LABOUR COURT OF NAMIBIA: MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: LCA 13/2014

In the matter between:

AIR NAMIBIA (PTY) LTD **APPLICANT**

And

JONAS SHEELONGO **RESPONDENT**

Neutral citation: *Air Namibia v Sheelongo (*LCA 13-2014) [2015] NALCMD 14 (17 June 2015)

Coram: UEITELE,J

Heard on: 24 October 2014, 20 November 2014 & 03 February 215

Delivered on: 17 June 2015

Flynote: ***Labour law*** — Labour Act 11 of 2007, s 87(1)(b) — Interpretation of — The effect of making an arbitration award an order of the Labour Court.

Practice — Disobedience of an arbitration award - constitutes a practice that is not only inconsistent with the rule of law but - which subvert the rule of law- Court refusing to hear appeal

Summary: On 05 December 2013 the respondent referred a dispute between him and the applicant, of alleged unilateral change of terms and conditions of employment and unfair labour practice to the office of the Labour Commissioner in terms of ss 82 (7) and 86 (1) of the Labour Act, 2007 read with Regulations 16(1), 18(1) and 20(1) of the Labour General Regulations.

The parties agreed to conduct the arbitration proceedings on the basis of the stated case. On 28 February 2014 the arbitrator delivered his award and he declared that the appellant had unilaterally changed the respondent's terms and conditions of employment. It is against that award that the appellant appeals. The appeal was lodged and filed on 28 March 2018.

On 09 June 2014 the Registrar of this Court informed the respondent that the arbitration award under case No. LC 78/2014 was filed with the High Court on 09 June 2014 and that from that date it became an order of this court. The court raised the question whether it has jurisdiction to hear the appeal once the arbitration award was made an order of Court. The respondent also raised a point *in limine* namely that the appellant is non-suited to proceed with its appeal because it has ignored the arbitration award which was made an order of court.

Held that from the moment that an arbitration award is made an order of court and so long as the order of this Court making such award an order of this court stands that order remains sun an **"**order". The consequences of that transformation are that it would not be competent for this court to hear an appeal or review against its own 'order'.

Held further that the arbitration award became an order of court not in pursuance of any application made by a party or the Labour Commissioner to this Court but by simply filling the award with this Court, this court is of the view that Rule 16 of the Labour Court Rules does not apply to circumstances where a party wishes to rescind an order which became an order of this Court pursuant to s 87(1)(b). Thus this court finds that Rule 22(1) of the Labour Court finds application in this matter.

Held furthermore that in certain circumstances it may be irregular for a litigant or the Labour Commissioner to file an arbitration award with the High Court within the thirty

day period within which the other litigant has the right to appeal against the award or to apply for the review and setting aside of the award. For these reasons this court invokes the powers vested in it in terms of Rule 103(1) and set aside the order making the arbitration award under reference number LC 78/14 an order of this court.

Held furthermore disobedience of an arbitration award with impunity constitutes a practice that is not only inconsistent with the rule of law but amounts to a practice which will subvert the rule of law.

Held furthermore for purposes of the point *in limine* raised by the respondent it is sufficient that the appellant has been and still is in willful default of the arbitration order and that it has not placed any exceptional circumstances before this court which will allow the Court to hear the appeal before it has purged its default.

ORDER

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1. The appeal is struck from the roll.

2. The appellant is granted leave to re-enroll the appeal once it has purged its default to comply with the arbitration award dated 28 February 2014.

3. If the appellant elects to re-enroll the appeal, it must do so no later than 30 days from the day it purges its default to comply with the arbitration award dated 28 February 2014.

JUDGMENT

UEITELE, J

A INTRODUCTION AND BACKGROUND

[1] On 05 December 2013 Mr. Jonas Sheelongo (I will, in this judgment, refer to him as the respondent) referred a dispute between him and his employer Air Namibia (I will, in this judgment, refer to Air Namibia as the appellant), of alleged unilateral change of terms and conditions of employment and unfair labour practice to the office of the Labour Commissioner in terms of ss 82 (7) and 86 (1) of the Labour Act, 2007[1] read with Regulations 16(1), 18(1) and 20(1) of the Labour General Regulations[2].

[2] On 09 December 2013 the Labour Commissioner in terms of s 85 (5) of the Labour Act, 2007 read with Regulation 20(2) of the Labour General Regulations, designated Mr. Eliaser Nekwaya to arbitrate the dispute which was referred to him. The Labour Commissioner informed the parties (i.e. the respondent and the appellant) that he has designated Mr Nekwaya (I will, in this judgment, refer to Mr Nekwaya as the arbitrator) to arbitrate the dispute and that the arbitration hearing would take place on 09 January 2014. On 03 January 2014 the appellant applied for a postponement of the arbitration hearing. The application for postponement was granted and the arbitration hearing was postponed to 23 January 2014.

[3] On 23 January 2014 the respondent applied for a postponement of the arbitration hearing. The application for postponement was granted and the arbitration hearing was postponed to 11 February 2014. On 29 January 2014 the parties agreed to, in terms of the Rule 20 (2) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner[3], proceed by way of a stated case. The arbitration proceedings proceeded on the basis of the stated case.

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1 Act No. 11 of 2007.
2 Labour General Regulations (Published by Government Notice No. 261 in *Government G*azette 4151 of 31 October 2008).
3 Published by Government Notice No. 262 in *Government G*azette 4151 of 31 October 2008.

On 28 February 2014 the arbitrator delivered his award and he declared that the appellant had unilaterally changed the respondent's terms and conditions of employment and made the following award:

> '1 respondent shall restore applicant in the position and contractual obligations held prior to the unilateral change in his terms and conditions of employment;
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> 2 respondent shall restore applicant's contractual obligations on or before 05 March 2014;
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> 3 there is no order as to costs.'

[4] It is against the above award that the appellant now appeals. The appellant noted its notice of appeal on 28 March 2014. In the Notice of Appeal the appellant states that it intends to appeal '*against the whole of the decision or order of the arbitrator…'* and also sets out the points of law on which the appeal is based. I will later return (if necessary) to the points of law and the grounds of appeal. On 02 April 2014 the respondent indicated that he will oppose the appeal and on 18 June 2014 he filed the grounds on which he opposes the appeal.

[5] The hearing of the appeal was set down for 24 October 2014. On that day i.e. the 24th day of October 2014 the respondent initiated an application by notice of motion in terms of which it sought to introduce further evidence in opposition of the appeal. The Appellant opposed the respondent's application and in order to give the appellant time to file its opposing affidavit I postponed the matter to 20 November 2014 for hearing the appeal. On 20 November 2014 counsel for the appellant indicated that he will not persist in his opposition of the respondent's application to file a further affidavit introducing additional evidence. I accordingly admitted into evidence the additional affidavit of the respondent.

[6] From the application and the supporting affidavit filed by the respondent on 24 October 2014, it appears (I say appears as there is no direct evidence that the arbitration award was filed on 28 February 2014) that on 28 February 2014 the Labour Commissioner through a Labour Inspector requested the Registrar of the High Court to file with the Labour Court the award made by the arbitrator on the 28th February 2014. On 09 June 2014 the Registrar of the High Court informed the

Labour Commissioner that the arbitration award was, in terms of s 87(1)(b) of the Labour Act, 2007, filed with the High Court on 09 June 2014 and it thus became an order of the Labour Court. I accordingly asked counsel to, in view of the fact that the arbitration award became an order of the Labour Court, address me on the question whether I, sitting as a Labour Court, have jurisdiction to hear appeals against an order of the Labour Court. Counsel requested time to consider that aspect and I accordingly postponed the hearing to 03 February 2015 to hear submissions on the question of the court's jurisdiction which I raised with them. Both counsel submitted heads of arguments and the court is indebted to their industry. I will now turn to consider the effect of making an arbitration award an order of the Labour Court.

B WHAT IS THE EFFECT OF SECTION 87(1)(b) OF THE LABOUR ACT, 2007?

[7] Section 87 of the Labour Act, 2007 reads as follows:

> '**87 Effect of arbitration awards**
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> (1) An arbitration award made in terms of this Part-
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> (a) is binding unless the award is advisory;
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> (b) becomes an order of the Labour Court on filing the award in the Court by-
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> (i) any party affected by the award; or
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> (ii) the Labour Commissioner.
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> (2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates of Interest Act, 1975 (Act 55 of 1975) unless the award provides otherwise'

[8] In the matter of ***National Housing Enterprise v Maureen Hinda-Mbazira***[4] Unengu, AJ said:

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4 An unreported judgment of the Labour Court case No.: LC 21/2011 delivered on 01 April 2011.

'…The problem the applicant has is the request to the Court in paragraph 2 to direct and order for the execution of the arbitration award in favour of the respondent, under case number CRWK 361/10 handed down on 09 February 2011, to be stayed/suspended pending the finalisation of the appeal noted by applicant against that award. *That award is no more an award of the arbitrator in the office of the Labour Commissioner, but an order of the Court as from 25 February 2011, when it was filed in terms of section 87(1)(b) of the Labour Act, (Act 11 of 2007)*… Therefore, I am inclined to agree with the sentiments expressed in the Labour case of *Potch Speed Den v Rajah* (supra) cited by counsel for respondent where it states that it is wrong to speak of an award once the award has been made an order of the Court, that is more accurate to speak of an order of the Court.'

[9] Mr. Barnard who appeared on behalf of the appellant, however, argued that s 87(1)(b) must be interpreted purposively and be read to mean that upon filing of the arbitration award, it becomes an order of the Labour Court for purposes of execution only. I, in detail quote from the submission of Mr. Barnard. He said:

'17 It is submitted that the meaning to be given to the provisions of section 87(1)(b) is that upon filing of the arbitration award, it becomes an order of the Labour Court for purposes of execution only. It is not a fully-fledged order made on the merits of the matter superseding the arbitration award. Such an interpretation would render the provisions of section 89 affording the right of appeal and the right to review meaningless and the provisions of section 87(1)(b) meaning which is not destructive of the other.

18 Furthermore, if the South African approach is to be applied, it would mean that once a labour award has been filed an order of the Labour Court comes into existence. The only avenue for redress would then be an appeal to the Supreme Court upon leave being granted. This appeal would then in effect be against the award of the arbitrator. It is submitted that this could not have been the intention of the legislature. The Labour Act, 2007 is aimed at promoting fair labour practices.

19 It is difficult to conceive any redress left to a party if the South African approach is followed. Once the labour award is filed and becomes an order

of the Labour Court there is no apparent basis upon which this order of the Labour Court could be set aside. The Labour Act, 2007 does not make provision for any such rescission. It is doubtful whether this could be done in terms of the common law.

20 The provisions of section 87(1)(b) create an artificial situation. An arbitration award "becomes" an order of the Labour Court where it is not in reality so. The award by the arbitrator is not an order of the Labour Court in the true sense. The provision appears to be aimed at assisting with execution only.

21 The Labour Act, 2007 is aimed at promoting fairness and protecting against unfair labour practices. This purpose of the Act would dictate an interpretation allowing redress against an arbitration award rather than applying an interpretation that limits the right of a party to have access to court.

22 It is therefore submitted that the approach of this Honourable Court in the ***Nedbank v Louw*** matter should be followed in that upon filing of the arbitration award it is elevated to the status of an order of the Labour Court for purposes of execution only.

23 A court should be prepared to read words into an act or to ignore certain words on rare occasions only. The general rule is that a court will not read words into an act or ignore words as it may be usurping the function of the legislature and making law, not interpreting it. However, there are recognized exceptions to the general rule:

23.1 Words may be added where it is necessary to do so to give the relevant section sense and meaning in its context;

23.2 Where to insist on the literal meaning of the words would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of the legislature; and

23.3 If insistence upon the literal meaning of words would lead to a result contrary to the intention of parliament as shown by the context or by such other considerations as the court is justified in taking into account.' See: ***Engels v Allied Chemical Manufacturers (Pty) Ltd***

***and Another* 1992 NR 372 (HC) at p. 380 and *Minister of Health and Social Services and Others v Medical Association of Namibia Limited and Another* 2012 (2) NR 566 (SC) at [100]**.

24 It is submitted that a court should be entitled to read into the provisions of section 87(1)(b) of the Labour Act 2007 the words "for execution purposes only".'

[10] Mr Maasdorp who appeared for the respondent at the hearing of this matter on 03 February 2015 argued that the ordinary meaning of the words in s 87(1)(b) must prevail and that it must be left to the legislature to revisit the statute to avoid the anomalies and hardship that follow from a literal interpretation. He therefore concluded by stating that since the court order (in terms of s 87(1)(b)) has not been set aside, this Honourable Court has no jurisdiction to hear the appeal. Mr Maasdorp, however, changed his mind and subsequent to the hearing submitted (with the permission of the appellant and the court) an additional note in which he argued that:

'3 …a literal interpretation of section 87(1)(b) may give rise to more than mere anomaly but to an absurdity and should therefore not be adopted.

4 'Anomaly' is defined in the Shorter Oxford English Dictionary on Historical Principles, Third Edition, volume 1 at p 76, inter alia as "Irregularity, deviation from the natural order,…"

5 'Absurd' is defined at p 8 of the same text and volume as "Out of harmony with reason or propriety, in mod use, plainly opposed to reason…"

6 'Absurdity' is also defined in the 8th edition of Black's Law Dictionary at p 10 as "The state or quality of being grossly unreasonable; esp., an interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended and probably never considered."

7 Much has already been said by this Honourable Court (as set out in the heads already filed) about the obvious intention of the drafters of the Labour Act 11 of 2007 regarding speed and informality and protection of employees when it comes to dispute resolution. The additional burdens that will be imposed on parties, including potentially impecunious employees, to labour disputes

escalated from the Labour Commissioner's office to the Labour court, by the acceptance of the literal interpretation of section 87(1)(b), are results which could not have been intended by the legislature.

8 An example of the literal interpretation of the section operating contrary to the legislative intent appears from an attempt to reconcile such an interpretation with the intention behind section 89(6) of the Act. In the latter section the legislature attempts to free an employee who must perform under an arbitration award from the duty to do so while the employee challenges the award. Unlike an employer, the employee can focus solely on the challenge. If section 87(1)(b) is interpreted literally, an employer who was successful in arbitration could file that award with the Labour Court and at the very least introduce an additional and substantial hurdle for the employee. It is submitted this does not fit at all into the scheme and context of the Act and, in particular, is contrary to the legislature's intention gathered from the express language of Part C of Chapter 8 of the Act.

9 It is therefore submitted that the purposive interpretation adopted by Henning AJ at paragraph 7 in ***Nedbank v Louw***, unreported judgment in LC 66/2010 delivered on 30 November 2010[5], should be followed.'

[11] The starting point is to interpret the wording of s 87(1)(b). It has long been accepted that the correct approach to interpret any legal instrument is to give the words in that instrument their ordinary grammatical meaning. In the matter of ***Venter v R***[6] Innes, CJ held that:

'By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'

[12] The above pronouncements were approved by the full bench of this court in the matter of ***Van As and Another v Prosecutor-General***[7] Levy, AJ said:

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5 This judgment is now reported in 2011 (1) NR 217.
6 Venter v R 1907 TS 910 at 913.
7 2000 NR 271 (HC) at 278.

> 'It is true that a Court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislator or authors of document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention.'

[13] I find the arguments by both Messrs. Barnard and Maasdorp attractive but which I approach with great caution because what they are both asking is, in effect, that the Court must put words into the subsection which are not there. In the matter of ***Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another***[8] the Supreme Court cautioned that the function of a court is to interpret the law and not to make it. Du Plessis[9] puts it as follows:

> 'The interpreter judge is no legislator and must constantly remind himself of that. Adaptive interpretation is meant to make sense of the legislature's law as it stands and not to substitute the judges' law for it.'

[14] In the case of ***Engels v Allied Chemical Manufacturers and Another***[10] this Court[11] said:

> 'Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there . . .' The basic reasoning behind this approach is that by remedying a defect which the Legislature itself could have remedied the Court is usurping the function of the Legislature and making law, not interpreting it. And there are cases when the literal meaning of a statute may be departed from, where to insist on the literal meaning of the words would lead to an
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> > `absurdity so glaring that it could never have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other considerations as the Court is justified

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8 2012 (2) NR at 566 (SC).

9 Lourens du Plessis: *Re-Interpretation of Statutes* at 229.

10 1992 NR 372 (HC) or (1993 (4) SA 45.

11 Per Hannah J quoting from the judgment of Lord Goddard, CJ *in R v Wimbledon Justices; Ex parte Derwent* [1953] 1 QB 380 ([1953] 1 All ER 390 (QB).

in taking into account.'

[15] I am of the view that the question that I have to resolve here is, if I give the words in s 87(1)(b) of the Labour Act, 2007 their ordinary grammatical meaning would that lead to an absurdity so glaring that it could never have been contemplated by the Legislature, or would it lead to a result contrary to the intention of Parliament? I am of the further view that the answer to that question is in the negative. I say so for the following reasons, once an arbitration award has been made an order of Court, a change takes place in the legal status of the award. The award becomes an order of this Court like any other order of the Court, there is nothing absurd or anomalous about that transformation.

[16] Both Mr Barnard and Mr Maasdorp implored me to follow the decision of ***Nedbank v Louw***[12], (I will in this judgment refer to this matter as the ***Nedbank*** matter) and hold that the fact that an arbitration award has been transformed into an order of his Court, does not preclude this Court from hearing an appeal against the arbitration award or from reviewing the arbitration award. I pause here and observe echo what Unengu, AJ said in the ***National Housing Enterprise v Maureen Hinda-Mbazira*** namely that it is wrong to speak of an arbitration award once the award has been made an order of the Court, is more accurate to speak of an order of the Court.

[17] I am not sure whether the decision in the ***Nedbank*** matter was that the Labour Court has jurisdiction to hear an appeal against an arbitration award which has become a Court order. My doubts are based on the fact that, firstly the *dictum* of Henning, AJ on which both Messrs. Barnard and Maasdorp rely was expressed without him having heard arguments as to the status of an arbitration award once it has been made an order of Court and the consequences arising from that transformation. Secondly my understanding of the ***Nedbank*** matter is that the Court in that case found that the application to stay the arbitration award was filed before the award became an order of court and the relief [i.e. to stay the order of court] prayed for was thus incapable of being granted, the learned judge said:

'[3] The relief sought by the applicant reads:

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12 *Supra.*

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

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

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

[4] It will be noticed that the relief referred to above reveals a duality. The original prayer 1.1 is premised on the notion that when an appeal has been noted, the employer may apply for the award to be suspended. The proposed prayer 1.2 invokes the fact that the award had been filed and accordingly became an order of this court. If the applicant were dependent on the proposed prayer 1.2 it encounters the problem that the application for suspension was filed some 15 days before the award was filed and became an order of court. (See para 1 above.) The premature lodging of the application would *prima facie* be a nullity incapable of culminating in relief.

[18] Thirdly the court in the ***Nedbank*** matter found that the arbitration award was a nullity because it was granted outside the time limits stipulated in the Labour Act, 2007 and that it would have caused the applicant irreparable harm if it was not stayed. The court accordingly stayed the arbitration award and not the Court order. Fourthly the argument that the arbitration award is only made an order of Court for execution purposes only is pure conjecture and has no basis at all. I say so because s 87(1)(a) states that the award is binding on all the parties and s 90 reads as follows:

'90 Enforcement of awards

A party to an arbitration award made in terms of this Part may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of that person.'

[19] I therefore reiterate that it is not for the Courts to legislate or to attempt to improve on the situation achieved by Parliament in the language it has chosen in its

enactment. I must give effect to what the Act says and not to what I think it ought to have said. If there is a loophole in the Act and if that could lead to undesirable consequences (as argued by both Messrs Barnard and Maasdorp), then that is a matter for the Legislature. I am of the view that from the moment that an arbitration award is made an order of court and, so long as the order of this Court making such award an order of this Court stands that order remains sun an **"order"**. The consequences of that transformation are that it would not be competent for this Court to hear an appeal or review against its own 'order'.

[20] I accordingly echo the words of Zondo, J[13], when he said 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. Such an approach may be cumbersome, but I do not find anything anomalous or absurd with such an approach. Mr Barnard's argument that he does not see any *'…basis upon which this order of the Labour Court could be set aside. The Labour Act, 2007 does not make provision for any such rescission. It is doubtful whether this could be done in terms of the common law',* is unconvincing for the simple reason that the award was made an order of court in the absence of a party thereto.

[21] Despite my finding that once an arbitration award has been made an order of this Court and that this Court does not have jurisdiction to entertain an appeal against such an 'order', I am reluctant to order and will thus not order that the appeal in this matter be struck from the roll on the ground that the arbitration award was made an order of this Court and that this Court does not have jurisdiction to hear the appeal. My reluctance stems from the following. The arbitration award was handed down on 28 February 2014, the appeal against the arbitration awarded was noted and lodged with this Court on 28 March 2014. On 02 April 2014 the respondent indicated that he will oppose the appeal. On 22 May 2014 the appellant applied to the Registrar for the allocation of hearing date to hear the appeal. On 09 June 2014 the Registrar of this Court informed the respondent that the arbitration award under case No. LC 78/2014 was filed with the High Court on 09 June 2014 and that from that date it became an order of court. It furthermore appears that during the entire

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[13] In the matter of *Potch Speed Den v Rajah* (1999) 20 ILJ 2676 (LC).

period between 28 February 2014 and 09 June 2014 the respondent was oblivious of the fact that the Labour Commissioner had filed the arbitration award as contemplated in s 87(1)(b).

[22] Section 89(1) of the Labour Act, 2007 grants to a person who is a party to a dispute the right to appeal against an arbitration award within thirty days from the date on which the award was served on him, her or it. I am therefore of the view that in certain circumstances the procedure contemplated by s 87(1)(b) of the Labour Act, 2007 can only be resorted to after the expiry of the thirty days period contemplated in s 89(1) of the Labour Act, 2007.

[23] I am therefore of the further view that in certain circumstances it may be irregular for a litigant or the Labour Commissioner to file an arbitration award with the High Court within the thirty day period within which the other litigant has the right to appeal against the award or to apply for the review and setting aside of the award. It is irregular and an abuse of the process of this Court for a litigant or the Labour Commissioner to file an arbitration award with the High Court as contemplated in s 87(1)(b) of the Labour Act, 2007 once a litigant has lodged and filed a notice of appeal or has applied for the review and a setting aside of the arbitration award. Having said this I will briefly digress and consider what entails abuse of the process of the court.

[24] In the matter of ***Beinash v Wixley***[14]***,*** Mahomed, CJ quoted with approval from the judgment in ***Hudson v Hudson and Another***[15], where the following was said:

> 'When…the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

[25] The learned Chief Justice thereupon proceeded as follows:

> 'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in

[14] 1997 (3) SA 721 (SCA) at 734 - 735.
[15] 1927 AD 259 at 268.

general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective…'

[26] In my view the filing of an arbitration award in terms of s 87(1)(b) of the Labour Act, 2007 must have a legitimate purpose. Ordinarily, a litigant is of course entitled to execute and realize a judgment in its favour. The procedure contemplated in s 87(1)(b) of the Labour Act, 2007 is designed precisely to facilitate the protection of that right, but where the procedure is employed to thwart, frustrate and delay the pursuit of the resolution of a dispute that will constitute an abuse of the process of court. In this matter the letter from the Registrar indicates that the arbitration award was filed with the High Court on 09 June 2014. By that time the intention to appeal had already been given to the respondent and the appeal actually lodged and filed with this court. It cannot therefore be said that the process [i.e. of filing of an arbitration award in terms of s 87(1)(b)] was being utilized for a legitimate purpose.

[27] I have indicated above that Mr. Barnard expressed his doubts whether this Court has the powers to rescind or set aside an order which became an order of this court as a consequence of s 87(1)(b). Rule 16 of the Labour Court Rules deals with the rescission or variation of judgments or orders of this Court. That Rule reads as follows:

'16 Rescission and variation of judgment or order

(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 judgment 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.'

[28] It is common cause that the arbitration award became an order of court not in pursuance of any application made by a party or the Labour Commissioner to this Court but by simply filling 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 this Court pursuant to s 87(1)(b). I thus find that Rule 22(1) of the Labour Court finds application in this matter. Rule 22(1) of the Labour Court Rules reads as follows:

'**22 Applications of Rules of the High Court**

(1) Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in the High Court made in terms of section 39(1) of the High Court Act, 1990 (Act 16 of 1990) do apply to proceedings before the court with such qualifications, modifications and adaptations as the court may deem necessary.'

[29] Rule 103 of the High Court Rules provides as follows,

Variation and rescission of order or judgment generally

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) erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) in respect of interest or costs granted without being argued;

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

(d) an order granted as a result of a mistake common to the parties.'

[30] In the matter of ***Hanstein v Hanstein***[16] this court rescinded a judgment granted in the absence of a party where the plaintiff adopted a wrong procedure. I held, in that case, that where a party adopts a wrong procedure in applying for a default judgment that party erroneously *sought* the order or judgment. In the matter of ***Tshabalala and Another v Peer***[17] it was held that the judgment in the *De Wet case*[18] postulates proof of an irregularity as a prerequisite for the conclusion that a judgment was erroneously sought or granted. I have in this matter made the finding that filing an arbitration award as contemplated by s 87(1)(b) of the Labour Act, 2007 is an irregularity. For these reasons I invoke the powers vested in this court in terms of Rule 103(1) and set aside the order making the arbitration award under reference number LC 78/14 an order of this court.

C POINTS IN LIMINE

[31] At the hearing of this appeal Mr. Maasdorp raised two points in limine as regard the appeal. The respondent formulated his first point *in limine* as follows:

> 'The … appellant is non-suited to proceed with its appeal as it has, acting in bad faith, simply ignored a court order to reinstate the respondent to the position he occupied prior to the unilateral unauthorised change in the terms and conditions of his employment. The appellant has not applied for the suspension of its obligation to comply with the arbitration award that became a court order on its filing. If employers are able to ignore court orders with impunity, in particular where clear mechanisms

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16 An unreported judgment of this Court Case No. (I 483/2014) [2014] NAHCMD 340 (delivered on 07 November 2014).

17 1979 (4) SA 27 (T).

18 *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1041B.

exist for employers to seek leave from this Court to ameliorate any undue hardship that would follow upon having to comply with the arbitration award pending the outcome of the appeal, this will contradict the statutory scheme of the Labour Act for the speedy and inexpensive resolution of employment related disputes, and including but not limited to the dispensation created to protect employees in whose favour arbitration awards operate. For this reason parties it is submitted that the appeal must be struck from the roll and only reinstated for the determination of the merits once the appellant complied with the order or obtained a stay of execution.'[19]

[32] In response to the respondent's point *in limine* Mr. Barnard, on behalf of the appellant argued that the respondent's stance is self-serving and has no place in Namibian law which has a constitutional dispensation. He argued that:

'The relevant principle is the "doctrine of unclean hands". However the doctrine finds application only in circumstances where the conduct of an appellant is dishonest or fraudulent. It does not find application where the conduct is merely unlawful.'

[33] I now turn to consider the arguments of Messrs. Barnard and Maasdorp. It is common cause that, on 28 February 2014 the arbitrator made a finding in favour of the respondent and ordered the appellant to restore the respondent in the position and contractual obligations held prior to the unilateral change in his terms and conditions of employment and that the restoration must be effected on or before 05 March 2014. It is furthermore common cause that the appellant has not restored the respondent as ordered by the arbitrator and that it has not applied to the Labour Court for an order contemplated in s 89(7). Section 89(6) & (7) of the Labour Act, 2007 read as follows:

'(6) When an appeal is noted in terms of subsection (1), or an application for review is made in terms of subsection (4), the appeal or application-

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

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[19] The respondent than referred me to the following authorities. Labour Act, 11 of 2007 – s 87(1)(b); s 89(6)(b); s 89(7); s 89(8); *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC) at par [24]-[31]; *Hendrik Christian t/a Hope Financial Services v The Chairman of the Namibia Financial Institutions Supervisory Authority (NAMFISA) and Another* (A 244/2007) by Hoff, J delivered on 13 February 2009.

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

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

[34] The doctrine of 'unclean hands' was considered by the Supreme Court in the matter of ***Shaanika and Others v The Windhoek City Police and Others***[20] Writing for the Court O'Regan, AJA said:

'[27] The doctrine of 'unclean hands' appears to have originated as an equitable doctrine in England. As noted in a recent decision of this court, ***Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd***, the doctrine has largely found application in the area of unlawful competition law where its effect is that an applicant is prevented from obtaining relief where he or she has behaved dishonestly. Accordingly, in ***Black Range Mining***, this court refused to uphold a challenge based on the doctrine of 'unclean hands' in the absence of any evidence showing that the appellant had acted dishonestly or fraudulently. Although the court in ***Black Range Mining*** did not expressly say so, I have no doubt that in using the words 'dishonestly or fraudulently', it would have considered bad faith or *mala fides* in the conduct of litigation to be included within its formulation.'

[35] I therefore do not agree with Mr. Barnard that we are, in this matter dealing with the principle of 'dirty/unclean hands'. I say so for the simple reason that what the respondent is complaining about is the fact that the appellant has not complied with the arbitration award and has also not approached this Court for the arbitration award to be stayed pending an appeal noted against the award. In the matter of ***Sikunda v Government of the Republic of Namibia and Another (2)***[21] this Court said:

'Judgments, orders, are but what the Courts are all about. The effectiveness of a Court lies in execution of its judgments and orders. You frustrate or disobey a Court order you strike at one of the foundations which established and founded the State of Namibia. The collapse of a rule of law in any country is the birth to anarchy. A rule of

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20 2013 (4) NR 1106 (SC).

21 2001 NR 86 (HC) at 92D-E.

law is a cornerstone of the existence of any democratic government and should be proudly guarded.'[22]

[36] In the matter of ***Kotze v Kotze***[23] Herbstein, J said that it is a *'matter ... of public policy … that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.*' It is for these reasons that Froneman, J pointed out in ***Bezuidenhout v Patensie Sitrus Beherend Bpk*** [24] that:

'An order of a Court of law stands until set aside by a Court of competent jurisdiction. Until that is done the Court order must be obeyed even if it may be wrong (***Culverwell v Beira*** 1992 (4) SA 490 (W) at 494A--C). A person may even be barred from approaching the Court until he or she has obeyed an order of Court that has not been properly set aside ***(Hadkinson v Hadkinson*** [1952] 2 All ER 567 (CA); ***Byliefeldt v Redpath*** 1982 (1) SA 702 (A) at 714).'

[37] Hoff, J quoting from the English case of ***Hadkinson v Hadkinson*** [25] said:

'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham L.C., said in ***Chuck v Gremer*** (1) (Coop. temp. (1 Cott. 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

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22 Also see the case of *Hamutenya v Hamutenya.*
23 1953 (2) SA 184 (C).
24 2001 (2) SA 224 (E) at 229B-D.
25 1952 (2) All ER 567.

> Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.'

[38] I am conscious of the fact that the authorities I have quoted above relate to orders of court and that in this matter the appellant disobeyed an arbitration award. In my view it is immaterial whether what a person disobeys is a court order or an arbitration award; the principles apply with equal force to both court orders and arbitration awards. I say so for the following reasons: Speaking in the matter of ***Ex parte Attorney General: in re Corporal Punishment***[26] the late Mahomed, AJA (as he then was) said:

> 'The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.'

[39] Article 12 (1)(a) of the Namibian Constitution provides as follows:

> **'Article 12: Fair Trial**
>
> (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[40] It is common cause that the arbitration tribunals which made the arbitration award which the appellant disobeyed was establish in pursuance of Article 12(1)(a)

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[26] 1991 NR 178 (SC) at 179.

of the Namibian Constitution.[27]It thus follow that disobedience of an arbitration award with impunity constitutes a practice that is not only inconsistent with the rule of law but amounts to a practice which subverts the rule of law. I am aware of the fact that the barring of a litigant to seek redress in a Court of law, simply because he or she has failed to comply with an earlier order of Court, is not an absolute one. That much has been recognized by this Court in the case of ***Hamutenya v Hamutenya***[28] where Maritz, J quoted with approval from the case of ***Di Bona v Di Bona and Another*** [29], and said:

> 'The rule, however, that a person in contempt of Court will not be heard is not an absolute rule. This appears clearly from the judgments of Romer LJ and Denning LJ in ***Hadkinson's*** case and in this regard those judgments have been adopted by our Courts in ***Kotze's*** case supra, ***Clement's*** case supra, and in the decision in ***Byliefeldt v Redpath*** 1982 (1) SA 702 (A). In Hadkinson's case Romer LJ mentioned a number of exceptions to which he said the consequence of the refusal to hear a person in contempt is undoubtedly subject.'

[41] For purposes of the point *in limine* raised by the respondent it is sufficient that the appellant has been and still is in willful default of the arbitration award and that it has not placed any exceptional circumstances before me which will allow the Court to hear the appeal before it has purged its default. I now consider the issue of costs. I am not persuaded that in launching this application the appellant acted frivolously or vexatiously within the meaning of s 20 of the Labour Act. That being the case, I think it is fair and just that each of the parties pay their own costs.

[42] In the result I make the following order.

1. The appeal is struck from the roll.

2. The appellant is granted leave to re-enroll the appeal once it has purged its default to comply with the arbitration award dated 28 February 2014.

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27 See s 85(1) of the Labour Act, 2007.
28 2005 NR 76 (HC).
29 1993 (2) SA 682 (C) at 688.

3. If the appellant elects to re-enroll the appeal, it must do so no later than 30 days from the day it purges its default to comply with the arbitration award dated 28 February 2014.

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Ueitele SFI, Judge

APPEARANCES

APPELLANT	P Barnard Instructed By LorentzAngula Inc
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RESPONDENT	R l Maasdorp Instructed By Clement Daniels Attorneys