

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-CIV-MOT-GEN-2021/00323

In the matter between:

JOSEPH KAULITANGWA SIMSON

APPLICANT

and

CMC/OTESA JOINT VENTURE

FIRST RESPONDENT

DEPUTY SHERIFF OF OKAHANDJA

SECOND RESPONDENT

Neutral citation: *Simson v CMC/Otesa Joint Venture* (HC-MD-CIV-MOT-GEN-2021/00323) [2023] 762 (24 November 2023)

Coram: PRINSLOO J

Heard: 06-07 June 2023 and 01 August 2023

Delivered: 24 November 2023

Flynote: Motion Proceedings – Factual disputes present – Court applying Rule 67(1)(a) – Matter referred for oral argument.

Summary: The applicant was previously employed by the first respondent as a Quality Control Assistant from 1 August 2019 to 15 October 2019, when he was dismissed. Mr Simson approached the offices of the Labour Commissioner and lodged a dispute of unfair dismissal. The matter was set down for hearing. On the date set down for hearing, Otesa did not attend the hearing, and the Labour Commissioner held that Mr Simson was unfairly dismissed and issued the applicant with a compensation award and reinstatement. The applicant alleges, amongst other things, that the first respondent failed to reinstate him to his previous employment, hence this current application.

Held that Mr Simson was on the premises of Otesa on 1 September 2020, and the reinstatement issue was met with resistance.

Held that Otesa took no proactive steps to reinstate the applicant.

Held that Mr Simson repeatedly attempted to enforce the court order, but Otesa was not interested in reinstating him.

Held that the failure by the applicant to render his services from September 2020 to January 2021 was not attributable to factors that were within his control.

Held further that Mr Simson is entitled to be paid his remuneration for September 2020 to January 2021, the period for which he did not render services to the employer.

Held that with reference to the issue of whether Otesa was in contempt of court, the applicant did not approach this court in terms of rule 74, and therefore, this issue is not a live issue.

Held that Otesa complied with the court order (although belatedly) and offered Mr Simson reinstatement, which he chose not to accept.

Held further that the reasons why the applicant alleges that the contract constituted re-employment and not reinstatement have no merit.

Held furthermore that Mr Simson has no further claims as to reinstatement. Any prejudice he might have suffered for the delay in reinstating him will be mitigated by the order hereunder.

ORDER

1. The first respondent is liable for the payment of N\$120 000 (N\$24 000 x 5) to the applicant for the period September 2020 to January 2021.
2. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until date of final payment.
3. The remainder of the applicant's relief claimed is dismissed.
4. No order as to costs.

JUDGMENT

PRINSLOO J:

Introduction

[1] Presently serving before the court is an application launched by the applicant, Mr Joseph Kaulitangwa Simson (Mr Simson). In his Notice of Motion, Mr Simson claims the following amended relief against the first respondent, CMC/Otesa Joint Venture (Otesa):

'TAKE NOTICE that JOSEPH KAULITANGWA SIMSON (hereinafter called the applicant) intends to make application to this court for an order:

1. An order directing the First Respondent to re-instate the applicant into his position and to pay the applicant Joseph Kaulitangwa Simson an amount of N\$24 000 x 10 months = N\$240 000 for the duration which the Applicant was prejudiced for not being in his position from 01 September 2020 as per the arbitration award till date;
2. It is not in dispute that the Applicant was paid N\$264 000 but the first Respondent fail to comply with the full condition and rebel (sic) against the re-instatement of the applicant in the same position dividing from the originality of the award by offering the applicant a lower position not as no as per award mandate.
3. In the event that the first Respondent fail to comply with such order, an order directing the third respondent to assist the Messenger of the Court in directed to attach and take into execution the movable property and/ goods of CMC/OTESA JOINT with registration No. 2013/0231;
4. Further and/ or alternative relief.'

[2] The first respondent, Otesa, is a joint venture with its principal place of business in Okahandja and, at the time, held the contract to construct the B1 Highway next to Okahandja. Otesa opposed the relief sought by Mr Simson.

[3] The second respondent is the Deputy Sheriff of Okahandja. The second respondent did not participate in the current proceedings.

Background

[4] Mr Simson was previously employed by Otesa as a Quality Control Assistant from 1 August 2019 to 15 October 2019, when he was dismissed.

[5] Mr Simson approached the offices of the Labour Commissioner and lodged a dispute of unfair dismissal. The matter was set down for hearing. On the date in question, Otesa did not attend the hearing, and the Labour Commissioner held that Mr Simson was unfairly dismissed and issued the following award:

- a) Payment from the date of dismissal until 30 July 2020 in the amount of N\$264 000 with interest at a rate of 20% per annum from the date that the award became due, i.e. 30 August 2020 and;
- b) Reinstatement of Mr Simson in his previous position of Quality Control Assistant from 1 September 2020.

[6] Otesa did not appeal the Arbitrator's award. The award was registered in terms of s 87(1)(b) of the Labour Act 11 of 2007 on 1 September 2020 under case number HC-MD-LAB-AA-2020/00196. The court order was served on Otesa on 8 September 2020. Otesa paid Mr Simson the amount of N\$290 400 on 3 February 2021 in compliance with the arbitration award and court order.

Case management order

[7] Mr Simson seeks an order for payment for the loss of income due to Otesa's alleged failure to reinstate him. The monetary claim is based on an equivalent of 10 months' salary.

[8] Otesa denies that it failed or refused to reinstate the applicant and avers that Mr Simson failed to present himself when the reinstatement was due.

[9] Otesa further maintains that Mr Simson is not genuine in his application as he was paid the amount of N\$290 400 in compliance with the arbitration award, and Otesa offered Mr Simson reinstated in January/February 2021, but he refused to be reinstated alternatively failed to revert to Otesa on its offer of reinstatement. Otesa, therefore, maintains that Mr Simson is not entitled to any claim in lieu of reinstatement or for any loss of income or losses suffered.

Issues to be determined

[10] The issues for determination by this court are as follows:

- a) Whether the applicant is entitled to the relief sought in the amended notice of motion dated 15 October 2021.
- b) Whether the first respondent failed or refused to reinstate the applicant and whether the applicant presented himself for reinstatement.
- c) Whether the N\$290 400 payment was in lieu of reinstatement or not.
- d) Whether the first respondent offered the applicant an employment contract purporting to reinstate him in his previous position in February 2021.
- e) Whether or not the employment offer made to the applicant in February 2021 and the applicant's refusal or failure to be employed was made to the applicant in February 2021 and the applicant's refusal or failure to be employed released the first respondent from the arbitration award.

Factual disputes

[11] As a result of the clear factual disputes between the parties, the court directed that the matter be referred for oral evidence in terms of rule 67(1)(a) of the Rules of Court.

Evidence adduced

[12] Each of the parties elected to call two witnesses. In respect of the applicant's case, Mr Simson testified and also called Ms Fredline Steyn to testify on his behalf. On behalf of Otesa, Mr Luca De Maria, the Project Manager of Otesa and Daniel Lukas, the Human Resources Manager, were called to testify.

On behalf of the applicant

Joseph Simson

[13] Mr Simson testified that, pursuant to receiving the arbitrator's award, he reported to the offices of the project manager, Mr Luca De Maria, on the morning of 1 September 2020 to iron out the details of his reinstatement. He informed Ms Fredeline Steyn, the secretary, about why he was at the project manager's office. After approaching Mr De Maria, Ms Steyn returned and informed Mr Simson that Mr De Maria indicated he did not wish to see him. When Mr De Maria came out of his office, Mr Simson followed him, but he was informed by Mr De Maria that he had nothing to discuss and that Mr Simson should leave the premises alternatively, he would be removed by security. Mr De Maria then got into his vehicle and left the premises.

[14] Mr Simson then met with Mr Johan Smith, the Deputy Project Manager, and explained why he was on the premises. Mr Smith told him that if Mr De Maria refused to talk to him, he (Mr Smith) would follow suit as it was not his place to say or do anything.

[15] Mr Simson then went to the Human Resource- (HR) Offices, where he met Ms Ingrid Nel, who informed him that she was also unable to handle the situation of his reinstatement unless she received instructions from management.

[16] Mr Simson then returned to the secretary's office, Ms Steyn, to wait for the Project Manager. Mr De Maria did not return to the office, and at lunchtime, he went with Ms Steyn to the shops, where she bought him a bite to eat.

[17] In light of the events of the morning of 1 September 2020, Mr Simson went to report at the offices of the Labour Commissioner. He was advised to have the arbitration award registered with the High Court to enforce the order. Mr Simson testified that he travelled back to Windhoek and registered the arbitration award. The office of the Registrar directed him to serve copies of the court order on both the Labour Inspector and Otesa.

[18] On the morning of 2 September 2020, Mr Simson again travelled to Okahandja to serve the copies of the court order and also to see Mr De Maria. Ms Nel from the HR

offices of Otesa received and acknowledged receipt of the court order and indicated that she would hand it over to the project manager. Yet again, he was unable to consult with Mr De Maria.

[19] According to Mr Simson, he did not return to Otesa for the third day but followed up via e-mail to determine the state of affairs. He testified that he received no correspondence from Otesa regarding his reinstatement. However, on 29 January 2021, he received a WhatsApp communication from Mr Johan Smith informing him that a contract of employment was available for him, effective from 6 January 2021 and that he should consult with the new HR Manager, Mr Daniel Lukas.

[20] Mr Simson reported for duty on 1 February 2021. During his consultation with Mr Lukas, a new contract was presented to him for a limited period of six months, including a three-month probation period, which, according to him, he had already completed. He was afforded five days within which to consider the contract. However, in his view, the new terms of the contract were not aligned with the arbitration award and the court order.

[21] Mr Simson further testified that during the five days he was afforded to consider the employment contract presented to him by Mr Lukas, he was stationed at the road construction site for the whole duration as opposed to the usual office where he was stationed before.

[22] As Mr Simson was unhappy with the state of affairs, he approached the offices of Kadhila Amoomo Legal Practitioners for legal assistance.

[23] During cross-examination, Mr Simson stated that he arrived at Otesa premises on 1 September 2020 with the arbitration award in hand, but no one wanted to assist or attend to him. He stated that he wanted to present the award to Mr De Maria as Mr De Maria had the final say and for him to inform the other staff members to avoid confusion.

[24] He conceded that much of the details of what happened on 1 September 2020 were not set out in his founding affidavit, although necessary for his case. Still, he explained that he was unrepresented then and was unaware of what to include in the affidavit. Mr Simson was confronted with the fact that if reinstatement was such an important factor to him, it is questionable why he omitted these vital details from his affidavit.

[25] Mr Simson further confirmed that he did not return to work after receiving payment in February 2021 and reasoned that he believed the contract presented to him was unreasonable. Mr Simson had qualms with the terms of the agreement as he would be required to undergo probation again and feared dismissal if his probation was not confirmed. Mr Simson also complained that the contract presented to him was a short-term employment contract. The employment contract additionally made provision for transfer to another department/division/section or district, which term was not included in the initial employment contract.

[26] On a question from the court, it was determined that Mr Simson only received an offer of appointment at the time of his initial appointment and not a comprehensive employment agreement.

Fredeline Steyn

[27] Otesa previously employed Ms Steyn as a receptionist and secretary to the project manager. She held this position until December 2021. She resigned from her position due to medical reasons. While employed with Otesa, part of her duties was receiving visitors and scheduling appointments with management.

[28] Ms Steyn confirmed that she knew Mr Simson and that Mr Simson was in her office on 1 September 2020, wanting to see Mr De Maria about him resuming his position in the company. Ms Steyn approached Mr De Maria, informing him that Mr

Simson wished to see him. Mr De Maria was, however, not amenable to seeing Mr Simson, and she told him accordingly. Mr Simson waited in her office, and when Mr De Maria left his office, Mr Simson followed him. There was a brief conversation between Mr Simson and Mr De Maria, but Ms Steyn was not privy to the exchange.

[29] Thereafter, Mr Simson also had a brief conversation with Mr Johan Smith, but again, Ms Steyn was not privy to the conversation.

[30] During lunchtime, Ms Steyn and Mr Simson shared a meal, and he left for Windhoek. On 2 September 2020, Mr Simson returned to her office and requested a meeting with Mr De Maria. When Ms Steyn approached Mr De Maria, the response was the same as the previous day, and she informed Mr Simson accordingly. He again waited in her office until lunchtime, and when she left for lunch, he walked with her and then left for Windhoek.

[31] Ms Steyn testified that on 8 September 2020, the Labour Inspector served a letter on the first respondent via her office titled 'Request for compliance with arbitration award' which she handed over to Mr De Maria, who instructed her to hand it to the Deputy Project Manager, Mr Johan Smith.

[32] According to Ms Steyn, the applicant did not return after that but communicated via email, which she brought to the attention of the Project Manager.

On behalf of the first respondent

Luca De Maria

[33] As indicated, Mr De Maria is the project manager for the B1 project for Otesa. Mr De Maria testified regarding the arbitration proceedings and the reason for the absence

of the first respondent at the proceedings. As no appeal was noted against the award of the Arbitrator, I do not intend to deal with the arbitration process.

[34] Mr De Maria testified that Otesa opposes the relief sought by Mr Simson primarily because he did not present himself for reinstatement on 1 September 2020. He testified that he does not deal with the administration of personnel and recruitment, and it is to be expected that a person reporting for reinstatement would report to the HR Offices. He further observed that Ms Steyn knew she had to channel visitors to the correct departments.

[35] Mr De Maria denies that Mr Simson was on the premises on 1 September 2020 to report for duty. He further stated that the happenings of the said date, as set out by the applicant and Ms Steyn, only came to the fore belatedly. It was never dealt with in the applicant's founding papers. The witness questions the fact Mr Simson vividly recalls the details of 1 September 2020 at this late stage of the proceedings. Mr De Maria stated that Ms Steyn is no longer employed by Otesa but did not provide any negative feedback regarding her resignation or departure from the company.

[36] The witness further pointed out that Mr Simson at no stage mentions in any email correspondence directed to the first respondent that he was on the premises on the days in question, nor is there any reference to his (Mr De Maria's) alleged refusal to see Mr Simson. The correspondence of the erstwhile legal representative of Mr Simson also makes no mention of him presenting himself for duty.

[37] He further states that he was acquainted with Mr Simson, but Mr Simson did not approach him. Mr De Maria testified that he was not on the office premises on 1 September 2020, and if he was he would have attended the weekly technical meeting held that morning in the engineering board room. He was, however, not in attendance. The court was referred to the meeting minutes to support this contention. Mr De Maria further denied the allegation by the applicant's erstwhile legal practitioners that the applicant was chased away from the premises by Otesa's management.

[38] During cross-examination, Mr De Maria insisted that he didn't see Mr Simson on 1 September 2020, nor did any of the employees apart from Ms Steyn. Mr De Maria further stated that it was not reported to him that Mr Simson reported for duty, and having read Mr Simson's affidavit, he made enquiries to verify Mr Simson's allegation, but none of the other 64 odd employees could confirm that he was on the premises. He further insisted that the company would have reinstated the applicant as it had received the award and reinstatement could not have been avoided. He reiterated that the reinstatement process was the responsibility of the HR department, and they would communicate with him as the project manager. As project manager, he does not deal directly with personnel issues.

[39] Mr De Maria continued to testify that because of Mr Simson's failure to report for duty on 1 September 2020, it was regarded that he waived his rights in this regard, however, having discussed the position of the applicant with Mr Lukas, the HR Manager, it was clear that Otesa must give Mr Simson a contract. Although Otesa only received the court order on 8 September 2020, it had the arbitration award directing that the applicant must be reinstated on 1 September 2020.

[40] Mr De Maria further conceded that the N\$290 400 (the award amount plus interest) paid to Mr Simson was in compliance with the arbitration award and the pursuant court order and is not in lieu of reinstatement. When invited by Ms Mombayarara to give an opinion of what would be due to Mr Simson if the court finds in his favour, Mr De Maria stated that the amount he had in mind would be payment for September 2020 to January 2021. Mr De Maria suggested the amount of N\$60 000, but it was unclear how he calculated it. When prompted further, he stated that N\$60 000 was the amount proposed by the applicant's erstwhile legal practitioner. However, the correspondence in that regard is not before the court as it was not discovered.

[41] When questioned about the difference between the offer of employment issued to the applicant upon his initial employment and the contract of employment offered in

February 2021, Mr De Maria testified that it is essentially the same, but an offer of employment contains key points and the contract contains the details of the terms of the agreement.

Daniel Lukas

[42] Mr Lukas was not the Human Resources Manager in 2020 and was only appointed on 6 January 2021. Mr Lukas testified that he was tasked to draft the employment contracts of all the employees for the year 2021. He also worked through all the employees' files. He received the applicant's name from Otesa's Cost Centre and became aware of Mr Simson's arbitration award. He could not find the applicant's file and had to reconstruct the applicant's personnel file from different sources. Mr Lukas testified that there was no contract or payslip on the file.

[43] Mr Lukas also prepared the employment contracts for distribution to the employees. Mr Lukas testified that all the employees of Otesa (including himself) received limited-period employment contracts, which are limited to 12 months at a time. According to the witness, all the benefits are paid out in December every year, and new contracts are drafted in January. Therefore, if Mr Simson had not been dismissed, he would have received a new contract like the other employees.

[44] According to Mr Lukas, he also drafted a contract for Mr Simson, which he sent to Mr Johan Smith, who informed Mr Simson accordingly and directed him to see the HR Manager. Mr Lukas explained that Mr Simson was directed to see him because there were issues in the contract relating to payment and reinstatement.

[45] He met Mr Simson on 1 February 2021, and they discussed the payment due to the applicant. Mr Lukas formed the view that Mr Simson was more interested in the money than in being reinstated. Mr Lukas further testified that he explained the contract

to Mr Simson during the meeting. The employment contract included a probation period as a result of the fact that Mr Simson was on probation in 2019, and he did not complete his probation period. Mr Lukas stated that he deemed it fitting to leave the clause regarding the probation in the employment contract as the applicant did not work for 18 months, and if the applicant finished the probation, the clause would be deleted. The witness further stated that with the technical personnel, it is a given that the probation would be confirmed. He added that there was nothing sinister about a probation period, and the applicant's fears of being dismissed after the probation period are unfounded as management cannot merely terminate an employee's employment after his or her probation period. Before any dismissal can take place, a hearing must be conducted where an employee can defend himself.

[46] Mr Lukas testified that the issue of probation was explained to Mr Simson. Still, he was so focused on the payment of the arbitration award that he did not raise issues regarding the probation period. Mr Simson also raised the issue of payment for the period September 2019 to February 2020. He indicated to Mr Simson that the Joint Venture was in financial difficulty, but that consideration could be given to include the sum in the applicant's salary and that he would take it up with management.

[47] After discussing the contract and answering Mr Simson's questions, he handed the contract to Mr Simson for his consideration, and he was requested to return the contract within five days. After that, Mr Simson was taken to the construction site, where he had to commence work. Mr Lukas testified that he understood Mr Simson to be unhappy about the fact that he was required to work on-site but stated that it is a significant part of the work function of a Quality Control Assistant to be on the construction site to ensure that the quality of the construction work is in line with the requirements. Therefore, a Quality Control Assistant is not office-bound and only uses the office space to finalise reports.

[48] Mr Lukas testified that Mr Simson received the payment regarding the arbitration award and did not return to work thereafter, nor did he return the signed employment contract to the HR Department.

[49] On why the contract offered to the applicant was limited to six months, Mr Lukas stated that Otesa at the time had substantial financial hardship due to non-payment on its government contract. However, all the employee contracts were extended when the payment was received. Mr Lukas testified that all the salaried personnel's contracts were extended to 12 months, but the labourers' contracts remained valid for six months.

Arguments advanced

On behalf of the applicant

[50] Ms Mombeyarara submitted that Otesa disregarded the court order by failing or refusing to reinstate the applicant in his previous position and provided him with a new contract in February 2021, which did not amount to reinstatement. Counsel further submitted that Otesa had no legal basis for refusing to comply with the court order, and the non-compliance with the court order constitutes contempt of court.

[51] Counsel argued that the court order was issued in favour of the applicant on 1 September 2020 and served on 8 September 2020. Hence, Otesa became aware that the award had been registered as a court order. Counsel further contends that it is common cause that Otesa has failed, to date, to reinstate Mr Simson as mandated by the court order and, thus, in non-compliance with the said order. She further submitted that Otesa had no intention to reinstate the applicant even when faced with a court order and acted in wilful and mala fide contempt of court.

[52] Ms Mombeyarara contended that Otesa's submission that the applicant waived his right to be reinstated as he allegedly failed to present himself on 1 September 2020

is flawed. She submitted that Otesa did not accept the arbitration award and failed to initiate communication with the applicant regarding his reinstatement. Even if the court found that Mr Simson did not present himself for reinstatement on 1 September 2020, it did not discharge Otesa's obligation to comply with the court order and initiate or follow up with the applicant when he did not show up for reinstatement. According to counsel, this failure on the part of Otesa speaks of its mala fide intention towards Mr Simson. In this regard, the court was referred to *Sithole v Enlightened Security Force (Pty) Ltd & Another*,¹ wherein the court noted that even if the employee had not tendered his services, the obligation rested on the company to give effect to the court order. It should at least have invited the employee to return to work so that it could give effect to the order.

[53] On the issues referred for oral hearing, Ms Mombeyara submitted that Mr Simson testified that he presented himself to the first respondent for reinstatement on 1 September 2020, and a witness corroborated Mr Simson's evidence in this regard. Ms Mombeyarara contends that the witnesses were consistent in their evidence during cross-examination and that Mr Simson was on the premises for reinstatement. She further submitted that the assertion that Mr Simson should have reported to the HR Department and not spoken to Mr De Maria is immaterial, given that Mr Simson was not a new employee and was familiar with the premises. She further contended that neither Mr De Maria nor Mr Lukas could gainsay the evidence of Mr Simson as they were not on the premises and relied entirely on hearsay evidence.

[54] Ms Mombeyarara insisted that there were no waivers on the part of the applicant and any submissions by Otesa to suggest that Mr Simson was solely interested in the money and not reinstatement is a fallacy as Mr Simson was legally entitled to both reinstatement and payment even if he did not demand both these reliefs. The one does not preclude the other or constitute a waiver. The fact that Mr Simson constantly followed up with Otesa indicated that Mr Simson was interested in being reinstated.

¹ *Sithole v Enlightened Security Force (Pty) Ltd & Another* (2017) 38 ILJ 1202 (LC).

[55] On the issue of reinstatement, Ms Mombeyarara referred the court to *TransNamib Holdings v Engelbrecht*,² wherein the Apex Court accepted the contention by counsel that the word 'reinstatement' refers to putting the dismissed employee back into his or her former position at work and nothing more. Mr Simson was offered a limited-duration contract of employment in February 2021 after he enquired about compliance with the court order. Ms Mombeyarara submitted that that contract amounted to re-employment and not reinstatement. It is submitted that the employment contract before the dismissal was indefinite, whereas the second contract had a limited duration. In the second contract, Mr Simson was required to submit to three months' probation again. In contrast, the expectation was that the applicant would continue with his probation from the point before his dismissal. She contended that the first respondent's stance that Mr Simson could have lost his skills and thus needed to be subjected to probation again was not legally sound as the court order ordered reinstatement. In addition, the employment contract also made provision for transfer to another department/division/section or district, which was not included in the initial employment contract.

On behalf of the first respondent

[56] Mr De Beer argued that Mr Simson is not entitled to the relief claimed on the following basis:

- a) Based on the evidence, it is clear that neither the project manager nor any other member of management chased the applicant away from Otesa's premises on 1 September 2020.
- b) Mr Simson took no steps to take up employment after 2 September 2020.
- c) Mr Simson was concerned about the payment in lieu of reinstatement. Although he reported for work at the end of January 2021, he failed to return to work after receiving payment in respect of the arbitration award.

² *TransNamib Holdings v Engelbrecht* 2005 NR 372 (SC) at 381 E-F.

- d) Mr Simson alleged that he reported for duty on 1 September 2020 but failed to report to the HR department despite being aware that the HR Department controlled the process of recruitment and appointments.
- e) Mr Simson failed to provide sufficient details in his founding papers and supplementary affidavit to substantiate his claim that he demanded reinstatement.

[57] Mr De Beer submitted that the onus to show on a balance of probabilities that he did report for work lies with the applicant, which he failed to do. Mr De Beer submitted that Mr Simson failed to show that he reported for duty and that there is no onus on the first respondent to call employees to prove the contrary.

[58] Counsel submitted that even if the court accepts the version of Mr Simson and Ms Steyn that he was on the premises of Otesa on 1 and 2 September 2020, there is no support for his contention. The affidavits filed supporting his claim are sketchy and were only improved upon by filing a witness statement. Mr De Beer argued that the lack of details is questionable. Counsel submitted that Mr Simson was aware of the HR department, and he did not approach the said department and insisted on being reinstated. It seems that Mr Simson chose to spend time with the secretary, Ms Steyn, who clearly had no authority dealing with employment or recruitment.

[59] Mr De Beer submitted that the re-instatement by the arbitration award could not grant more rights and entitlements than the original terms and conditions of employment, and as the applicant at the time of dismissal did not complete his probation period, which still had two weeks left, the applicant was at best only entitled to two weeks reinstatement. If the probation was not confirmed at the end of the two weeks, the applicant would not have been entitled to a permanent position by default.

[60] In conclusion, Mr De Beer submitted that at the end of January 2021, Mr Smith informed Mr Simson to report to Mr Lukas as an employment contract was prepared and ready for him. Mr Simson was given a contract and was to continue with work,

irrespective of whether or not the employment contract was signed. Mr Simson was accepted back at work and given the opportunity to consider the terms and conditions of the contract. However, Mr Simson elected not to accept that he had to work at the construction area, and he elected not to return and not to take any further steps to discuss the contract. In his view, Otesa complied with the directions of the court order to reinstate Mr Simson. Reinstatement, however, implied that a) the dismissed employee must make himself available for reinstatement, b) the individual must function in that position, c) the reinstatement is on the same terms and conditions as the old position, and d) the employer must pay the reinstated individual compensation for rendering services, which is by working and providing work. Mr Simson chose not to remain in the employ of Otesa.

Discussion

The meaning of reinstatement

[61] In *Adcon CC v Von Wielligh*,³ Ueitele J discussed the meaning of reinstatement as follows:

[27] The meaning of '*reinstatement*' was authoritatively settled by the Supreme Court in the matter of *TransNamib Holdings Ltd v Engelbrecht*⁴ where O'Linn AJA who delivered the majority judgment of the Court said:

The meaning contended for by Mr Corbett, on behalf of TransNamib, is that the word 'reinstatement' 'refers to putting the employee back into his/her former position at work, and nothing more.'

[28] This Court in the matter of *Paulo v Shoprite Namibia (Pty) Ltd and Others*⁵ said:

³ *Adcon CC v Von Wielligh* (LC 80/2016) [2017] NALCMD 24 (07 July 2017).

⁴ *Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC).

⁵ *Paulo v Shoprite Namibia (Pty) Ltd and Others* 2013 (1) NR 78 (LC).

[9] It must now be obvious that Namibia's 2007 Labour Act does not contemplate retrospectivity in reinstatement. This has led Parker to conclude in his book *Labour Law in Namibia* that the word 'reinstatement' in s 86(15)(d) of the 2007 Labour Act ought to bear its 'ordinary, grammatical meaning in the employment context'; interpreted by McNally JA in *Chegutu Municipality v Manyora* as follows:

"I conclude therefore that reinstatement in the employment context means no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding backpay and/or compensation. But mere reinstatement does not necessarily imply that backpay and/or compensation automatically follows."

Mutually destructive versions

[62] One of the main reasons why this matter was referred to oral evidence was the factual dispute between the parties regarding whether the applicant reported for duty on 1 September 2020 or not, whether the first respondent failed to reinstate the applicant and if the further contract offered to him in January/February 2021 was akin to reinstatement.

[63] The versions in this regard before the court are mutually destructive, and the guiding principles applied to the evaluation of the evidence when there are two irreconcilable versions were succinctly set out in *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others*,⁶ as follows:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of factors, not necessarily in order to importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions

⁶ *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

with what was pleaded or put on this behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all facts are equipoised probabilities prevail.' ⁷

[64] In my view, the applicant's position in this regard is contradictory. Mr Simson's version is that he was on Otesa's premises and attempted to speak to Mr De Maria to report to him as he is the project manager. Mr Simson, as well as Ms Steyn, testified how Mr Simson approached Mr De Maria and how he was not amenable to having a discussion with Mr Simson. Mr De Maria insisted that he neither saw Mr Simson on 1 September 2020 nor spoke to him.

[65] In the applicant's heads of argument, the following is advanced in para 18.1.5:

'In addition, the contention by the First Respondent that no one other than Ms Steyn, who was the secretary at the time, saw the Applicant on the 01st of September 2020, is also negated by the fact that **none** of the First Respondent's witnesses, being Mr Lukas Daniel and Mr. Luca De Maria, were on the premises themselves **on the days in question** and relied entirely on hearsay evidence.' (my emphasis)

[66] On the one hand, the applicant seems to insist that Mr De Maria was on the premises and refused to talk to him. On the other hand, there is an attempt to discredit

⁷ At 14I-15D. See also *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC) at 541 para [39].

his evidence by implying that he only relies on hearsay as he was not on the premises. It is common cause that Mr Lukas was not there as he was not employed by Otesa at the time, and he did not testify on what happened on 1 and 2 September 2020.

[67] It is unclear whether the applicant now concedes that Mr De Maria was not on the Otesa premises on the two days in question, as it would negate both his version and that of Ms Steyn as to what happened on those dates.

[68] Mr De Maria can, on his version, neither confirm nor deny that Mr Simson was on the premises on 1 and 2 September 2020. Ms Steyn confirmed that Mr Simson was in attendance but did not confirm that Mr Simson had reported for duty. Mr Simson testified that he presented himself to the HR Department, but they did not want to assist him. Again, Mr De Maria can neither confirm nor deny this. Neither party called anybody from the HR Department to corroborate their versions. For his version that Mr Simson was not on the premises on the days in question, Mr De Maria further relies on the responses received from the rest of the personnel. This is hearsay at best and cannot be relied upon.

[69] However, I am inclined to find that Mr Simson was on the premises of Otesa on 1 September 2020 and that the reinstatement was met with resistance, if not from Mr De Maria, then from the department. In a Whatsapp communication between Mr Simson and Mr Johan Smith on 29 January 2021, Mr Smith stated as much when he said, 'high level of resistance from CMC with reinstatement'.

[70] This resistance gave rise to Mr Simson approaching the Office of the Labour Commissioner to seek assistance, which resulted in him coming to this court to register the arbitration award in terms of s 90 of the Labour Act 11 of 2007.

[71] The further question is, however, if the reporting or non-reporting of the applicant relieved the first respondent from the obligation to comply with the court order dated 1 September 2020. Otesa was aware of the court order as of 8 September 2020 when the

Office of the Labour Commissioner served the order. It was aware of the arbitration award from approximately 28 August 2020 already. The parties are not ad idem as to the date of the service of the arbitration award; however the exact date of service is not relevant for the current proceedings.

[72] In *Sithole v Enlightened Security Force (Pty) Ltd & Another*,⁸ Lagrange J held that:

[20][E]ven if the respondents contend that the applicant had not tendered his services, the obligation rested on it to give effect to the court order and it should at least have invited him to return to work so it could give effect to the order. The respondents do not even bother to explain their abject failure to do anything to implement the order once they were aware of it.'

[73] It is common cause that there was an obligation on Otesa to reinstate the applicant as they did not appeal the arbitration award, and the award was reduced to a court order. Otesa only informed the applicant in January 2021 that an employment contract was available and had been available since 6 January 2021. Otesa took no proactive steps to reinstate the applicant.

[74] In the present matter, Mr Simson repeatedly attempted to enforce the court order, but Otesa was not interested in reinstating him. The issue of reinstatement was only addressed when the new HR Manager came on board in January 2021. Therefore, the failure by the applicant to render his services from September 2020 to January 2021 was not attributable to factors that were within his control. How the applicant calculated the ten months in the notice of motion is unclear and unfounded.

[75] As a result, I find that Mr Simson is entitled to his remuneration for September 2020 to January 2021, the period in which he did not render services to the employer.

⁸ *Sithole v Enlightened Security Force (Pty) Ltd & Another*, (2017) 38 ILJ 1202 (LC).

Contempt of Court

[76] The applicant repeatedly stated in his papers that Otesa acted mala fide and willfully disobeyed the court order; therefore, Otesa is in contempt of court. Civil contempt is regulated in terms of rule 74 of the Rules of Court.⁹

[77] In *Teachers Union of Namibia v Namibia National Teachers Union & Others*,¹⁰ our Apex Court discussed civil contempt as follows:

'Civil contempt' occurs where a party to a civil case against whom a court has given an order, intentionally refuses to comply with it.¹¹ The procedure for bringing proceedings is that in the event of non-compliance with a court order, a private litigant who had obtained a court order against an opponent re-approaches the court in another civil proceeding to obtain a further court order declaring the non-compliant party in contempt of court and imposing a criminal sanction on such party. In the hands of a private party, the application for committal for contempt of court has been described as 'a peculiar amalgam', because it is a civil proceeding that seeks a criminal sanction.¹² The form of proceeding has however been accepted and hailed as a valuable mechanism whose primary purpose is to serve the broader public interest in ensuring

⁹ 'Contempt of court application

74. (1) A party instituting proceedings for contempt of court must do so by way application on notice of motion to the person against whom the contempt of court is alleged.

(2) The application must be served in terms of these rules.

(3) The applicant must in a founding affidavit distinctly set out the grounds and facts of the complaint on which the applicant relies for relief in his or her application for contempt of 84 court.

(4) Where a judge of his or her own initiative institutes proceedings of contempt of court against anyone, the proceedings must be instituted by a notice issued by the registrar and served on the person against whom such contempt of court is alleged and no affidavit is necessary.

(5) Nothing in this rule may be interpreted as detracting from any of the court's powers with regard to contempt of court committed in facie curiae or ex facie curiae.'

¹⁰ *Teachers Union of Namibia v Namibia National Teachers Union & Others* (SA 26 of 2019) [2020] NASC 42 (7 May 2020).

¹¹ CR Snyman *Criminal Law* 6 ed (2014) at 325.

¹² *Fakkie v CCII (Pty) Ltd* 2006 (4) SA 326 (SCA) para 8.

that court orders are not disregarded, as doing so 'sullies the authority of the courts and detracts from the rule of law'.¹³

[78] The applicant did not approach this court in terms of rule 74, and I do not intend to dwell further on the issue of contempt of court.

Was the employment contract of January/February 2021 concomitant with reinstatement?

[79] Mr Simson reported for duty on 1 February 2021 and the employment contract was discussed with him. Ms Mombeyarara submitted that the employment contract constituted re-employment instead of reinstatement.

[80] Put in its simplest terms, reinstatement means "to put an employee in the same position he/she was in prior to dismissal." This means that the employee will resume his or her position on the same terms and conditions as if the dismissal did not occur. An employee who settles on re-employment returns to the employer's employ as a new employee. They sign a new employment contract, and their employment start date is not the same as the time when they commenced employment with the employer.

[81] At first glance, this might appear to be the position in the current instance. However, the applicant was never issued an employment contract when initially appointed. He only received an offer of employment consisting of one page, which only sets out the main terms of the applicant's employment contract should he accept the offer. This included the effective date of employment, the position, salary, working hours and probation. The contract of employment is substantially more comprehensive.

¹³ Footnote 10 supra at para 7.

[82] The applicant further takes issue with the fact that the contract was of limited duration. However, if one considers the offer of employment, it is silent on the period of employment. The assertion that he was employed permanently does not add up with the fact that the project is for a limited period until completed. Mr Lukas made it clear that none of the employment contracts go beyond 12 months at a time, and all the employees receive new contracts each year in January. He further explained that Otesa was having financial difficulty at the time, and the employment contracts were limited to six months. However, once the payment was received from the Government employer, all the qualified staff contracts were extended to December 2021, which would have included Mr Simson, provided he accepted the reinstatement. There is nothing before this court to gainsay the evidence of Mr Lukas in this regard.

[83] The applicant takes issue with the probation period that was included in the employment agreement because he completed the probation. Yet, he did not complete it as he was dismissed two weeks before its completion. Mr De Beer argued that the reinstatement of the applicant would technically imply that he had to complete the two-week probation, whereafter the employer was at liberty to confirm the probation or not, yet Otesa offered the applicant a six-month contract. I am of the view that this is a fanciful argument and does not detract from the fact that Otesa had an obligation to reinstate the applicant as a result of a court order. In any event, in an attempt to explain the applicant's concerns on this issue, Mr Lukas testified that the probation of technical staff is normally confirmed.

[84] Mr Simson had the opportunity to consider and discuss the employment contract with Mr Lukas. He was able to negotiate those terms with which he took issue. However, Mr Simson failed to return to work after he received the payment of the money awarded to him. He also did not return the contract.

[85] I believe that Otesa complied with the court order (although belatedly) and offered Mr Simson reinstatement, which he chose not to accept. The reasons advanced by the applicant that the contract constituted re-employment and not reinstatement have

no merit. I further find that Mr Simson has no further claims regarding reinstatement. Any prejudice he might have suffered for the delay in reinstating him will be mitigated by the order hereunder.

Order

[86] The order of this court is as follows:

1. The first respondent is liable for the payment of N\$120 000 (N\$24 000 x 5) to the applicant for the period September 2020 to January 2021.
2. Interest on the aforesaid amount at the rate of 20% per annum from the date of judgment until date of final payment.
3. The remainder of the applicant's relief claimed is dismissed.
4. No order as to costs.

JS Prinsloo
Judge

Appearances:

Applicant:

M Mombeyarara
Of MM Legal Practitioners
Windhoek

First respondent:

P De Beer
Of De Beer Law
Chambers
Windhoek