to deal with the evidence canvassed by the parties. In crux, the Court dealt with the grounds on which the appeal was based. However, notwithstanding the appeal succeeding, did the Court deal with any of the consequential reliefs as provided in the Act.

[10] On behalf of the first respondent, it was argued that the applicant made the application for the variation of the order of this Honourable Court some 4 years after the initial order was issued. In paragraph 18 of her founding affidavit, the applicant explains that:

‘The Supreme Court, however, intimated to my legal practitioner of record during his address, that the order of 13 May 2019 could not be enforced in its current form. This is the point in time I realized that the judgment is inexecutable.

[11] This is the extent of her explanation and according to the first respondent, not sufficient to explain the delay and the application was therefore, not made within a reasonable time.

[12] It is also pointed out by the first respondent that it is implausible that the applicant only knew that the order of 13 May 2019 is inexecutable at the date of the hearing of the appeal in the Supreme Court (i.e. 8 March 2023). This is so because the first respondent precisely set that out in its application to set aside the writ of execution that the applicant inexplicably obtained. That was on 8 July 2021 – some two years prior to the launching of this application for the variation of the order. In that application, the first respondent’s deponent stated:

‘12. The Labour Court’s order...is vague: it does not order the reinstatement, alternatively the re-employment of the first respondent or the payment of any compensation and or damages, to the

first respondent.’

[13] It was further argued that in any event, the order of 13 May 2019 was not ambiguous. There was no compensation ordered. The applicant could have – and should have – taken further steps to protect her purported interest at the time when the order was issued or soon thereafter. She had the option to seek a review of the order, appeal or counter-appeal on the back of the first respondent’s appeal to the Supreme Court, or she could have sought a variation of the order in the same court. She elected not to do so.

[14] On behalf of the first respondent, rule 103 of the Rules of the High Court, in terms of which this application is brought, requires that the application be brought within a reasonable time. In the circumstances of this matter, the application, which has been brought after the passing of more than 4 years since the order sought to be varied was granted, is not only unreasonable, but an abuse of the court process and offensive to the rights of the first respondent.

Legal considerations

[15] Rule 103(c) reads as follows:

‘103. (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time rescind or vary any order or judgment –

(a) . . .

(b) . . .

(c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission;’

[16] Section 89(10) of the Labour Act 11 of 2007 says the following as to what needs to happen when a decision is set aside on appeal. It reads as follows:

‘(10) If the award is set aside, the Labour Court may –

- (a) in the case of an appeal, determine the dispute in the manner it considers appropriate;
- (b) refer it back to the arbitrator or direct that a new arbitrator be designated; or
- (c) make any order it considers appropriate about the procedures to be followed to determine the dispute.'

[17] Parker AJ says the following in *Gibeon Village Council v Development Bank of Namibia & 3 Others*¹ regarding the reasonable time requirement. He explains that:

'(w)hen an enabling Act or a rule made thereunder prescribes that something may be done 'within a reasonable time', the rule does not give an interested person unbridled licence to act any any time that that person pleases. The words 'within a reasonable time' is meant to instill a sense of urgency in the person involved who wished to act. And whether an application in terms of rule 103(1) has been brought within 'a reasonable time' is a question of fact, and applicant bears the onus to place before the court cogent and sufficient evidence that the application has been brought within a reasonable time.'

[18] In *Ledwaba n.o. v Mthembu and 5 Others: in re Mthembu v Makume and 3 Others*² the following was said regarding reasonable time:

'Unlike rule 31(2)(b), rule 42, similar to the common law, does not specify a period within which a rescission application in terms thereof should be launched. However, a rescission application in terms of rule 42 or the common law must be launched within a reasonable period. What is a reasonable period depends upon the facts of each case. The purpose of rule 42 is to correct expeditiously an obviously wrong judgement or order.' (Rule 42 of the South African High Court rules reads similarly to our rule 103).'

¹ *Gibeon Village Council v Development Bank of Namibia & 3 Others* (HC-MD-CIV-MOT-GEN-2019/00329) NAHCMD 189 (27 October 2020).

² *Ledwaba n.o. v Mthembu and 5 Others: in re Mthembu v Makume* Unreported case in the High Court of South Africa Gauteng Local Division, Johannesburg Case no: 25312/2016 Handed down 4 November 2021.

Conclusion

[19] The applicant came to this court with an application under rule 103(2) for the amendment of an order of Justice Cheda given in 2019. It is four years later and the court must come to a conclusion as to whether it is a reasonable time or not from when this order was granted until an application to correct the said order was brought. It is clear from the papers that the applicant should at least by 2021 when the application for the cancellation of the warrant of execution was brought, have realised that the order lacks certain remedies which would have allowed her to enforce an award in her favour. I am of the opinion that the long delay in bringing the rule 103(2) application was not sufficiently explained and for that reason the application will be dismissed.

[20] There will however, be no order as to costs as this is essentially a labour matter.

[21] In the result, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.
3. The matter is finalized and removed from the roll.

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| Judge's signature | Note to the parties: |
| | Not applicable |
| Counsel: | |
| Applicant | Respondents |
| T Kasita Instructed by T Nanhapo Incorporated, Windhoek | N Tjombe Of Tjombe–Elago Inc, Windhoek |