REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between: Case no: LC 108/2014(A)

CHRISTEL PATRICIA JOUBERT **APPLICANT**

And

SWAKOP URANIUM (PTY) LTD **1ST RESPONDENT**

GERTRUDE USIKU **2ND RESPONDENT**

Neutral citation: *Joubert v Swakop Uranium (Pty) Ltd* (LC 108-2014A) [2015] NALCMD 24 (04 September 2015)

Coram: GEIER J

Heard: **04 September 2015**

Delivered: **04 September 2015**

Reasons released: 22 October 2015

Flynote: Labour law—Arbitration—Review—Costs—Arbitration award under Labour Act 11 of 2007set aside on review by Labour Court—Court finding award tainted by bias and malice on the part of arbitrator—In application for review of award, aggrieved party also seeking award of costs *de bonis propriis* on attorney and client scale against arbitrator – arbitrator initially opposing such order and filing affidavit in support of opposition but withdrawing such opposition later—By acting with bias, arbitrator not acting in good faith and thus 'losing shield of immunity' conferred by s 134 of Labour Act 11 of 2007. By opposing costs order arbitrator bringing herself within ambit of s 118 of Act— In view of court's ultimate finding on

the merits on the applicants version and thus implicit in such finding – the arbitrators opposition having been withdrawn before the hearing - arbitrator's opposition on merits considered frivolous as contemplated by section 118 of the Act – Order accordingly granted that arbitrator pay costs of applicant in the review *de bonis propriis* on attorney and client scale up to the date of the withdrawal of her defence.

Summary: The facts appear from the judgment.

ORDER

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1. The second respondent's decision of 11 July 2014 setting the arbitration down for hearing on 22 July 2014 contrary to Rule 15 of the Conciliation and Arbitration Rules is hereby reviewed and set aside.

2. The second respondent's decision of 22 July 2014 dismissing the applicant's dispute referred to the Labour Commissioner on 19 November 2013 is hereby reviewed and set aside.

3. The second respondent is to pay the applicant's costs of the review application *de bonis propris*, on a scale as between attorney and own client, such costs to include the costs of one instructed- and one instructing counsel until date of withdrawal of second respondent's opposition on 17 August 2015.

4. The matter is referred back for continuation before another arbitrator.

JUDGMENT

GEIER J:

[1] The background in this matter has been sketched in the heads of argument filed on the applicant's behalf as follows:

'6. The applicant referred a dispute of unfair dismissal to the Office of the Labour Commissioner, Swakopmund complaining that the first respondent had dismissed her unfairly.

7. The Labour Commissioner appointed the second respondent to arbitrate the dispute.

8. The applicant is a layperson and unacquainted with the provisions of the Act and its Rules. She is not a member of any trade union and did not know any fellow employee working for the first respondent to ask for assistance in representing her.

9. The first respondent was in an entirely different position. It was represented by its Human Resources Official, Mr Hofni Shikongo, who was a labour consultant for many years and also a member of the Labour Law Committee of the Namibia Employers Federation. Furthermore, Mr Shikongo reported to Mr Percy McCullum, the Senior Human Resources Manager of the first respondent. Mr McCullum was the Senior Human Resources Manager at Namdeb in Oranjemund for many years before taking up similar positions with diamond mines in Botswana. He is vastly experienced in labour matters.

10. As a result the applicant approached Mr Frank Köpplinger of Köpplinger Boltman to assist her. Mr Köpplinger advised that an application in terms of section 86(13) of the Act be filed, applying for representation at the conciliation and arbitration hearings. Such application was duly filed.

11. The first respondent opposed the application for representation on the basis that the dispute was not complex or "legal technically".

12. At the conciliation proceedings on 20 January 2014 the second respondent immediately adopted Mr Shikongo's approach, namely that the matter was not complicated. Mr Shikongo objected to Mr Köpplinger's presence and he had to leave the meeting. The applicant's husband was not permitted to assist her.

13. The main thrust of Mr Shikongo's opposition to the dispute was that the applicant was not an employee of the first respondent and that the Act did not apply. The opposition was therefore based on the issue of jurisdiction.

14. Once again the second respondent, without more, adopted Mr Shikongo's view, i.e. that she did not have jurisdiction to hear the dispute. The second respondent advised the

applicant to withdraw the dispute and to institute her case in the High Court. The second respondent stated that the applicant should not have referred the matter to the Office of the Labour Commissioner. She had clearly exhibited pre-conceived ideas and had prejudged the issue during the conciliation proceedings.

15. The second respondent thereafter called Mr Köpplinger back into the meeting. Her view had now changed and she conceded that the issue is complex as it involves jurisdiction. The second respondent again stated that the applicant should withdraw the dispute and institute the matter in the High Court.

16. The conciliation proceedings were concluded on 20 January 2014.

17. The second respondent failed to provide the parties with an arbitration date despite letters by Mr Köpplinger and telephone calls by his office in this regard.

18. Mr Köpplinger was constrained to report the matter to the Labour Commissioner. It was only then that the second respondent, on 20 June 2014, provided the parties with a notice of set down for 4 July 2014.

19. Without hearing the parties on the application for representation lodged by the applicant, the second respondent determined such application and refused the applicant legal representation. Whereas her initial reason for ejecting Mr Köpplinger from the conciliation proceedings was that the matter was not complex, her later written reasons were the following:

> "Rufusing (sic) representation because the other party will be prejudiced, unless both parties are represented. Representation can only be granted if the other party agree to it. Otherwise not as the issue / dispute if representation granted will prejudice the other party if not represented."

20. Since the second respondent had clearly not applied her mind to the issue of representation and the requirements of section 86(13) of the Act, Mr Köpplinger addressed a letter to the first respondent's human resources manager, Mr McCullum, which read as follows:

> "We refer to the above matter and the arbitrator's formal ruling that legal representation will not be allowed at the arbitration proceedings and record that we

hold instructions to apply to the Labour Court for a review of her decision in this regard.

Kindly, therefore, indicate to us, as a matter of urgency, whether the parties agree to a postponement of the arbitration proceedings pending the outcome of the Labour Court Review.

We await your urgent respondent."

21. No response was received to Mr Köpplinger's aforementioned letter. He then advised that the applicant should file an application for the recusal of the second respondent on account of bias as well as an application for the postponement of the matter pending a review to the Labour Court of her decision to refuse legal representation.

22. Following the filing of the aforementioned applications Mr Shikongo wrote an email to Mr Köpplinger which read as follows:

"Dear Frank

Your letter dated 25th June 2014, regarding Case Number CRSW 129-13 refers; On behalf of Swakop Uranium, I would like to inform you that, your proposal of the arbitration proceedings postponement is accepted, until further notice from your good office again." (emphasis supplied)

23. Thereafter Mr Köpplinger wrote a letter to the second respondent:

"We refer to the above matter and advise that the parties have agreed for the matter to be postponed pending the outcome of a Review Application to be lodged at the Labour Court in respect of your refusal to allow legal representation for the Applicant."

24. Despite an agreement between the parties to postpone the matter pending the Labour Court review, the second respondent was having none of it. She insisted that the matter must proceed. She pretended that she had no discretion in the matter. The letter she subsequently addressed to Mr Köpplinger on 4 July 2014 reads as follows:

"I herewith acknowledge receipt of your letter dated 30 June 2014 informing me of an agreement on the postponement of the arbitration hearing pending the outcome of a

review application lodged at the Labour Court in respect of my refusal to allow legal representation.

The parties do not meet the requirements as per form LC 28 on the postponement of the matter hence the continuation of the matter as set-down

I hope you will find the above in order."

25. Despite concerted efforts by Mr Köpplinger to comply with the requirements expected from the second respondent for a postponement, all attempts failed. Through fallacious and confused reasoning, the second respondent stubbornly insisted that the arbitration must proceed. This was despite:

25.1 both parties agreeing to the postponement;

25.2 a formal application for postponement having been filed;

25.3 knowing that a review to the Labour Court was imminent.

26. The second respondent's above-mentioned attitude resulted in an arbitration hearing on 4 July 2014. The second respondent's attitude during those proceedings can be gleaned from the applicant's first review application.

27. When the second respondent asked Mr Shikongo whether he had agreed to a postponement, he opportunistically and dishonesty attempted to distance himself from the clear wording of his email.

28. The second respondent refused to consider the applicant's substantive application for a postponement. Her response was basically "Why should I?"

29. When the proceedings resumed at 14h30 on 4 July 2014 Mr Shikongo (having stated earlier that his witness would only be available at 16h00) informed the hearing that he had forgotten that he had to leave Swakopmund by 15h00. Without any application for a postponement by the first respondent and upon the mere request of Mr Shikongo, the second respondent promptly postponed the matter. That was after the applicant had struggled all morning to convince the second respondent to postpone the matter, despite an agreement between the parties and an unopposed substantive application for postponement.

30. The second respondent provided her confusing reasons on the application for postponement, the application for representation and the application for her recusal on 11 July 2014. Not surprisingly the second respondent:

30.1 Refused my application for representation on the basis that the first respondent, who was represented by persons experienced in labour matters, would be prejudiced if the applicant was also represented by a person experienced in labour matters;

30.2 Dismissed my application for her recusal on the basis that conciliation proceedings are private and confidential, off the record and without prejudice. The second respondent's reasoning seems to be that we could not refer to her statement during conciliation that she had no jurisdiction to hear the dispute and that I should withdraw same and institute my case in the High Court;

30.3 Dismissed the request for a postponement (despite an agreement to that effect as well as my substantive application for a postponement) by pretending that she had no discretion and by accepting, without more, Mr Shikongo's untruthful explanation why he had agreed to a postponement;

30.4 Justified ejecting the applicant's husband from the hearing by finding that the Act does not make provision for an observer and that Mr Shikongo had not agreed to his presence.

31. In the same ruling and without complying with rule 15 of the Rules Relating to the Conduct of Conciliation and Arbitration the second respondent (well knowing that I intended filing a review with the Labour Court) set the arbitration proceedings down for 22 July 2014 at 11h00 in Swakopmund.

32. The applicant filed her review application in the Labour Court on 17 July 2014. The applicant already stated the following at the end of her founding affidavit in the first review application under case no LC106/2014:

> "77.
> I point out that the second defendant is so eager to determine this matter before I get the opportunity to review her decisions that she ruled, in her reasons of 11 July 2014, annexure "CJ30" hereto, that the arbitration is set down for 22 July 2014 at 11h00. I am advised that this is entirely contrary to Rule 15, which reads:
>
> > "The Labour Commissioner must give the parties at least 14 days notice of an arbitration hearing on Form LC 28, unless the parties agree to a shorter period."
>
> The parties did not agree to a shorter period. Should the second respondent not indicate that she will not proceed with the arbitration on 22 July 2014 at 11h00, I have instructed my legal practitioners to apply to this court for an interdict on an urgent basis to prevent the arbitration taking place on that date and also to apply that the second respondent pays the costs of such application *de bonis propriis* on a scale as between attorney and client."

33. On 18 July 2014 and on the applicant's instructions Mr Köpplinger addressed the following letter to the second respondent:

"We refer to the Review application served on the Labour Commissioner's Office on 17 July 2014 on behalf of our client Mrs Joubert, the courtesy copy thereof faxed to your Walvis Bay office earlier today and the date set down for the arbitration to continue on, i.e. 22 July 2014, as referred to in your written ruling of 11 July 2014.

As pointed out in paragraph 77 of the founding affidavit to the review application, the contents that are incorporated herein by reference, the date set down for the continuance of the arbitration proceedings is contrary to Rule 15 that states that the parties must receive at least 14 days' notice of an arbitration hearing, on form LC28, unless the parties agree to a shorter period. Our client records that she did not agree to any shorter period. You also failed to provide our client with any LC28 form for the intended arbitration hearing on 22 July 2014.

As a result, the arbitration cannot take place on 22 July 2014.

You are, accordingly, requested to confirm that no proceedings will take place on such date, as a matter of urgency. Kindly note that should you fail to do so and/or intend to continue on such a date with the arbitration, we reserve our right as per our instructions to apply to the Labour Court for an urgent interdict to prevent this from happening, with a cost order against you personally *de bonis propriis* on a scale as between attorney and client.

We await your urgent response."

Such letter was forwarded to the Swakopmund as well as the Walvis Bay offices of the Labour Commissioner.

34. The second respondent did not favour Mr Köpplinger with the courtesy of a reply.

35. The applicant and her husband reside in Windhoek. For each hearing she had to travel to Swakopmund at her own expense.

36. Due to the defective nature and the manner in which the arbitration was set down for 22 July 2014, Mr Köpplinger's secretary, Ms Kleynhans, contacted the second respondent on 21 July 2014 in order to confirm that it would not be necessary for the parties to appear at the hearing. The second respondent was rude and impatient. She informed Ms Kleynhans that she would no longer take calls from Mr Köpplinger's office. She further informed Ms Kleynhans that rule 15 does not apply to her, but only to the Labour Commissioner and that she was at liberty to set the arbitration hearing down as she pleases.

37. Thereafter Mr Köpplinger wrote a further letter to the second respondent, as follows:

"Our letter of 18 July 2014 and the telephonic discussion between our Ms Kleinhans and yourself this morning refer.

In the aforementioned letter is it was succinctly pointed out to you that your purported notice of the arbitration hearing as contained in your ruling of 11 July 2014 is defective for a number of reasons, including and most importantly that the 14 day notice required by Rule 15 has not been complied with. The date set for the arbitration, namely 22 July 2014, is a nullity.

On writer's instructions Ms Kleinhans called you this morning to confirm that you will not proceed with the matter tomorrow, 22 July 2014, due to the defective notice. We

herewith record that your response was that Rule 15 refers and applies to the Labour Commissioner and not to yourself, who, as the arbitrator, can set the matter down as you please. You informed her that the matter will proceed tomorrow.

As you know, our client has to travel from Windhoek to Swakopmund for each appearance at her own expense. In the light of the pending review and your defective notice of the hearing, we have advised our client not to travel to Swakopmund.

Your above response is further proof of your bias against our client and amounts to malice. It is a clear indication that you are not performing your functions in good faith in terms of Section 134(c) of the Labour Act, 11 of 2007.

Be informed that should you proceed with the matter tomorrow, 22 July 2014, and make any adverse decision against our client, we hold instructions to also review such decision to the Labour Court and to pray for a cost order against you personally *de bonis propriis* on a scale as between attorney and client.

In such event our letter of 18 July 2014 and this letter will be annexed to the application for review in order to inform the Labour Court of your mala fide conduct." (emphasis added)

38. The second respondent did not reply to Mr Köpplinger's letter.

39 The applicant received a call from the second respondent on 22 July 2014 at 10h15 enquiring whether she will be attending the arbitration hearing. Shortly thereafter the second respondent dismissed the applicant's dispute.'

THE APPLICANT'S CASE ON THE MERITS

[2] As a result of this background and the history of this matter, the applicant contends that the second respondent's conduct, while presiding at the arbitration in this matter, was biased, malicious and reprehensible, as well as indefensible.

[3] It is on this basis that the applicant has then sought the review and setting aside the second respondent's decisions of 11th July 2014 and 22 July 2014, on the latter occasion of which, she then also dismissed the applicant's dispute as a result of her non- appearance.

[4] It was pointed out further that the first and second respondents had conceded the merits of the review.

[5] I therefore agree that, in the premises, a case in this regard has been made out and that the review relief sought by the applicant should be granted.

THE ISSUE OF COSTS

[6] The applicant is however not content with the reviewing and setting aside of the aforementioned decisions alone but also seeks a special punitive cost order against the 2nd respondent.

[7] The question which arises is twofold: one, whether or not the 2nd respondent has lost the shield of immunity afforded to arbitrators, in labour matters, in terms of section 134 of the Act, and, secondly, whether by opposing this matter up to a late stage, when her opposition was withdrawn, the applicant is still entitled to a costs order, in terms of section 118 of the Labour Act 2007.

[8] It should be mentioned at this stage that the 2nd respondent initially opposed the relief sought against her in that she filed a notice of opposition and also filed an answering affidavit in this regard. After the matter had been set down for hearing and also after the applicant had already filed heads of argument, the 2nd respondent withdrew her notice of opposition in this matter.

[9] From the findings that I have made above, and thus also through the granting of the main relief, namely that also the decision of the 2nd respondent, to dismiss the dispute on 22nd July, be set aside on the applicant's version, is the inherent finding that the second respondent conducted herself in the manner as alleged, namely that she acted with 'bias, with malice and in a reprehensible, as well as indefensible way'. It is because of this conduct, that she has lost the shield of immunity afforded to her in terms of section 134 of the Labour Act. [1]

[1] See in this regard : *Namibia Estate Agents Board v Like NO* 2015 (1) NR 112 where the court held at [77] to [79] : 'Bias – as a form of gross misconduct – also being indicative of malice towards the one or other party – in my view constitutes a valid basis for the granting of a *de bonis*

[10] The question thus remains whether a costs order should also attach in accordance with the provisions of section 118 of the Labour Act?

[11] Section 118 provides that *' … 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.'*

[12] It is clear that the second respondent, up to the date, that her notice of withdrawal of opposition was filed, on the 17th of August 2015, has prosecuted her case- and proceeded in defending the review application launched by the applicant. The question thus arises, whether or not her opposition, in the circumstances of this matter, can also be termed as vexatious or frivolous?

[13] Mr Dicks has submitted in this regard that the withdrawal was occasioned by technical motives and although no ground for the notice of withdrawal of opposition was formally provided, it was reasonable to infer that the withdrawal was effected for the sole reason to shield the 2nd respondent from the adverse cost order sought against her.

[14] It should further be mentioned that the legal practitioner acting on behalf of the applicant, Ms Kandjella, had written a letter to the court, copied also to the legal practitioners acting for the 2nd respondent, the Government Attorneys, on the 19th of August 2015, in which she advised that the applicant's legal practitioners would attend at court, in spite of the withdrawal, in their quest to pursue the adverse costs order sought against the 2nd respondent.

[15] As the basis on which the review application, on the merits, was granted, indicates that the court has found that the 2nd respondent's conduct in the arbitration was biased, it must be concluded, by necessary implication, that her defence in the

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propriis costs order. Bias also constitutes a valid basis for finding that the second respondent's actions, in the performance of her functions in terms of this Labour Act, were not performed 'in good faith'. This finding then also removes the shield of immunity as conferred by Section 134 of the Labour Act 2007 from the second respondent.'

review was also without basis, especially once it had been withdrawn, which scenario then brings the 2nd respondent within the ambit of the word 'frivolous' as contained in Section 118 of the Labour Act.[2]

[16] In such circumstances, a case for an adverse costs order against the 2nd respondent has been made out.

[17] As the 2nd respondent however did not persist with her opposition in this matter to the bitter end and also did not pursue such opposition up to- and on the date of the hearing, I am inclined only to grant to the applicant, the costs, on the scale as prayed for, up to the date of the filing of the notice of withdrawal of opposition, which was the 17th of August 2015.

[18] In the result, I therefore order that:

1. The second respondent's decision of 11 July 2014 - setting the arbitration down for hearing on 22 July 2014 - contrary to Rule 15 of the Conciliation and Arbitration Rules - is hereby reviewed and set aside.

2. The second respondent's decision of 22 July 2014 - dismissing the applicant's dispute referred to the Labour Commissioner on 19 November 2013 - is hereby reviewed and set aside.

3. The second respondent is to pay the applicant's costs of the review application *de bonis propris*, on a scale as between attorney and own client, such costs to include the costs of one instructed- and one instructing counsel until date of withdrawal of second respondent's opposition on 17 August 2015.

4. The matter is referred back for continuation before another arbitrator.

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[2] *Namibia Seaman and Allied Workers Union v Tunacor Group Ltd* 2012 (1) NR 126 (LC) at [20] – [24]

H GEIER

Judge

APPEARANCES

APPLICANT:	Mr G Dicks Instructed by Köpplinger Boltman Legal Practitioners, Windhoek