

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

Practice Directive 61

<b>Case Title:</b> Samuel Mulemwa Amukena v Nampower Corporation (Pty) Ltd; Ministry Of Labour and Social Welfare And Employment Creation; Bester Maiba Sinvula	<b>Case No:</b> HC-MD-CIV-MOT-REV -2021/00092
	<b>Division of Court:</b> HIGH COURT(MAIN DIVISION)
<b>Heard before:</b> Honourable Justice Tommasi, J	<b>Date of hearing:</b> 31 July 2023
	<b>Delivered on:</b> 15 September 2023
<b>Neutral citation:</b> <i>Amukena v Nampower</i> (HC-MD-CIV-MOT-REV-2021/00092) [2023] NAHCMD 574 (15 September 2023)	
<b>Results on merits:</b> No decision on the merits	
<b>Order</b>	
<ol style="list-style-type: none"><li>1. The application for leave to appeal is dismissed.</li><li>2. No order as to costs is made.</li><li>3. The Registrar is to allocate this matter to another judge.</li></ol>	
<b>Reasons:</b>	
TOMMASI J:  [1] The applicant applied for leave to appeal a portion of the court's order granted on 7 June 2023 in respect of an application for leave to amend his notice of motion. The	

applicant initially applied for the insertion of 13 new prayers in his notice of motion. The court granted the applicant leave to amend his notice of motion by the insertion of 12 of the proposed prayers with a qualification that one of the prayers is to read as an alternative prayer. The court refused to grant the applicant leave to insert paragraph 10 as a prayer of the notice of motion.

[2] The grounds of appeal are that the court erred and/or misdirected herself in one or more of the following aspects:

- (a) In concluding in terms of annexure (AMU-1) that prayer number 9 as a standalone prayer to read as an alternative prayer number two (2) to prayer (11), in the circumstances where there were no reasons provided by the Court for integrating prayer 9 with prayer 11, without any justification as to what the integration of prayer 9 and 11 was intended to achieve.
- (b) In concluding in terms of annexure (AMU-1) to dismiss prayer number ten (10), in the circumstances where there was no proper challenge mounted by the first respondent, in which the Court went on a frolic of her own to make a decision not supported by evidence and the law governing amendments of pleadings.
- (c) In concluding to refuse the applicant the opportunity to have his review application relating to his termination of employment heard on urgent basis and the decision to verbally refusing granting leave to the applicant to file on e-justice his Annexure (AMU-2A), (AMU-2B), (AMU-3) and (AMU-4) supporting an urgent application.

[3] The application for amendment of the notice of motion is an interlocutory application and therefore leave to appeal is required. Mr Amukena, the applicant appeared in person and the application for leave to appeal was not opposed.

#### Ad first ground

[4] The court ordered that prayer 9 be read as an alternative to prayer 11 prayer. Prayer 9 reads as follows:

‘An order to the 1<sup>st</sup> respondent to compensate the applicant for unprocedural dismissal as found by the arbitrator in line with the compensation granted by the 1<sup>st</sup> respondent to Mr Yilonga for his procedural dismissal in which he was granted 15 months’ salary pay out, this order should be made in the interest of equality and consistency in the application of the law.’

[5] Prayer eleven reads as follows:

‘An order for retrospective reinstatement with back pay as from the date of dismissal with cost on the applications, alternatively compensation for 13 years’ remainder of the contract of employment, on grounds of dismissal motivated by corruption, tribalism, racism, whistleblowing and for failure to offer and guarantee safety and protection for whistleblowers as provided for in the contract of employment.’

[6] The applicant filed several complaints with the Labour Commissioner ie:

NERU 44-19 – This matter concerns a written warning given by the first respondent after the applicant was charged with and found guilty of making remarks that can cause racial tension or has the potential to lead to racial tension. In this matter he prays for the written warning to be set aside. This claim was dismissed by the arbitrator.

NERU 57-19 – This matter concerns the suspension of the applicant. He was suspended pending the hearing in terms whereof he was ultimately dismissed (See NERU 97-2019). Herein he claims that his suspension be lifted with immediate effect and that the respondent restores his work e-mail address with full access and functionality with immediate effect. The arbitrator found that the suspension was unfair and ordered the respondent to pay compensation of four 4 months’ salary.

NERU 97-2019 – In this matter the applicant lodged a complaint of unfair dismissal on 9 October 2019. He claimed to be reinstated to his former position with all the benefits that come with the said position. The arbitrator found that the dismissal was procedurally and substantively fair.

NERU 38 -2020 This matter relates to a complaint of unfair labour practices, victimisation and discrimination in the workplace. In this matter the applicant sought a declaratory order to be promoted to level 6, alternatively that he be allowed to complete step 8 of

level 6 of an assessment; and in the further alternative that the applicant should be provided with reasons why the applicant was prevented from starting and doing step 8 of level 6. The applicant claimed remuneration of all the benefits associated with being promoted to level 6 from date he would have been promoted to level 6 ie 8 May 2018. This claim was dismissed by the arbitrator.

[7] The claims relate to different disputes during the employment of the applicant with the respondent. The claims for suspension and dismissal originated from the same facts as the applicant was first suspended and thereafter dismissed on the same charge(s). The applicant in the proposed amendments sought payment for both these claims separately when they clearly overlap. It was obvious that these two claims ought to be in the alternative and this was pointed out by Mr Ulrich, counsel for the first respondent during argument. This was in effect the reason for ordering that the relief sought in prayer nine be read in the alternative to prayer 11.

[8] The applicant correctly indicated that the court in its ruling gave no reasons for this order. The reasons however, at the time of noting the ruling in a shortened PDF form, appeared obvious to this court. In *Hartzenberg v Standard Bank Namibia Ltd*<sup>1</sup> the court stated the following:

‘Given the myriad of interlocutory skirmishes that occur during the lifespan of a case-managed case, it is a potentially impossible task to expect the managing judge to give fully researched judgments on each and every interlocutory motion that he or she has to adjudicate. However, as this court recognised in *Buhrmann*, parties have a right to reasons. In addition, the obligation (or rather discipline) to give reasons acts as an insurance against caprice and bias. The self-imposed discipline to give reasons for one's decisions has the salutary effect on the judicial officer that he or she can only act according to the law and the facts of the case; uninfluenced by extraneous factors. That said, it must be accepted that the extent of the reasons to be provided will depend on the circumstances of the case. In some cases the reasons for the order/ruling will be obvious from the exchange between the parties and bench. As often happens, a particular point might even be conceded in argument and would clearly provide the basis for the ruling/order that follows. It would be pedantic in the extreme to expect written reasons in such circumstances.’

[9] Section 18(3) of the High Court Act 16 of 1990 provides that appeals against

<sup>1</sup> *Hartzenberg v Standard Bank Namibia Ltd* 2016 (2) NR 307 (SC).

interlocutory orders are possible only with the leave of the court that had given the judgment or made the order or in the event that leave is refused by that court, the Supreme Court may grant leave upon petition for leave to appeal. In *Marmorwerke Karibib (Pty) Ltd V Transnamib Holdings Ltd*<sup>2</sup> court provided the following guidelines for when a judgment or order would be appealable:

[33] A judgment or order will generally be appealable if it possesses the well-known three characteristics of appealability: (a) it is final in effect and not susceptible to alteration by the court of first instance; (b) it is definitive of the rights of the parties, ie it must grant definite and distinct relief; and (c) it disposes of at least a substantial portion of the relief claimed in the main proceedings.'

[10] The above order does not have the effect that prayer nine has been finally disposed of and whilst it may be said that it is granting a definite and distinct relief, this court is of the view that it does not dispose of the relief claimed in the main application. It is this court's considered view that in the event that this conclusion is flawed, that there are no reasonable prospects that the appellate court would come to a different conclusion.

#### Ad second ground

[11] The applicant applied for the insertion of prayer ten in the notice of motion and it reads as follows:

'An order of compensation to hold the 1<sup>st</sup> Respondent liable for failure to provide safe (sic) working environment and for failure to protect employees from harm, whether physical or emotional and for its failure to take actions against its senior employees who are guilty of tribalism and racism.'

[12] The respondent raised the following opposition to this ground:

'Prayers 8 to 11 of the desired amendments (paragraphs 2.8 to 2.11 herein) seek relief which, in terms of ss 89(10)(b) and (c) and section 117 of the Labour Act cannot be granted by this Honourable Court in review proceedings.; ...

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<sup>2</sup>*Marmorwerke Karibib (Pty) Ltd V Transnamib Holdings Ltd* 2022 (3) NR 629 (SC)

1st Respondent therefore is of the opinion that the proposed amendments serve no purpose other than to introduce further delay in the already protracted matter.'

[13] The court gave the following reasons for not granting the amendment by the insertion of prayer 10:

'There is however one amendment proposed which is not only for clarification but is a complete new application to this court, seeking an order for compensation. To accede to this amendment would be highly prejudicial to the respondents in that it would necessitate the filing of supplementary affidavits and re-opening of the pleadings. Not only would this be detrimental to the respondent but also to the applicant who is seeking finality in this matter. This amendment ought to be distinguished from those amendments which are proposed to clarify the initial application.'

[14] S 89(10) provides that, if the award is set aside, the Labour Court may-

'(a) ....

(b) refer it back to the arbitrator or direct that a new arbitrator be designated; or

(c) make any order it considers appropriate about the procedures to be followed to determine the dispute.'

[15] The applicant herein filed an application for review. The claim for compensation as set out in the prayer was never part of any claim before the arbitrator and it constitutes a new claim raised for the first time before this court. Mr Amukena during his submissions in this court for leave to appeal, was unable to point out when this claim served before the arbitrator.

[16] Mr Ulrich during his argument, addressed the issue of prejudice and the issue of costs indicating that the first respondent suffers severe prejudice particularly having to litigate with the prospect that no order as to costs would be made. He argued that the applicant did not address the issue of prejudice. He furthermore argued that the amendments sought by the applicant were substantial and that the proposed amendments range from reviewing actions of the third respondent to seeking declaratory orders about the validity of internal policies of the first respondent. He also highlighted that the applicant is seeking remuneration on terms that have never been revealed to this court, prayer ten being a case in point. This court can hardly be accused of "going on a

frolic of her own". This court exercised its discretion not to grant leave to last minute amendments which would clearly be prejudicial to the other party particularly when that party is not entitled, as a rule, to recover costs.

[17] The applicant failed to make out a case for this court to conclude that the appellate court would come to a different decision.

Ad third ground

[18] The applicant's third ground relates to the court's refusal to grant the applicant the opportunity to have his review application heard on an urgent basis and he is seeking leave to appeal the verbal decision to refuse leave to file Annexures (AMU-2A), (AMU-2B), (AMU-3) and (AMU-4) in support of an urgent application on e-justice.

[19] In terms of s 18(3) of the High Court Act the applicant may appeal a judgment or order of this court. The decision/order of this court does not form part of the order dated 7 June 2023 and it is not evident from this ground when such a decision/order has been made. Given the failure to provide particulars of the order/decision, this court is unable to consider this ground.

[20] In the result the following order is made:

1. The application for leave to appeal is dismissed.
2. No order as to costs is made.
3. The Registrar is to allocate this matter to another judge.

<b>Judges Signature:</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
SM Amukena Windhoek	B Ulrich Of Angula Co Inc. Windhoek

