REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: INT-HC-SUMJUD-2023/00017
(Main Case Number : HC-MD-CIV-ACT-OTH-2022/04660)

In the matter between:

NAMIBIA WILDLIFE RESORTS LIMITED **APPLICANT**

and

DEBBIE KALEINASHO MAXUILILI-ANKAMA **RESPONDENT**

Neutral citation: *Namibia Wildlife Resorts Limited v Maxuilili-Ankama* (HC-MD-CIV-ACT-OTH-2022/04660)(INT-HC-SUMJUD-2023/00017)) [2023] NAHCMD 94 (7 March 2023)

Coram: PARKER AJ
Heard: **16 February 2023**
Delivered: **7 March 2023**

Flynote: Practice – Judgments and orders – Summary Judgment – Requirements – Application aimed at implementing an order of court where an award

granted by an arbitrator was set aside by the court – A refusal of the application would have the effect of setting at naught that order.

Summary: In a labour dispute before the Labour Commissioner in terms of the Labour Act 11 of 2007, the arbitrator ordered the plaintiff (the employer) to pay N$1 416 240.68 (including interest) to the defendant (the aggrieved employee). The payment was, thus, in satisfaction of the arbitral award which was executed in terms of s 87 of the Labour Act. Upon successful application to review the arbitral award, the award was set aside by the court. The plaintiff brought an application for summary judgment to retrieve the amount paid to the defendant on a claim of unjust enrichment. The court found that the application is aimed at implementing the setting aside order of the court. A refusal of the application would have the effect of setting at naught that court order, and that would not conduce to due administration justice. The court concluded that the justice of the matter demanded that the application be granted. The defendant failed to set up a bona fide defence and also failed to raise an issue against the claim which ought to be tried.

Held, the purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain summary judgment without trial if he or she can prove his or her claim and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

Held, further, the Labour Court has exclusive jurisdiction over the matters adumbrated in s 117 (1)*(a)-(i)* of the Labour Act 11 of 2007. They do not include a dispute over unjust enrichment; and so, the High Court is the proper forum to entertain such dispute.

ORDER

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1. Summary judgment is granted in the amount of N$1 416 240.68 plus interest thereon at the rate of 20 percent per annum calculated from the date of this judgment to the date of full and final payment with costs on the party and party scale, and the costs shall include the costs occasioned by the

employment of one instructing counsel and one instructed counsel.

2. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] In the instant matter, the plaintiff (the applicant) has prayed the court to grant an order for summary judgment. The defendant (the respondent) has moved to reject the application and has in turn urged the court to refuse the application and grant leave to the defendant to defend the action. Mr Maasdorp represents the plaintiff, and Ms Alexander the defendant.

[2] The genesis of the application lies in the following brief background. In a labour dispute, the defendant received payment (including interest thereon) of N$1 416 240.68 from the plaintiff. The payment was in satisfaction of an award made by an arbitrator in terms of the Labour Act 11 of 2007 in Case No. CRWK9-11-18, dated 9 June 2019 (‘the arbitral award’).

[3] Upon a successful application to review the arbitral award brought by the plaintiff, the court, in a judgment by Masuku J, delivered on 20 May 2022, set aside the arbitral award (in para 1 of the order granted)(‘the Masuku J order’). The case is Case No. 2019/00381. In para 2 of the said order, the court ordered that the dispute ‘be referred back to the Office of the Labour Commissioner to be heard de novo before another Arbitrator from the conciliation stage’. I shall return to para 2 of the said order in due course.

[4] The plaintiff instituted an action to recover the amount that had been paid to the defendant, as I have said, in satisfaction of the arbitral award. The plaintiff brought the present application for summary judgment upon the defendant’s entry of appearance to defend the action.

[5] Mr Maasdorp submitted that the plaintiff's claim is based on unjust enrichment. That being the case, I hold that this court has jurisdiction. The Labour Court has exclusive jurisdiction over the matters adumbrated in s 117(1)*(a)-(i)* of the Labour Act; and a dispute over unjust enrichment is not one of them. The fact that the genesis of the application, as I have said, lay (that is, in the past) in a labour dispute, does not detract from the fact that a claim of unjust enrichment is sans the s 117(1)*(a)-(i)* of the Labour Act. The High Court is, therefore, the competent forum to entertain such dispute.[1]

[6] All that the plaintiff says is that the legal basis upon which the aforementioned amount was paid by the plaintiff to the defendant has, by the order of the court, been taken away. In my view, as a matter of law, logic and common sense, there is no reason why the defendant can be allowed to hold on to the money. To allow the defendant to keep the money would set at naught the Masuku J order, and that would not conduce to due administration of justice. As I see it, the present application is to implement the Masuku J order.

[7] The gravamen of the defendant's opposition to the application and as articulated by Ms Alexander is this. According to counsel, the dispute has not been resolved and it is still before the Labour Commissioner in terms of para 2 of the Masuku J order. Ms Alexander misses the point. The dispute that is before the Labour Commissioner is a dispute defined in s 84 of the Labour Act. It is not a dispute about unjust enrichment. And, more important – and this is crucial – the conciliation and arbitration that took place was as a result of the *voluntary* acts (italicised for emphasis) of the defendant: The defendant lodged a complaint of unfair dismissal with the Labour Commissioner, that is, the defendant *voluntarily* referred a dispute to the Labour Commissioner (italicised for emphasis). The Labour Commissioner then set in motion the alternative dispute resolution mechanisms provided in Part C of the Labour Act.

[8] Thus, but for the aforesaid initiating voluntary acts of the defendant, there would surely have been no conciliation proceedings, no arbitration proceedings and no arbitral award. I have discussed the procedure in para 7 above to make this

[1] See *Classic Engines CC v Nghikofa* 2013 (3) NR 777 (LC), upheld on appeal in *Nghikofa v Classic Engines* CC 2014 (2) NR 314 (SC) on the issue of damages which fell outside the jurisdiction of the Labour Court and, therefore, the High Court was the competent forum to entertain such dispute.

crucial point: There is no rule in our law that can compel one to seek redress in the court or a tribunal, like the arbitration tribunal under the Labour Act, for any wrong done to one. Moreover, the Masuku J order cannot compel the defendant to participate in any conciliation or arbitration that is conducted anew. And, *a fortiori*, nothing in law prevents the defendant from withdrawing the complaint he lodged with the Labour Commissioner. And if he did that, there would be no dispute to conciliate or arbitrate anew, as I have said previously. Ms Alexander overlooked all these legal realities.

[9] The inexorable conclusion that can be drawn from the analysis and conclusions in paras 5-8 is that it will be substantially unjust and unfair to allow the defendant to keep the money she was paid by the plaintiff.

[10] It must be remembered, the purpose of an order in terms of rule 60 of the rules of court is to enable a plaintiff to obtain a summary judgment without trial if the plaintiff can prove his or her claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. Once a defence is shown, unconditional leave to defend ought to be given.

[11] The opposition of the defendant has no legal leg to stand on for the reasons I have discussed previously; and they are rehearsed briefly here. The first is this. The Masuku order did effectively negate the consequences of the registration of the arbitral order in terms of s 87 of the Labour Act, otherwise that order would be rendered otiose, having no effect. But the rule of law demands that court orders must be implemented. Indeed, the defendant accepted the legal reality that the Masuku J order (para 1 thereof) setting aside the arbitral order negated the consequences of the registration of the arbitral award. If she so accepts this legal reality, I do not see why she has opposed the summary judgment application which is merely to give effect to para 1 of the Masuku J order.

[12] The second is that, if the defendant decided to withdraw the complaint she lodged with the Labour Commissioner, as aforesaid, that would be the end of the matter. There would be no dispute 'to be heard *de novo* before another Arbitrator' (para 2 of the Masuku order), as I have explained previously. Indeed, the likelihood of the defendant withdrawing the complaint she lodged with the Labour

Commissioner cannot be discounted. She has already received a large compensatory award. What incentive is there for her to keep the dispute alive. If the defendant withdrew the complaint – and she is entitled to do so – the dispute would die a natural death, as I have explained previously. There would be no dispute to hear *de novo*, as aforesaid.

[13] In Ms Alexander's view, the applicant should have applied to set the writ of execution aside. That is what Ms Alexander would have chosen to do. But, it should be remembered, in our law, there are many legal ways in skinning a cat. In the instant matter, in virtue of the analysis and conclusions thereanent in paras 5-12 above, I cannot fault the route that the applicant has chosen to approach the door of the court for the relief sought.

[14] Accordingly, I hold that the justice of the matter demands that the application be granted. The defendant has failed to show that she has a bona fide defence and she has also failed to raise an issue against the claim which ought to be tried. Indeed, there are no disputes of facts which require to be resolved in a trial, as Mr Maasdorp submitted.

[15] Based on these reasons, I hold that the defendant has failed to set up a bona fide defence and has also failed to raise an issue against the claim which ought to be tried. I find that the plaintiff has made out case for the relief sought. In the result, I order as follows:

1. Summary judgment is granted in the amount of N$1 416 240.68 plus interest thereon at the rate of 20 percent per annum calculated from the date of this judgment to the date of full and final payment with costs on the party and party scale, and the costs shall include the costs occasioned by the employment of one instructing counsel and one instructed counsel.

2. The matter is finalized and removed from the roll.

C PARKER

Acting Judge

APPEARANCES

APPLICANT:	RL Maasdorp Of Köpplinger Boltman, Windhoek
RESPONDENT:	NN Alexander Of Sisa Namandje & Co. Inc., Windhoek