SUMMARY *REPORTABLE*

CASE NO. LC 50/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

LEON JANSE VAN RENSBURG v SEFOFANE AIR CHARTERS (PTY) LTD AND JERMAIN KETJI

PARKER J

2011 February 1

Labour Law - Application to vary or supplement order granted by the Labour Court respecting a costs order - Applicant relying on rule 16 (5) of the Labour Court Rules, alternatively on rule 44 of the Rules of the High Court, and, further, alternatively on the common law - Court finding that Rules of the High Court and the common law do not apply in instant case where the Labour Court Rules deal adequately with the issue at hand - Accordingly Court applying rule 16 (5) of the Rules of the Labour Court - Court finding that the 'mistake' offering a ground for varying a judgment or order of the Labour Court in terms of rule 16 (5) is not a mistake attributable to the judge but a mistake made by the party in obtaining the judgment or order in question - In any case, Court explaining that where it is alleged a judge has taken

a wrong view of the facts or of the law that judicial decision does not constitute a mistake on the part of the judge.

Held, that in terms of rule 16 (5) of the Rules of the Labour Court the 'mistake' offering a ground for varying a judgment or order of the Labour Court is not a mistake attributable to the judge but a mistake made by the party in obtaining the judgment or order in question.

Held, further that, where a judge has made an order and given reasons therefor in his or her judgment, it is his or her judgment and the judgment of the Court concerned. If a party says that it is aggrieved by the order because the judge took a wrong view of the facts or of the law, it is fallacious in law for one to argue that a mistake has been made by the judge, capable of calling in aid rule 16 (5) of the Labour Court Rules.

Case No. LC 75/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

LEON JANSE VAN RENSBURG **Applicant**

And

SEFOFANE AIR CHARTERS (PTY) LTD **First Respondent**

JERMAIN KETJI **Second Respondent**

CORAM: **PARKER J**

Heard on: 2011 January 19
Delivered on: 2011 January 19 (Ex *tempore)*
2011 February 1 (Reasons)

JUDGMENT:

PARKER J:

[1] In this matter application has been brought on notice of motion in which the applicant, represented by Mr. Van Zyl, has moved the Court to vary or supplement the costs order granted by the Court *(per* Geier AJ) on 8 July 2010. The 1st respondent represented by Mr. Mouton has moved the Court to reject the application.

[2] The applicant bases his application on 'Rule 16 (5) of the Rules of this Honourable Court, alternatively, in terms of Rule 44 of the Rules of the High Court of Namibia read with Rule 22 of the Rules of this Honourable Court, in the further alternative, in terms of the common law.' It would seem the applicant has embarked on a fishing expedition in search of a rule on which to hang his application, not sure in what waters he should fish. The rules of this Court are crystal clear as to when the rules of the High Court may

become applicable. Rule 22 of the Labour Court Rules provides:

> '22. Subject to the Act and these rules, where these rules do no make provision for the procedure to be followed in any matter before the Court, the rules applicable to civil proceedings in the High Court made in terms of section 39 (1) of the High Court Act, 1990 (Act 16 of 1990) do apply to proceedings before the court with such qualification, modifications and adaptations as the court may deem necessary.'

[3] As I see it, the aforementioned rule 16 (5) makes provision for the procedure regarding variation of any judgment or order of this Court and so it is this rule that I shall apply in these proceedings. On a parity of reasoning, I will only go out of my way to apply the common law rule which, according to the applicant, is a further alternative in his fishing expedition to catch a rule, only if rule 16 (5) does not address the issue at hand. As matters stand, rule 16 (5) does address the issue at hand - and absolutely adequately so.

[4] It is to rule 16(5), therefore, that I now direct the enquiry; and rule provides.

> '(5) Where rescission or variation of a judgment or order is sought on the ground that it is void from the beginning or was obtained by fraud or mistake, application may be made not later than one year after the applicant first had knowledge of such voidness, fraud or mistake.'

[5] It is the applicant's contention that in terms of s. 118 of the Labour Act, 2007 a costs order does not follow the event, and that before this Court exercises its discretion to grant a costs order against a party, ' "frivolous and vexatious" conduct must (have)

been complained of and must have (been) "proved" ' by the other party. Flowing from this premise, Mr. Van Zyl submitted that 'the order was obtained by mistake ... because this Honourable Court's jurisdiction and power to grant a costs order is restricted by s. 118 of the Labour Act.'

[6] In these proceedings, I am not interested in whether Mr. Van Zyl is correct or not correct in his interpretation and application of s. 118 of the Labour Act for the simple reason that this Court is not sitting as an appeal court over its own decision - as if that was competent in law. In any case, from what I can gather from Mr. Van Zyl's submission it is the applicant's averment that Geier AJ took a wrong view of the facts and of the law and so Geier AJ's order cannot stand. Mr. Van Zyl argues - unwittingly, though not in so many words - that there was no factual basis upon which Geier AJ could have exercised his discretion to grant a costs order, considering s. 118 of the Labour Act; and yet Mr. Van Zyl insisted strenuously in his submission that the learned judge 'made a mistake' in his interpretation and application of s. 118 of the Labour Act.

[7] With the greatest deference to Mr. Van Zyl, Mr. Van Zyl's argument is not only over simplistic and fallacious, it is also sad and unfortunate. Where a judge has made an order and given reasons therefor in his or her judgment; it is his or her judgment and the judgment of the Court concerned. If a party says that it is aggrieved by the order because the judge took a wrong view of the facts or of the law, it is on any pan of scale superlatively fallacious in law for any person to argue, as Mr Van Zyl does, that a mistake has been made by that judge, capable of calling in aid, in these proceedings, rule 16 (5) of the Labour Court Rules. This conclusion is so logical and so elementary that I need not cite any authority in support thereof. In any case, Mr. Van Zyl's

predicament does not end there. Mr. Van Zyl's reliance on 'mistake' to assist the applicant in these proceedings is misplaced; for, rule 16 (5) does not just refer to 'mistake' *simpliciter.* The ground contained in that rule respecting 'mistake' is this:

> (5) Where rescission or variation of a judgment or order is sought on the ground that it ... *was obtained by mistake,* application may be made not later than one year after the applicant first had knowledge of *such mistake.* (Italicized for emphasis)

[8] *Pace* Mr. Van Zyl, the 'mistake' referred to in rule 16 (5), offering a ground for varying a judgment or order of the Labour Court in terms of rule 16 (5), is not a mistake attributable to the judge but a mistake made by the party in obtaining the judgment or order in question. This conclusion on the interpretation and application of rule 16 (5) and the previous conclusion alone bury Mr. Van Zyl in his overzealous but baseless argument; but it is attractively interesting to consider Mr. Van Zyl's other equally pointless argument; not least because it was made with equal verve.

[9] In this regard, with respect, Mr. Van Zyl digs a dangerously deeper hole for himself when he argues further that 'it was never the true intention of the Labour Court (presided over by Geier AJ, as aforesaid) to have handed down an order for costs' in view of s.118 of the Act. Mr. Van Zyl unfortunately misses the boat. The indubitable fact that has remained is that this Court did grant a costs order in clear and unambiguous terms, and the Court gave reasons for its decision. What Mr. Van Zyl has done is to arrogate to himself the mystic power of claiming better knowledge of what Geier AJ intended than what Geier AJ actually had in mind when the learned judge expressed himself as he did - and so clearly and unambiguously - in his judgment. By doing so, Mr. Van Zyl has put forward, *sans* a phantom of justification, the unexpressed intention of

the learned judge; and that is fallacious and self-serving; and above all unacceptable. Mr. Van Zyl is wrong in his submission on the point; Mr. Van Zyl has not made a mistake respecting the point.

[10] The aforegoing are my reasons for granting the order after hearing the application, which order stated:

(1) The application filed on 30 August 2010 is dismissed.

(2) There is no order as to costs.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT: Mr. C J Van Zyl

Instructed by: Hohne & Co

COUNSEL ON BEHALF OF THE 1st RESPONDENT: Mr. C J Mouton

Instructed by: Koep & Partners