



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00100

In the matter between:

MINISTER OF URBAN AND RURAL DEVELOPMENT

APPLICANT

and

**THE TOWN COUNCIL OF THE MUNICIPALITY
OF GROOTFONTEIN**

1ST RESPONDENT

JOHN PULESTON

2ND RESPONDENT

KLEOPHAS GAINGOB

3RD RESPONDENT

PIETER KHOA

4TH RESPONDENT

EDGARS FRANCIS

5TH RESPONDENT

SETH GAWASEB

6TH RESPONDENT

SINVULA SMART

7TH RESPONDENT

ERASMUS MUUNDA

8TH RESPONDENT

SHILUNGA HAFENI

9TH RESPONDENT

ANGULA ABED

10TH RESPONDENT

MICHEAL NAIBAB KAYGEE

11TH RESPONDENT

STENLEY XOASEB

12TH RESPONDENT

ASSER AIDANA

13TH RESPONDENT

WILSON NGEAMA

14TH RESPONDENT

PATRICK FRANCIS

15TH RESPONDENT

DANIEL TSIBEB

16TH RESPONDENT

GERSON TJILEPA

17TH RESPONDENT

LAURENTIUS HOESEB	18 TH RESPONDENT
ALFEUS JOSEPH	19 TH RESPONDENT
PAULUS WIMMERT	20 TH RESPONDENT
JACKSON ELI	21 ST RESPONDENT
RUBEN ASHIPALA	22 ND RESPONDENT
EMGARDT MBAI	23 RD RESPONDENT
ASHLEY NGEAMA NGEAMA	24 TH RESPONDENT
EINO NTINDA	25 TH RESPONDENT
JOHN ARNOLD	26 TH RESPONDENT

Neutral citation: *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)

Coram: ANGULA DJP
Heard: 18 April 2019
Delivered: 18 June 2019

Flynote: Opposed motion – Jurisdiction of High Court to set aside a Labour Court order – Rule 16(5) and (6) of Labour Court Rules – Applicant has recourse to the Labour Court in terms of the Labour Court Rules rescind a Labour Court order – High Court does not have jurisdiction to set aside an Order of the Labour Court.

Summary: Prior to 2010, local authorities offered a remuneration package to its employees which included a five year bonus benefit – The benefit was subsequently abolished by notice in the Government Gazette, effective from 24 June 2010 – First respondent only stopped the benefit sometime after the time it ought to have abolished the benefit – Some employees, were aggrieved by this change – They approach the Labour Commissioner with a complaint of unfair Labour Practice – The Council and the employees then settled the dispute and the settlement agreement was made an award – The award was also subsequently made an order of the Labour Court in terms of Labour Court’s Rules, rule 87(1) – Pursuant to that Labour Court’s, trucks belonging to the first town Council were attached for purposes of sale in execution to satisfy the Order – The sale in execution was scheduled to take place on 4 April 2019 – In an bid to save the trucks from being sold in execution, the

applicant brought this application, to stay the sale in execution, and further to have the settlement agreement declared null and void as his (the applicant's) approval to approve the payment of the said benefit had not been obtained as required by s 27 of the Local Authorities Act 23 of 1992.

The respondents raised a point *in limine* – that is that this Court does not have jurisdiction to set aside an order of the Labour Court; and that the applicant did not have the *locus standi* in the dispute between the Council and the twenty-six respondents; and secondly, that applicant has no *locus standi*.

Held, High Court does not have jurisdiction to set aside an order of the Labour Court.

Held, the application in essence amounted to a rescission application to set aside an Order of a Labour Court, under the guise of an ordinary review application in the High Court.

Held, a rescission of Labour Court order in the present matter can be rescinded in terms of rule 16 of the Labour Court Rules.

ORDER

1. The application is dismissed.
2. The applicant is to pay the costs of respondents who opposed the application.
3. The order made by this court on 3 April 2019 suspending the sale in execution of the properties of the Council for the town of Grootfontein, is hereby uplifted.
4. The matter is removed from the roll and is considered finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] The applicant in this matter, the Minister of Urban and Rural Development launched this application on 3 April 2019, on an urgent basis seeking an order to stay the sale in execution of the property belonging to the council for the town of Grootfontein (the council), the first respondent. The sale in execution was due to take place on 4 April 2019.

[2] When the matter was called on 3 April 2019, the respondents had not filed their answering affidavits. In the circumstances, I thought it prudent to rather make an order suspending the sale in execution which was due to take place the following day. I further ordered those respondents who opposed the application to file their answering affidavits and thereafter for the applicant to file his replying affidavit. I then postponed the matter to 17 April 2019 for hearing. The order suspending the sale in execution removed the issue of urgency.

[3] Following the postponement, the respondents filed their answering affidavits and the applicant thereafter filed his replying affidavit.

Factual background

[4] It appears that it is common cause that prior to 2010 the local authorities offered a remuneration package to its employees which included a five year leave bonus benefit. Due to the concern regarding the affordability of the benefit which constituted a heavy financial burden on the local authorities, that benefit was abolished, through a notice published in the Government Gazette effective, from 24 June 2010.

[5] The bonus benefit ought to have been phased out over a period. However, it turned out the council did not take steps to phase out the bonus benefit. When the council stopped the granting of the said benefit, some of the employees, including the twenty-six respondents, became dissatisfied and lodged a complaint of unfair

labour practice against the council with the Office of the Labour Commissioner wherein they complained that the council refused to pay them their five years leave bonuses as well as money earned through overtime.

[6] The dispute was subsequently settled and the parties signed a settlement agreement which was made an award. The award was thereafter registered on 8 February 2019 as an Order of the Labour Court in terms of s 87(1) of the Labour Act, Act No. 11 of 2007.

[7] In execution of the Labour Court order, movable properties consisting of trucks, belonging to the council were attached for sale in execution to satisfy the Court order. The imminent sale in execution prompted the minister to bring this application on urgent basis.

The applicant's case

[8] In addition to the order staying the sale in execution, the applicant further seeks orders, firstly declaring the agreement entered into between the council and the employees, as unlawful, null and void and of no force and effect; secondly an order setting aside the aforesaid award; and order setting aside the writ of execution issued by the Registrar of the High Court, pursuant to the award being made an order of the Labour Court, as well as the writ of execution issued by the Senior Labour Inspector of the Labour Court.

[9] In support of the relief sought, the applicant contends that the settlement agreement reached between the council and its employees is unlawful for the reason that the practice of granting five years bonus to employees of local authorities was abolished effective from 24 June 2010. The applicant contends further that the contracts of the employees of the council which were entered into after the publication of the notice in the Gazette during 2010, should not have made provision for the payment of the five years' bonus, but the council concluded such contracts, which was unlawful. The applicant further points out that the council only abolished the payment of the said benefit by resolution dated 27 February 2018. Therefore, until that date the council had been paying the said benefits unlawfully and contrary to the notice published in the Gazette.

[10] The applicant decries the fact that the settlement agreement reached between the council and its employees ought to have received his approval in his capacity as the minister is responsible for local authorities, pursuant to the provisions of s 27 of the Local Authorities Act, 1992 in view of the fact that the agreement deals with remuneration of staff members of a local authority. In view of the fact, that the agreement did not have his prior approval, for that reason the agreement is liable to be set aside, he further submitted.

[11] In his replying affidavit, the applicant concedes that he does not have *locus standi* in the dispute between the council and the twenty-six respondents. The applicant further states that he has been advised that he cannot seek a rescission of the arbitrator's award in terms of s 88 of the Labour Act, 2007. He states further that he has been advised that the remedy of the rescission provided by rule 16 of the Labour Court Rules is not open to him in his capacity as the minister because he has to be a party to either an application or a counter application. The applicant further concedes that there is no *lis* between him and the respondents; and that the *lis* is between him and the council. Finally, the applicant states that he has been further advised that the bonuses offered by the council to its employees were not approved by him and that the action of the council constitutes a nullity and must therefore be set aside.

Opposition by 4th to 26th respondents

[12] The respondents' answering affidavit has been deposed to by, Mr Pieter Khoa, the fourth respondent while the remainder of the respondents filed confirmatory affidavits.

[13] The respondents raised two points in law *in limine*. Firstly, that this court does not have jurisdiction to entertain this application. This is because the applicant seeks to set aside an order of the Labour Court and it is only the Labour Court that has exclusive jurisdiction to set aside its orders in terms of its rules. Secondly, that the applicant has no *locus standi* to bring this application for the reasons that applicant is neither an employer of the fourth to twenty-sixth respondents nor was the applicant a

party to the labour dispute that was referred to the Office of the Labour Commissioner.

[14] The respondents thus submit that on the basis of either of the two points *in limine* the application falls to be dismissed with costs.

[15] As regards the merits, the respondents point out with respect to the applicant's complaint that council concluded the settlement agreement without his approval and in contravention of s 27 of the Labour Act, 2007, that order of the Labour Court operates as *res judicata*; and that until the order is set aside, the applicant cannot attack the settlement agreement. Furthermore, the power of this court to rescind a court order is limited to the circumstances stipulated by rule 103.

[16] The deponent points out further that the dispute was not only about the five years bonuses, but it was also about unpaid overtime. In this connection, the deponent argues that it is impermissible for the applicant to seek to set aside the whole award including the overtime portion without laying any basis for such an order.

[17] The deponent finally submits that before the abolishment of the five years bonuses by council on 27 February 2018, nothing prohibited it from paying the bonuses as the personnel rules published in the Gazette do not expressly prohibit council from paying such bonuses.

Issues for decision

[18] I will first consider the first point *in limine* raised by the respondents namely that this court has no jurisdiction to entertain the application. This approach will be in line with what the court advocated in the *Haindongo Shikwetepo*¹ matter where the court stated that 'if the jurisdiction of this court, sitting as the High Court, was being challenged at the threshold, it would not be competent for this court to determine anything else without first deciding the issue of jurisdiction; that is, without deciding

¹ Unreported judgment of this court *Shikwetepo v Khomas Regional Council & Others*, Case No. A 364/2008, delivered on 24 December 2008.

whether it has jurisdiction, in the first place, to determine anything about the application, including whether it should be heard on urgent basis’.

Submission on behalf of the respondents

[19] Mr Coetzee, who appeared on behalf of the respondents in support of the respondents’ contention submits that this court has no jurisdiction to hear the application. Counsel urged upon the court to inquire whether the relief sought by the applicant in the present matter falls within the category of the remedies where the High Court’s jurisdiction is clearly excluded. He stressed in his written submissions that the Legislature intended to exclude the jurisdiction of this court in all the instances listed in s 117(1) of the Labour Act, 2007:

‘Section 117 reads:

- (1) The Labour Court has exclusive jurisdiction to -
 - (a) determine appeals from -
 - (i) decisions of the Labour Commissioner made in terms of this Act;
 - (ii) arbitration tribunals’ awards, in terms of section 89; and Republic of Namibia 93 Annotated Statutes Labour Act 11 of 2007
 - (iii) compliance orders issued in terms of section 126.
 - (b) review -
 - (i) arbitration tribunals’ awards in terms of this Act; and
 - (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of -
 - (aa) this Act; or
 - (bb) any other Act relating to labour or employment for which the Minister is responsible;

- (c) review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;
 - (d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;
 - (e) to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;
 - (f) to grant an order to enforce an arbitration agreement;
 - (g) determine any other matter which it is empowered to hear and determine in terms of this Act;
 - (h) make an order which the circumstances may require in order to give effect to the objects of this Act;
 - (i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.
- (2) The Labour Court may -
- (a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or
 - (b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.'

Submissions on behalf of the applicant

[20] Mr Narib who appeared for the applicant, approached the issue of jurisdiction from the angle of jurisdiction of the Labour Court. Counsel submits in his heads of argument that the present matter does not fall within the exclusive jurisdiction of the

Labour Court because the applicant is not an employer, and the present dispute does not fall within the definitions of disputes as set out in the Labour Act. Counsel points out that the applicant's case is that the council and its employees, (the respondents) entered into an unlawful agreement, contrary to the provisions of s 27(1)(c)(ii)(bb) of the Local Authorities Act, 1992. Therefore the dispute cannot be classified a dispute of interest within the meaning of s 81 of the Labour Act nor can it be classified as a dispute of rights within the meaning of s 84 of the Labour Act.

[21] In counsel's view, the interpretation and reasoning by the court of s 117(1)(i) of the Labour Act, in *Katjjuanjo & Others*² and *Usakos Town Council v Jantze & Others*³ (supra footnote 3), is problematic. The following reasoning was adopted by the Court in the *Katjjuanjo & Other* matter:

'[7] ... For the High Court not to entertain a matter it must be clear that the original and unlimited jurisdiction it enjoys under Article 80 of the Constitution and section 16 of the High Court Act has been excluded by legislature in the clearest terms.

[14] The issue in my view is not so much whether the Labour Court does have jurisdiction, but whether the legislature intended to exclude the High Court's jurisdiction in the kind of dispute now *before* Court.'

[22] Counsel argued that the import of the above dictum appears to be that an Act of Parliament can limit the provisions of Article 80 of the Constitution, which vests this court with original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions. Mr Narib submits that that cannot be so and refers the court to the pronouncement by the court in *Onesmus v Minister of Labour and Another*⁴ as well as to the recent Supreme Court judgment of *Kashela*⁵. Interpreting the original jurisdiction of the High Court the Court in *Onesmus* said at para 15: '(The High Court) does not draw on any statute those power; it derives them directly from the Supreme Law of Namibia. Without constitutional amendment, those powers cannot be derogated from or diminished by any Act of Parliament'. Counsel submits that the foregoing dictum find support in the *Kashela* judgment where the court at para 59

² *Katjjuanjo v The Municipality Council of Windhoek* (1 2987/2013) [2014] NAHCMD 311 (21 October 2014).

³ *Usakos Town Council v Jantze* (A 222/2015) NAHCMD 225 (16 September 2015).

⁴ *Onesmus v Minister of Labour* 2010 (1) NR 187.

⁵ *Agnes Kahimbi Kashela v Katima Mulilo Town Council & Others* (SA 15/2017) [2018] NASC (16 November 2018).

said the following with reference *MW v The Minister of Home Affairs* 2016 (3) NR 707 (SC) at page 717, para 46:

[46] The Constitution is the source of all law and must take precedence over other laws which are subordinate to it. Constitutional provisions are not determined by the content of legislation.'

[23] On the basis of the foregoing court's pronouncement, counsel submits that the High Court's jurisdiction conferred by the provisions of the Constitution cannot be derogated from by way of an amendment in terms of an ordinary statute. Therefore, the exclusion of the jurisdiction 'in the clearest term' cannot be by the Legislature but 'by way of an amendment to the Constitution to oust the jurisdiction of the High Court'.

Applicable legal principles

[24] I have already referred to section 117 of the Labour Act, 2007 which sets out the instances in which the Labour Court. Has exclusive jurisdiction In the course of summarising the applicant's arguments, I have also referred to the provisions sections 81 and 84 which deal with the types of disputes which can be adjudicated by the Labour Court. The Court in *Air Namibia v Sheelongo*⁶ stated that 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 the Labour Court. The Court adopting the approach advanced by the Court in the ILJ South African Court in *Potch Speed Den v Rajah*⁷ that where a litigant finds himself in a position where an arbitral award has been made an order of court he or she should first seek to have that order making the award an order of Court rescinded or set aside or to the apply to have the order review or set aside.

Application of the law to the facts

[25] I am of the considered view that this court does not have jurisdiction to set aside the order of the Labour Court. I say this for the reason that the applicant fails and or refuses to recognise that the settlement agreement which, on his version

⁶ (LCA 13-2014 [2015] NALCMD 14 (17 June 2015) at par 15.

⁷ (1999) 20 ILJ 2676 (LC).

transgressed the provisions of section 27 of the Local Authorities Act, changed its character from a mere award to an order of the Labour Court. That is the import of the judgments in the matters of *Air Namibia v Jona Sheelongo*⁸ adopting the authoritative pronouncement by the Court in the *National Housing Enterprise v Maureen Hinda-Mbazira*⁹ where it was held that once an arbitration award has been transformed to an order of the Labour Court, the consequence of that transformation is that it would be wrong to speak of an arbitration award once the award has been made an order of the Labour Court.

[26] In my judgement, the relief sought by the applicant is incompetent in so far as the applicant seeks an order 'declaring the agreement... entered into between the first respondent and fourth to twenty-sixth respondents ... unlawful, null and void and of no force or effect.' And further 'setting aside the award of the arbitrator in Case NEGR 74-17'. The agreement was made an award which in turn was registered and transformed into an order of the Labour Court. In so far as the applicant seeks consequential orders based on the award, such orders would, in my view, equally be incompetent. This relief sought properly identified, in essence amounts to an application to rescind an order of the Labour Court disguised as an ordinary review application.

[27] The Labour Court has the exclusive jurisdiction to hear applications for the rescission of its orders in terms of rule 16 of the rules of the Labour Court. I cannot see the reason why the applicant would not be able to apply for the rescission of the order in terms of the rule 16 of the Labour Court. I say this for the reason that rule 16 (5) provides that where rescission of a judgment or order is sought on the ground that it is void from the beginning or was obtained by fraud or mistake the application for the rescission of such judgment or order may be made not later than one year after the applicant first had knowledge of such voidness, fraud or mistake. Furthermore rule 16(6) provides that any person affected by any order or judgment and who was not a party to the proceedings at which such judgment or order was made may apply the Labour Court, within 30 days after he or she knowledge thereof to have such order or judgment or order rescinded.

⁸ (LCA 13-2014) [2015 NALCMD 14 (17 June 2015).

⁹ An unreported judgment Case Number LC 21/2011 delivered on 1 April 2011.

[28] In the present matter the applicant alleges that the award which was registered as an order of the Labour Court is 'unlawful, null and void and of no force and effect' due to non-compliance with the provisions of s 27 of the Local Authorities Act, 1992. Based on this allegation the applicant is, in my view, an '*any person affected*' within the meaning of rule 16(6). Furthermore, the order was made at an occasion where the applicant, who claims to be affected, '*was not a party to the application*' when the award was made an order of court in terms of section 87(1) of the Labour Act, 2007.

[29] In the *Air Namibia* matter the court, at para 30 invoked the power of the Labour Court in terms of rule 103 of the High Court read with rule 22 of the Labour Court Rules and set aside the order making the arbitration award an order of Labour Court and set aside the order making the arbitration award an order of court. I should not be understood to mean that the court was wrong in adopting that route through rule 22 of the Labour Court's rules read with rule 103 of the High Court Rules. I am however of the considered view that the facts as pleaded by the applicant fit in with the scenarios envisaged by rule 16(5) and (6) of the Labour Court's rules. In the premises, I find it unnecessary to refer the matter via the provisions of rule 22 to be dealt with by the High Court in terms of rule 103.

[30] In the light of the conclusion I have arrived, it became unnecessary to consider the respondents' second point *in limine*. Furthermore, the interesting and thought provoking arguments advanced by Mr Narib as to whether it is possible that the original jurisdiction of this Court can be excluded by the legislature how clear the language of such enactment might be, will have to wait for another day or another court.

[31] I have therefore arrived at the conclusion that the relief sought by the applicant fall within the exclusive jurisdiction of the Labour Court and this court has no jurisdiction to hear the matter.

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

1. The application is dismissed.

2. The applicant is to pay the costs of respondents who opposed the application.
3. The order made by this court on 3 April 2019 suspending the sale in execution of the properties of the council for the town of Grootfontein, is hereby uplifted.
4. The matter is removed from the roll and is considered finalized.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT:

G NARIB (assisted by I W DAUSAB)

Instructed by Government Attorney, Windhoek

4TH, 5TH, 6TH, 7TH, 8TH, 9TH,

10TH, 11TH, 12TH, 13TH, 14TH,

15TH, 16TH, 17TH, 18TH, 19TH,

20TH, 21ST, 22ND, 23RD, 24TH

25TH AND 26TH RESPONDENTS: E E COETZEE

Instructed by Tjitemisa & Associates, Windhoek