REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 122/2014

In the matter between:

ROADS CONTRACTOR COMPANY	**APPLICANT**
And	
LOVEMORE MUGHANDIRA N.O	**1ST RESPONDENT**
THE LABOUR COMMISSIONER	**2ND RESPONDENT**
GODFREY IHUHUA	**3RD RESPONDENT**

Neutral citation: *Roads Contractor Company v Mughandira N.O* (LC 122/2014) [2016] NALCMD 7 (04 March 2016)

Coram: UNENGU AJ
Heard: **04 September 2015**
Delivered: **04 March 2016**

Flynote: Application to review and set aside an award in terms of s 89(4) and 89(5) of the Labour Act 11 of 2007 – Grounds for review – set out in s 89(4) and s 89(5) – Labour law – Grounds for review – gross irregularity and an award obtained improperly – application dismissed.

Summary: The applicant brought a review application in terms of s 89(4) and s 89(5) of the Labour Act 11 of 2007, seeking an order from the Court to review an award issued in favour of the third respondent alleging gross irregularity on the side of the arbitrator and the award obtained improperly – Court found no irregularities in

the procedure followed during the arbitration and no evidence causing the award to be obtained improperly – Application dismissed with no costs order.

ORDER

(i) The application is dismissed.

(ii) The request for a cost order by the third respondent is refused.

(iii) There is no order as to costs made.

JUDGMENT

UNENGU AJ:

[1] This is a review application in terms of s 89(4) and s 89(5) of the Labour Act[1] (the Act) by the applicant against the first to third respondents seeking the relief set out in the notice of motion dated 15 August 2014.

[2] In the application, the applicant has prayed for an order in the following terms:

'BE PLEASE TO TAKE NOTICE THAT:, That Roads Contractor Company (hereinafter referred to as the applicant) will make an application to this Court for the award and orders set out below to be reviewed and pray for an order in the following terms:

(a) Reviewing and setting aside the arbitration award granted by the 1st Respondent against the applicant in case no. CRWK 389-14 which award was delivered on 16 July 2014.

[1]Act 11 of 2007.

(b) Reviewing and setting aside the order of the 1st respondent that ordered that the amount of N$38 107.52 must be paid by the applicant to the 3rd respondent on or before the 25th day of July 2014.

(c) Reviewing and setting aside the order of the 1st respondent that ordered that the applicant must furnish the 3rd respondent with a duly completed pension withdrawal form on or before close of business on the 25th day of July 2014.

(d) Granting the applicant further and or alternative relief.'

[3] The notice of motion does include grounds for the review but they are set out in the founding affidavit of Mr Engelhard Haihambo who disposed to such an affidavit on behalf of the applicant. They are:

(i) 1st respondent committed gross irregularity in conducting second conciliation in the absence of the applicant after a first conciliation of 20 June 2014 resolved the dispute for which certificate was issued.

(ii) The second ground is that the 1st respondent committed gross irregularity in the conduct of the proceedings by recording in the award that the applicant was and not represented by a legal practitioner and that it has nowhere been recorded on the award that the applicant applied for representation, and also for allowing one party to a dispute legal representation but refuse same to the other.

(iii) The third ground is that the 1st respondent committed a gross irregularity in the conduct of the proceedings by finding that the deduction of N$66 480.35 the applicant claimed from the terminal benefits of the third respondent violated the provisions of s 12 of the Act.

(iv) The fourth ground is that the 1st respondent committed a gross irregularity in the conduct of the proceedings and or that the third respondent obtained the award improperly.

[4] The background facts common to the parties are that the applicant and the third respondent entered into a contract of employment or about 13 June 2012 when the third respondent was employed by the applicant as an internal auditor at its head quarters in Windhoek: employment agreement so concluded contained express and implied terms which terms were to be complied with by both parties. The agreement was also subject to the terms and conditions of the policy of the applicant.

[5] On the date of employment, the third respondent was given two options to choose one from either to lease a vehicle through FML scheme or to accept a car allowance. The third respondent chose the first option, namely to lease a vehicle through the scheme.

[6] However, the vehicle was returned to the owners on 3 February 2014 after he stopped working for the applicant on 13 January 2014. He tendered his resignation on 13 December 2013. The return of the vehicle was acknowledged by the Chief Executive Officer (CEO) of the applicant on 19 February 2014 by written correspondence in accordance with the terms of the agreement between the applicant and Eqstra.

[7] The third respondent was informed among others that he was liable in the amount of N$66 480.61 in respect of excess charges together with an amount of N$7 386.74 in advance payment payable to the applicant before the end of the lease agreement.

[8] In the correspondence exchanged between the applicant and the third respondent, it appears that the applicant owed the third respondent some money in the form of terminal benefits. The applicant though and after numerous requests by the third respondent self and by his legal practitioners, refused to pay him his terminal benefits.

[9] Because of the refusal to pay the third respondent his terminal benefits, the third respondent on 30 April 2014 referred a dispute for the non-payment of terminal benefits against the applicant, indicating that the cause of action arose on 13 January 2014, the date he stopped working for the applicant.

[10] All the necessary papers were served on the applicant and Loemore Mughandira was designated by the Labour Commissioner to conciliate and arbitrate the dispute. After the conciliation failed, the dispute was set down on 20 June 2014 at 10h00 for arbitration by Mr Lovemore Mughandira at the Labour Commissioner's Office in Khomasdal.

[11] On June 2014 the hearing was postponed to 4 July 2014 at 09h00 for hearing before the same arbitrator. Kelina Mudzanapabwe, representing the third respondent, Mr Ihuhua, (the third respondent) and Mr Bazil Strauss on behalf of the applicant were in attendance on the 20 June 2014.

[12] The same people were again present on 4 July 2014 when the hearing resumed. Mr Strauss applied for a postponement of the hearing from the bar but was refused after Ms Mudzanapabwe counsel for the third respondent objected to a further postponement. Mr Strauss was thereafter excused and the hearing proceeded in the absence of the applicant.

[13] The arbitrator, upon consideration of the evidence of the third respondent, who is the only person testifying in the hearing and his evidence not challenged by the applicant through cross-examination, made an award in favour of the third respondent on 16 July 2014. Hereunder is the verbatim reproduction of the award:

'19. Award:

Having made the findings as stated herein above, I now order as follows:

1. That the Respondent (Roads Contractor Company Limited) must pay the applicant (Godfrey Ihuhua) an amount of N$56 672.90 as terminal benefits less the applicant's

study loan in the amount of N$8 066.64. A further deduction of N$3 112.00 in respect of transport overpayment be effected. A further deduction of N$7 386.74 in respect of an authorized one month deduction be effected. The total amount to be paid by the Respondent to the Applicant is N$38 107.52 inclusive of payments due by the applicant to the Receiver of Revenue if applicable.

2. The said amount of N$38 107.52 must be paid by the Respondent to the Applicant on or before the 25th day of July 2014.

3. The Respondent must furnish the Applicant with a duly completed pension withdrawal form on or before close of business on the 25th day of July 2014.

4. No order as to costs.

Done on the 16th day of July 2014 at Windhoek.'

The grounds for review in detail

The first ground: The first respondent committed gross irregularity in the conduct of the proceedings

[14] The applicant submits it did not receive a notice informing it of the first and or subsequent conciliation meetings. The applicant asserts that, it did not participate in any conciliation meeting that resulted in the dispute referred to the second respondent by the third respondent being successfully resolved and consequently, the applicant denies that it was a party to any such alleged settlement agreement as alleged in the said certificate. On this basis, the applicant submits that on the effect of the terms of the certificate, it was irregular for the first respondent to proceed and conduct arbitration proceedings if the parties had already resolved the dispute at the conciliation stage. The applicant further submits that the arbitration proceedings be reviewed and the award be set aside on the basis that, the terms of the certificate purports that, the applicant participated in the alleged conciliation meeting and became a party to a settlement agreement that resolved the dispute when in fact and

in truth, the applicant never participated in either the alleged conciliation meeting and or the alleged settlement agreement.

[15] The third respondent in his answering affidavit submits that at the time of the hearing and at all material times thereafter it was the understanding that what the arbitrator issued was a certificate of unresolved dispute, same which would have enabled the arbitrator to proceed to arbitration in terms of Rule 27(2)*(b)* and 27(3) of Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ('the Con/Arb Rules') as he thereafter did.

[16] The third respondent submits that the arbitrator completed the certificate of resolved dispute in error for the following reasons: The dispute was not resolved as the parties had not been able to go through the process of conciliation due to the nonappearance of the applicant at the conciliation/arbitration proceedings. Furthermore, the third respondent submits that the certificate issued by the arbitrator is of no consequence and should be disregarded due to the mere fact that the matter proceeded to arbitration on 4 July 2014 and an arbitration award was thereafter issued on 16 July 2014. The arbitrator could not have intended to issue a certificate of resolved dispute after having proceeded to arbitration. An arbitrator conducting conciliation proceedings after having been designated in terms of s 85(5) as the arbitrator herein was, is not entitled to issue a certificate such as the one referred to by the applicant.

[17] The third respondent denies applicant's averments. In amplification of such denial the third respondent submits that from the outset the applicant's representative Mr. Kauta was aware of the set down dates and the applicant's averment that it was unaware of the conciliation meeting is untrue. He referred the Court to paragraph 2 of the arbitration award wherein the arbitrator states that at the first meeting of 20 June 2014 he took steps and confirmed with the administration section of the office of the Labour Commissioner that the Notice of Conciliation Meeting of Arbitration hearing was served on the applicant, and he obtained a confirmation of the fax transmission. He further telephonically contacted the offices

of the applicant and one Ms Eva Geingob indicated that the set down, although received, was not effectively brought to her attention, and she therefore requested for new dates.

[18] It was on this basis of such request that the arbitrator proceeded to issue new dates, same being 4 July 2014, and he confirmed that the applicant had received the fax transmission setting out the new set down dates. In light of these actions of the arbitrator the third respondent submits that the applicant cannot aver to have been unaware of both the dates on which the matter was set down. Furthermore, on 4 July 2014 Mr Strauss from the applicant's legal practitioners appeared at the office of the labour commissioner to postpone the matter on behalf of Mr Kauta who had apparently fallen ill and therefore unable to attend to the matter. The applicant thus knew the date of hearing.

[19] The third respondent denies that the terms of the certificate have no factual basis and they are not factually correct. In any event, the applicant uses this aspect to cover up their own ineptitude and do not care attitude portrayed before the hearing.

Second ground: The first respondent committed gross irregularity in the conduct of the proceedings.

[20] The applicant submits in paragraphs 2 and 3 of the award, that, the third respondent was represented by a firm of Legal Practitioners. At paragraphs 3 and 5 of the award, the first respondent records that, the applicant was not on record as having legal representation. The applicant points out that, there is nowhere in the arbitration award where it is reflected that the third respondent applied for legal representation in the arbitration proceedings and also there is nowhere in the award where it is reflected that the first respondent authorised the appearance of the third respondent's legal practitioners in those proceedings. The applicant submits that the conduct of the arbitrator was improper and contrary to the terms of article 10(1) of the Namibian constitution for the first respondent to allow a Legal Practitioner to

represent one party to the dispute and refuse same to the other party. On this basis the arbitrator committed a gross irregular in the manner in which he conducted the arbitration proceedings and the said proceedings should be reviewed and set aside.

[21] The arbitrator is correct in his assertion that the applicant was not on record as having legal representation as there was no request for representation filed on behalf of the applicant in this matter. Mr Strauss who represented the applicant and applied for a postponement could not point out such a request to the arbitrator. The third respondent alleges that despite there being nowhere in the arbitration award where it is reflected that he applied to have legal representation in this matter, he submits that he did apply for the same and a copy of his request for representation was duly received by the office of the labour commissioner and was in the record of arbitration proceedings which is attached to his answering affidavit. It is not the arbitrator who did not allow a legal practitioner to represent one party to the dispute and allowed same to the other party, as the applicant is alleging. It is clear from the arbitration award paragraph 6 that following the arbitrator's refusal to postpone the matter, Mr Strauss requested that he be excused as he did not have instructions to attend to the matter. Mr Strauss did also not ask for the hearing to be adjourned for him to get instruction from either Mr Kauta or the applicant self on what to do next. He merely requested to be excused from the proceedings and left. Nothing prohibited the arbitrator to conduct the arbitration hearing in the absence of the applicant.

Third ground: The first respondent committed a gross irregularity in the conduct of the proceedings.

[22] At paragraph 14 of the award, the first respondent made a finding to the effect that the deduction of money the third respondent claimed for the terminal benefits violated the provisions of s 12 of the Labour Act, and relied on this finding to grant the award in the favour of the third respondent. Applicant submits that this finding is not supported by law. Furthermore, applicant submits that the first respondent makes a finding that, the amounts of N$3 112.00 and N$7 386.74 constitute permissible and

lawful deductions in terms of the provisions of s 12 of the Labour Act. The applicant submits that this finding is not at all supported by the provisions of s 12. Applicant submits further that it is evident from the conditions set out in s 12(3) of the Act that, there is no category that supports the allowance of the deduction of overpayment and a monthly installment that the first respondent found to be permissible under the provisions of s12.

[23] Save for admitting the applicant's submission with regard the evidence that was placed before the arbitrator during the arbitration proceedings, the rest were denied by the third respondent and challenged the applicant to prove the allegations. On the allegation of permissible lawful deductions, the third respondent denies the contents thereof and submits that the arbitrator does indeed point out the basis on which he found that the deductions of N$3 112.00 and N$7 386.74 constituted permissible deductions for the reasons: that arbitrator does not at any part of the award hold that the deductions of the two amounts were lawful for purposes of section 12 of the Labour Act, but rather that he found them lawful in that the third respondent allowed the applicant to deduct same from his salary as he indeed owed it to the applicant.

[24] The third respondent further submits that the unlawfulness of the deductions of the two amounts was never challenged and was therefore never in question. The third respondent submits that he did not owe such amount and the applicant did not prove his liability for same.

[25] As indicated above in a review proceedings the applicant has to attack the method of the trial not the result thereof. It is the lawfulness of the trial, how the trial was conducted not the merit of such a trial. Therefore, in my view, the finding made by the arbitrator that the deductions of terminal benefits violated s 12 of the Act whether wrong or right is a question of interpretation of the facts and law placed before him during the trial. Therefore, not reviewable[2], but appealable.

[2]Collins Parker: Labour Law in Namibia: UNAM PRESS p 211.

[26] Miller AJ in *Purity Manganese (Pty) Ltd v Commissioner Mwafufya-Shikongo & Others*[3] in para 15 of his judgment said the following:

'An application seeking to review and setting aside those findings faces a stiffer and higher hurdle than it would be in an appeal. The applicant on review must establish, not only that the finding of fact is arguably wrong. The error in the factual finding must be of such a nature that no reasonable trier of fact would have come to a similar finding.'

Fourth ground: The first respondent committed a gross irregularity in the conduct of the proceedings and or the third respondent obtained the award improperly.

[27] At paragraph 14 of the award, the first respondent makes a finding to the effect that the deduction by the applicant of the amount of N$66 480. 35 payable to Eqstra Fleet Management and or Omatemba fleet services violates the provisions of s 12 of the Labour Act. The provisions of s 12(1)*(a)* clearly states that, if a deduction is required or permitted in terms of any law, then such a deduction is permissible. Applicant submits that, it relied on the legal principle of set off to claim the deduction of the amounts that third respondent owed the applicant. On this basis since set-off is a principle recognized in law, it falls within the scope and meaning of the concept "any law" prescribed in s 12(1)*(a)* of the Labour Act. Applicant submits that this finding is incorrect and is not supported by any law. Applicant submits that the third respondent obtained the award improperly as he was bound by the principle of set-off and on that basis, he was not entitled to the arbitration award and the award must be reviewed and set aside solely on this ground.

[28] On the other hand the third respondent submits that the deductions of the amount of N$66 480. 35 was not a deduction permitted in terms of law. The legal principle of set-off would only apply where it is a fact that a party owes an amount to another party, which fact he denies, and which fact the applicant had the onus to prove during the hearing of dispute at the office of Labour Commissioner.

[3] NLLP 2013 (7) 211 LCN 15 June 2012.

[29] Once again I should reiterate what I said already that the applicant did not present any evidence in the arbitration proceedings – nor cross-examined the third respondent after he had testified. Tribunal is a forum established for the purpose of resolving disputes[4] operating under the auspices of the Labour Commissioner with jurisdiction to hear and determine any dispute or any other matter arising from the interpretation, implementation or application of this Act and makes any order that the tribunal is empowered to make in terms of any provisions of this Act. The evidence of the third respondent tendered in the arbitration proceedings was unchallenged. Therefore, the arbitrator had no choice but to accept the evidence.

[30] The applicant self is to blame for being absent from the proceedings on 4 July 2014. Mr Strauss attended but requested to be excused after his request for a postponement was turned down.

[31] The applicant has alleged as one of his ground for review that the arbitrator issued a certificate to the effect that the matter was resolved between the litigants – therefore committed an irregularity.

[32] The question arises as why was this aspect not raised with the arbitrator earlier before set down of the hearing on 20 June 2014. Similarly, Mr Strauss was quiet about it on 4 July 2014. Why?

[33] In any event, even if the so-called certificate of resolve, was issued in error, it cannot now be used by the applicant to ask this Court to set aside the award. The applicant took part in the proceedings after the certificate was issued therefore ratified and condoned any defect the certificate might have had.

[34] Had the arbitrator granted a postponement on 4 July 2014, the probability is high that nothing would have been said by the applicant about the certificate.

[4] S 85(1) and (2) of the Act.

[35] Maritz JA in the *Ondjiva*[5] case reminds that litigation is a serious matter and, once having put a hand to the plough, the applicant should made arrangement to see it through. The principle applicable in *Ondjiva* case is applicable to the applicant in this matter.

[36] Section 89(4) and (5) the Act make provision for the review and setting aside of an arbitration award issued in terms of s 86 and reads as follows:

'89(4) A party to a dispute who alleges a defect in the arbitration proceedings, in terms of this part, may apply to the Labour Court for an order reviewing and setting aside of the award:

(a) within 30 days after the award was served on the party unless the defect involves corruption, or

(b) If the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption;

(5) a defect in subsection (4) means

(a) that the arbitrator:

(i) committed misconduct in relation to the duties of an arbitrator,

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or exceeded the arbitrator's powers or

(b) that the award have been improperly obtained.'

[37] As pointed out already hereinbefore, reliance on the certificate of resolve of the dispute will not assist the applicant for reasons stated above. I accepts the third respondent's version that the first respondent made a *bona fide* error by, instead issuing a certificate of unresolved dispute, a certificate of resolved dispute was issued. I am not even surprised that Mr Khama, counsel for the applicant did not bother to address the Court on the certificate issue during the hearing. I take it counsel regarded the aspect not to have tainted the lawfulness and fairness of the arbitration proceedings.

[38] That being the case, ground one of review is devoid of any substance and stands to be dismissed.

[5]Ondjiva Construction CC and Others v HAW Retailers t/a Ark Trading 2010 (1) NR 286 (SC).

[39] Ground two should suffer the same fate like ground one. In the discussion and evaluation of the evidence presented before him, the third respondent explained in detail and gave reasons for the finding that the applicant did not submit a request for legal representation to the Office of the Labour Commissioner. He could not find any prove on the file of such a request from the applicant. The applicant had also not attach a copy of such a request to the founding affidavit filed in support of this application if the applicant submitted one. On that basis I reject the allegation that the applicant was denied his right to equality before the law and freedom from discrimination provided for in Article 10 of the Constitution. Mr Khama also did not support the contention during the oral submissions.

[40] The applicant makes an allegation in the third ground for review that the finding by the first respondent that the deduction of money the third respondent claimed for the terminal benefits violated the provisions of s 12 of the Labour Act and relied on this finding to grant the award in favour of the third respondent, is a gross irregularity. This is so because the finding is not supported by law, they argue.

[41] I should point out at this stage that the applicant failed to set out his ground of review clearly and specifically in the notice of motion as required in applications for appeals. The defect of committing a gross irregularity in the conduct of the proceedings is provided for in s 89(5) (ii). The subsection talks of 'in the conduct of the proceedings' – meaning the irregularity must have been committed in the method, the way or through a procedure followed in the proceedings. To attack the finding of the arbitrator which was made against the law – (in the instant matter) against s 12 of the Act, is not a ground for review. It is an attack against the result of the proceedings (See Ellen Louw case[6]).

[42] In the *Ellen Louw* matter, Hoff AJ said that if the reason to have the judgment set aside is that the court came to a wrong conclusion on the facts or the law, the

[6]Ellen Louw v Chairperson, District Labour Court and J P Snyman & Partners (Namibia) (Pty) Ltd: Case No. LCA 27/1998 p11.

appropriate procedure is by way of appeal. Where however, the grievance is against the method of the trial, it is proper to bring the case on review.

[43] In the present matter, in ground three, the applicant is not complaining against the method of the trial but against the wrong conclusion on the law. This ground must also fail.

[44] While on this ground, I wish to mention that Mr Khama spent much of the time to argue the point. He started off by submitting that the first respondent (the arbitrator) was the proper person to answer to the allegations in the founding affidavit of the applicant not the third respondent. He submitted that the first respondent did make the findings in the award which are sought to be reviewed and set aside.

[45] Further, it is the contention of Mr Khama that the application before Court was to review an administrative decision. I agree. The arbitrator is an administrative official performing a public function in terms of the Labour Act. The same applies to the Office of the Labour Commissioner in its capacity as an administrative body. However, the essence of Mr Khama, if I understood him correctly, is that by failing to oppose and defend or justify his award, the first respondent rendered the application unopposed by default. That the third respondent was not competent to oppose and defend the application because he did not issue the award.

[46] Meanwhile, Ms Mudzanapabwe differed and submitted that although the third respondent cannot justify what the first respondent has decided, but has an audience to be heard in the similar fashion the applicant has a right to bring the application. In addition, Ms Mudzanapabwe argued that according to the policies of the applicant, her client, the third respondent was liable for excess alone per the vehicle benefit scheme policies. This, according to her will happen when the vehicle was driven over 150 km and the owner is unable to prove that the kilometres were for business purpose.

[47] Ms Mudzanapabwe denied on behalf of her client that the client was liable to pay the money the applicant is asking from the third respondent .The amount the first respondent stated in his award that it was deducted in violation of s 10 of the Act.

[48] In addition, Ms Mudzanapabwe argued that the agreement signed between applicant and the service provider, her client was not a party to it and that the client was not aware of the clause the applicant is now relying on for the payment.

[49] In my opinion Ms Mudzanapabwe is correct in view of the fact that the applicant did not lead evidence in the arbitration proceedings to prove that the third respondent was aware of the clause in the agreement between the applicant and the service provider. Therefore, I accept the version of the third respondent that it is possible that he was only aware of the excess charges which he would pay in case he had driven the vehicle over 150 km and cannot prove that the kilometres were for official purposes.

[50] With regard the concern of Mr Khama why the first respondent, the decision-maker did not come to Court to explain and justify his award, can be dispose of quickly and in short. The first respondent did not only issue the award without giving reasons justifying his findings – he wrote a detailed judgment wherein he assessed and evaluated the evidence placed before him. Therefore, the applicant was served with a written and signed award with concise reasons which the applicant is now appealing against. That said, it is therefore not necessary for the first respondent to oppose and defend a review or an appeal application.

[51] In the present review application, the third respondent has a right to oppose the application and defend the award issued in his favour. If he had failed to do so, this Court would have had no alternative but to grant the application on an unopposed basis. Therefore, and for reasons stated above, in particular that the applicant did not prove in the arbitration proceedings that the third respondent was aware of the clause in the agreement signed between the applicant and the service provider making him liable to pay any outstanding amount on the vehicle, I reject the argument of Mr Khama on the principle of set off because the third respondent, did

not owe the applicant any money apart from the money he said should be deducted from his terminal benefits, which the first respondent deducted from the terminal benefits in the award. As said above, I could not find anything untoward in the award which could have vitiated the finding made on the liability or not of the money due and payable to either the applicant or the service provider by the third respondent. That bring me to the last ground for review, namely the award was improperly obtained.

[52] As said hereinbefore, s 89(5)*(b)* has nothing to do with the conduct of the arbitration but of the litigant – in this case, the third respondent. Mr Khama did not argue to bolster the ground during oral submissions. He had also not indicated to the Court that the applicant no longer pursuing or has abandoned the ground. Be that it may. I have not been told what is that what the third respondent did which led him to obtain the award improperly.

[53] He referred a dispute for unpaid terminal benefits to the Labour Commissioner and obtained an award for terminal benefits. The ground is also without merits.

[54] In conclusion, I considered the request by counsel for the third respondent to be granted a costs order. According to her the application was frivolous. I disagree. Not in this application. The applicant acted within his right to bring the application. The request for costs will not be granted.

[55] Accordingly and for the reasons stated above, the following order is made:

(i) The application is dismissed.

(ii) The request for a cost order by the third respondent is refused.

(iii) There is no order as to costs made.

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E P UNENGU

Acting Judge

APPEARANCES

APPLICANT :	D Khama Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
3RD RESPONDENT:	K Mudzanapabwe Instructed by Köpplinger Boltman, Windhoek

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