

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-GEN-2022/00092

In the matter between:

BATELEUR HELICOPTERS CC

APPLICANT

and

GUNTHER HELMUTH HEIMSTADT JNR

1ST RESPONDENT

KLEOFAS GEINGOB

2ND RESPONDENT

THE LABOUR COMMISSIONER

3RD RESPONDENT

Neutral citation: *Bateleur Helicopters CC v Heimstadt JNR* (HC-MD-LAB-MOT-GEN-2022/00092) [2022] NALCMD 36 (16 June 2022)

CORAM: Ndauendapo J

Heard: 13 May 2022

Delivered: 16 June 2022

Reasons: 24 June 2022

Flynote: Labour Law – Stay of Arbitral award pending finalization of appeal against award – Application inherently urgent – Irreparable harm to applicant outweigh prejudice to first respondent – Application granted.

Summary: The applicant seeks an order staying the execution of arbitration award pending finalization of an appeal against the award. The first respondent was employed by the applicant. He alleged that he was unfairly dismissed by the applicant. He referred a complaint of unfair dismissal to the office of labour commissioner. The arbitrator found in favour of the first respondent and ordered the applicant to pay the first respondent an amount of N\$962, 322. 21 in damages. The applicant launched an appeal against the award. The first respondent wants to execute the award, hence this urgent application by the applicant to interdict and stay the execution of the award.

Held that, application of such nature is inherently urgent provided the execution is reasonably imminent and applicant is not guilty of any blameable conduct in not bringing the application timeously.

Held that, the grounds of appeal are against findings of law and therefore applicant has a right to appeal.

Held that, Court may refuse application to stay execution of award, pending finalization of appeal, if satisfied appeal is frivolous or vexatious or appeal is not bona fide.

Held further that, where court is satisfied appeal launched with bona fide intention, court must examine potentiality of irreparable harm to applicant and first respondent, respectively, and find where the balance lies.

Held further that, first respondent has found alternative employment and proposed that the award must be paid in the trust account of his attorneys trust account and that shows that he will not suffer irreparable harm, if the implementation of the award is suspended pending finalisation of the appeal.

Held that, the application succeeds.

ORDER

1. The application succeeds.
 2. I order stay of execution and operation of second respondent's arbitral award dated 30 March 2022 pending the finalization of the applicant's appeal against that award.
 3. There is no order as to costs.
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JUDGMENT

Ndauendapo J:

Introduction

[1] This is an urgent application in terms of which the applicant seeks an order in terms of section 89(7) read with section 89(9)(a) of the Labour Act, Act 11 of 2007 ("the Act") for an order that the execution of the award of the second respondent dated 30 March 2022, under case number CRSW163-20, be stayed pending the finalization of the appeal filed by the applicant on 27 April 2022 under case number HC-MD-LAB-APP-AAA-2022/00032.

The parties

[2] The Applicant is Bateuleur Helicopters CC, a close corporation incorporated in terms of the applicable laws of the Republic of Namibia with principal place of business situated at Shop 52, corner of Sam Nujoma Avenue and Bismarck Street, Anker Platz, Swakopmund, Republic of Namibia.

[3] The First respondent is Gunther Helmuth Heimstadt JNR, an adult male residing at Mile 4, Extension 1, 355 Emerald Street, Swakopmund, Namibia and whose full and further particulars are unknown to the applicant.

[4] The Second respondent is Kleofas Geingob, an adult male cited herein in his official capacity as the appointed Arbitrator in terms of the Labour Act, Act 11 of 2007, for the matter between the applicant and the first respondent hereto, employed at the Ministry of Labour with offices situate at Head Office, No. 32 Mercedes Street, Khomasdal, Windhoek, Republic of Namibia.

[5] The Third respondent is the Labour Commissioner who is cited herein in his official capacity, appointed as such in terms of the Labour Act 11 of 2007, with his address of service for purposes of this application being No. 32 Mercedes Street, Khomasdal, Windhoek, Republic of Namibia. No relief is claimed against the third respondent and he is cited herein merely for the interest that he may have in the outcome of this matter and in order to ensure compliance, as far as is necessary, with rule 14(4)(b) of the Labour Court Rules.

Background facts

[6] Mr. Jannie Swart, the sole and managing member of the applicant, deposed to the founding affidavit in support of the relief sought. He avers that, on 16 October 2022 the first respondent filed a referral of dispute to conciliation or arbitration in terms of section 82(7) and 86(1) of the Act.

[7] First respondent complained that he was allegedly unfairly dismissed by the applicant in that applicant “did not provide a valid or a fair reason “why his employment was terminated and that “no disciplinary hearing was held”. The first respondent claimed payment of his salary for 6 months (March – August 2020), all accrued leave for 6 months, accrued debt in the amount of N\$150,000.00 and costs.

[8] After the arbitration hearing was held on 6 September 2022 the second respondent found that the first respondent’s termination was substantively and procedurally unfair and awarded the first respondent, on 30 March 2022, the following relief –

- (a) Payment of N\$765,000.00 (loss of income);

- (b) Payment of N\$155,781.21 (accrued leave);
- (c) Payment of N\$41,541.00 (severance); and

The total amount the applicant had to pay was N\$962,322.21, plus interest.

[9] On 26 April 2022 the applicant appealed against the entire award of the second respondent and duly filed its (i) Notice of Case Registration (appeal), (ii) Notice of Appeal, (iii) Notice of Appeal from Arbitrator's Award and its (iv) Affidavit of Services (Form LG36). True copies of the documents referred to is annexed hereto and are marked "**JS4**", "**JS5**", "**JS6**" and "**JS7-1, JS7-2 and JS7-3**" respectively.

[10] The applicant's grounds of appeal are fully set out in terms of its Notice of Appeal. In summary, the grounds of appeal are as follows:

- (a) The arbitrator erred in law when he failed to consider the evidence of the applicant proving that the first respondent committed fraud, alternatively that the arbitrator erred in law to find that the first respondent did not commit fraud whilst in the employ of the applicant;
- (b) The arbitrator erred in law when he did not find that the first respondent repudiated the employment agreement, alternatively, breached the employment contract when he: rendered services to another business and acted in direct opposition to the interest of the applicant; abandoned his employment with the applicant; acted fraudulently towards the applicant when he was employed.
- (c) The arbitrator erred in law when he came to the legal conclusion that the applicant had to apply the procedure as per section 34 of the Labour Act to dismiss the first respondent.
- (d) The arbitrator erred in law when he found that the first respondent proved his damages in the amount of N\$962,322.21 as follows:

N\$765,000.00 (as from April 2021 to August 2022) as salary for 17 months;

N\$155,781.21 as leave days for the period 2018 – 2020; and

N\$41,541.00 as severance pay.

(e) The first respondent breached his employment agreement when he rendered the same services he was employed for by the applicant to a third party whilst being employed by the applicant;

(f) The first respondent breached his employment agreement when he acted in direct competition with the applicant; this evidence was not considered by the arbitrator at all.

(g) Unlawfully used the name and goodwill of the applicant for his own benefit.

(h) Applicant further appeals on the basis that the arbitrator erred in law when he found that the first respondent is entitled to leave days for 2 years and when he found that the first respondent established the existence of a dismissal.

[11] On 9 April 2022 the applicant's labour consultant, Ms. Izaan Prinsloo, confirmed by e-mail to the first respondent's labour consultant that she received the above-mentioned arbitration award and that the applicant intended to note an appeal against said award. A copy of the e-mail referred to is attached hereto and is marked "**JS8**". On 20 April 2022 the first respondent's representative applied to the Labour Inspector to enforce the second respondent's arbitration award. A copy of said application is annexed hereto marked "**JS9**".

[12] On 26 April 2022 the applicant appealed against the arbitration award under case number HC-MD-LAB-APP-AAA-2022/00032.

[13] On 26 April 2022 applicant's legal practitioners of record addressed an e-mail to the first respondent forwarding the relevant notices of appeal to the first respondent. A copy of this e-mail is annexed hereto marked "**JS10**". He avers that applicant's legal practitioners of record, Mr. Stoaan Horn, also addressed an e-mail to the representative of the first respondent stating that:

- “3. We have served our client’s notices of appeal to your client, by email, copies of which is attached herewith for your records.
4. We hold instructions to proceed with an application for the stay of the award, as per section 89(7) of the Labour Act. In the premises we request whether the execution of the award can be kept in abeyance until the stay application has been lodged in the normal course of events and finalized. In the event that your client can not agree, we shall bring an urgent application for the stay of the award.
5. ...
6. You would further appreciate that the award is for a substantial amount of money – almost 1 Million Dollars, which makes the risk very high if paid over to your client, especially if insufficient security exists.
7. We await your feedback urgently.”

A copy of this e-mail is annexed hereto marked “**JS11**”. First respondent’s representative replied to the above e-mail as per annexure “**JS12**” hereto.

[14] On 27 April 2022 applicant’s legal practitioner of record again addressed an e-mail to first respondent’s representative stating the following:

- “2. We have not receive the record of the arbitration proceedings ...
3. We do however wish to draw your attention to the fact that one of the grounds of appeal *inter alia* is that, your client absconded from/abandoned his employment and repudiated alternatively breached his employment agreement, and further to the above acted in competition with his employer ...
4. In terms of the application for the stay of the award we note that your client has obtained alternative employment and is not suffering irreparable harm ... We further accept that your client can not provide security in his name for the value of the award ...
5. In the premises we propose that we issue the application for the stay of the award on 13 May 2022, and your client be allowed 14 calendar days to reply

from the date of lodging his notice to oppose ... Kindly provide us with your counter proposals ...”

A copy of this e-mail is annexed hereto marked “**JS13**”.

[15] He avers that despite the applicant’s efforts to prevent the execution of the arbitration award pending the finalization of the appeal the first respondent’s representative sent a reply e-mail to applicant’s lawyer in the following terms:

“Dear Sirs

Attached hereto the necessary documents submitted to the Labour Inspectors to enforce the Arbitration Award.”

A copy of the mentioned e-mail and annexure thereto (Registration of Arbitration Award) is annexed hereto marked “**JS14**” and “**JS15**” respectively.

The arbitration award was filed with the registrar of the Labour Court on 27 April 2022 under case number HC-MD-LAB-AA-2022/00080, and henceforth became an order of the Labour Court on that date.

[16] On 27 April 2022, applicant’s legal practitioner addressed an e-mail to first respondent’s representative per annexure “**JS16**” hereto as follows:

- “1. I refer to your email of even date.*
- 2. I accept that you hold instructions not to stay the implementation of the award.*
- 3. In the premises we shall proceed with our application for the stay of the award unless otherwise advised by you.”*

He avers that from the above communications it is clear that first respondent is going full-steam ahead to have the arbitration award enforced.

[17] He avers that the matter is urgent because the first respondent is of the intention to enforce the arbitration award in his favour and the first respondent's next step is that he will cause the Deputy Sheriff to attach the property of the applicant. Applicant does not want to sit idle and wait for its property to be attached before it brings an urgent application.

[18] He further avers that the applicant is of the respectful opinion that the conduct of the first respondent in going ahead with the enforcement of the arbitration award is reproachable in the circumstances of this case because first respondent is well aware of the fact that the applicant has noted an appeal against said arbitration award. First respondent further fails and/or refuses to come to an amicable compromise pending the finalization of the appeal. The application is one of urgency and that the applicant has not unnecessarily delayed the bringing of this application. The applicant has throughout endeavoured to find an amicable solution to the issue in question and this application is necessitated solely as a result of the first respondent's refusal to co-operate.

[19] The applicant was informed of the first respondent's intention to enforce the arbitration award on Wednesday, 27 April 2022, when the applicant's legal representatives received an e-mail from first respondent's representative as per annexure "JS16" above.

[20] The applicant acted without delay and immediately gave instructions for the appointment of counsel to draft these papers as applicant's legal practitioner of record, Mr. Horn, had to travel abroad on 28 April 2022 for personal reasons. Due to the long weekend and public holidays of 1 May 2022 and 2 May 2022 applicant's legal practitioners only found and instructed available counsel on Tuesday, 3 May 2022. Counsel could unfortunately only attend to this matter and the drafting of papers on Wednesday, 4 May 2022. I point out that 4 May 2022 was also a public holiday.

[21] He avers that an application of this nature is inherently urgent. The first respondent has already registered the arbitration award with the Labour Court and has instructed the Labour Inspector to enforce the arbitration award. The first respondent is likely, at any time, to initiate proceedings that will result in the attachment and sale of the applicant's assets.

[22] He avers that the applicant will not be afforded adequate redress should this matter be heard in the ordinary course. He has been advised that applications of this nature brought in the ordinary course are generally only heard, at the earliest, 5 – 9 months after being lodged. This excludes the time set aside for this court to hand down its judgment. This time-frame would defeat the entire purpose of the application. In light of the above he avers that the applicant faces a real and imminent danger of suffering irreparable financial harm or prejudice should this honourable court not grant the relief sought by applicant in terms of its notice of motion.

[23] He submits that applicant has very good prospects of successfully appealing against the award of the second respondent having regard to the grounds of appeal as enumerated in the notice of appeal.

[24] He submits that the balance of convenience or potential prejudice favours the applicant. If the execution of the arbitration award in favour of the first respondent is not stayed pending the finalization of the appeal the applicant will suffer immense financial harm as the arbitration award is for a substantial amount of money. The applicant can't ill afford to part with N\$962,322.21 or more at this stage due to the state of the economy and the aftermath of the effects of the national lockdown due to the outbreak of the Covid-19 pandemic which resulted in a severe decline in tourism during the past 2 years or more.

[25] The first respondent on the other hand will not suffer the same prejudice if the arbitration award is stayed pending the finalization of the appeal. The first respondent has started his own business and is earning an income.

[26] The costs in this application was necessitated by the conduct of the first respondent who refuses to hold back on the execution of the arbitration award pending the finalization of the appeal noted by the applicant. He avers that the conduct of the first respondent is, with respect, frivolous and justify an adverse cost order from this honourable court.

[27] The first respondent avers that applicant's grounds of appeal relate to factual findings and not matters of law and therefore he has no right of appeal in respect of factual findings and has therefore no right of appeal and hold no prospects of success on appeal.

[28] He is entitled to proceed with execution. He suffered substantial losses as a result of having been unfairly dismissed by applicant and had to make due with loans from his relatives to sustain himself and his family.

[29] He avers that it is not reproachable for him to enforce his rights in circumstances where his family and himself have had to endure financial hardship pending the finalisation of this case and the delivery of the award which took much longer than what he have expected. He fell in arrears with payments of his accounts.

[30] Although he is currently employed his financial position is such that he is still in arrears with payments of his accounts. He can also not afford to expend legal costs to oppose this application and in desperation on 9 May 2022 instructed his legal practitioner to convey a proposal to applicant's legal practitioners, which he then did, to the effect that applicant can pay the award into his legal practitioner's trust account who will then retain it in trust and give an undertaking to applicant not to deal with such funds until such time as the appeal has been finalised, as security for applicant's fear that he may at the stage when the appeal is finalised, not be in a position to repay the award if the appeal is successful.

[31] He avers that he has hoped that this application could be settled by such proposal. Although that would not solve his financial problems he would at least show his creditors that the money is secured in trust and will become available when the appeal is finalised, which he trust will be successfully opposed.

[32] He also further offered that if the amount cannot be paid at once, it can be paid in instalments, but that offer was not accepted by the applicant.

[33] He further avers that applicant did not make out a case that it will suffer irreparable financial harm or prejudice if the relief is not granted. If the applicant is successful with the

appeal and has by that time already paid the award, applicant will have a claim against him for repayment. Applicant will by no means be ruined if the execution of the award is not stayed and also not if it is not recouped from him if the appeal succeeds. Applicant has substantial assets including three helicopters and a lucrative business.

[34] He maintains that he was unfairly dismissed and denies the allegations levelled against him as set out in the grounds of appeal. He avers that he did not abandon his employment, nor did he abscond. He did not compete with applicant and also did not make use of applicant's air operator certificate whether to make a profit or at all. He also did not start his own business in March 2020. This is a typographical error in the award. He wanted to start his own business in August 2020 after he learned with shock that applicant informed the whole aviation industry in writing (annexure A) that he was no longer employed by applicant. Nothing however came of it.

Submissions by applicant

[35] Counsel relaying on *Shoprite Namibia (Pty) Ltd v Paulo and Another*¹ submitted that application of this nature are inherently urgent. Counsel also referred to *Samicor Diamond Mining Ltd v Hercules*² where the court held that the test in applications such as this should be a consideration of the following factors (a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted; the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused; the prospect of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention to reverse the judgment but for some indirect purpose, e.g. to gain time or to harass the other party and where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent ,the balance off hardship or convenience, as the case may be.

[36] Counsel argued that the respondent does not have the financial means to repay the applicant the amount of the arbitration award should the applicant be successful on

¹ 2010(2) Nr 475(LC) at para 24

² NR (2020 304(HC)

appeal. Counsel further contended that it complied with all the requirements of an interim interdict in that it established a prima facie right and proved that it has a well-grounded apprehension that it will suffer irreparable harm if the interdict is not granted. Counsel submitted that the balance of convenience favours the applicant. The prejudice to the applicant if the interdict should be refused far outweighs the prejudice the respondent will suffer if the interdict is not granted.

Counsel submitted that applicant has good prospects of successfully appealing against the arbitrator's award as can be seen from the grounds of appeal as set out in the notice of appeal.

Submissions by first respondent

[37] Counsel submitted that the case for urgency has not been made out. Counsel further argued that the applicant is appealing against factual findings and has no right to appeal. Counsel contended that although the first respondent found alternative employment, he is in arrears with the payment of his accounts.

[38] He submitted that the first respondent has a right to execute the award and if the appeal succeeds and the first respondent had utilised the monies, the applicant can institute legal action against the first respondent to recoup the monies. He argued that the balance of convenience favours the first respondent. He financially suffered, had to rely on loans from family members and his accounts are in arrears. He argued that the appeal was doomed to fail as the first respondent was unfairly dismissed.

Discussions

Applicable legal principle

[39] In *Hardap Regional Council v Sankwasa Sankwa*³. The court held that: "I accept that by its very nature application for stay of execution is an urgent matter to be brought and

³ delivered 28 May 2009²(LC 15/9 (para4)).

heard on an urgent basis, but with this qualification, that is, provided, for example execution is reasonably imminent and applicant is not guilty of any blameable conduct in bringing the application timeously.”

[40] Section 89 of the Labour Act provides:

‘(8) When considering an application in terms of subsection (7), the labour court must-

- (a) Consider any irreparable harm that would result to the employee and the employer respectively if the award, or any part of it, were suspended, or were not suspended.
- (b) If the balance of irreparable harm favours neither the employer nor the employee conclusively, determine the matter in favour of the employee.’

[41] The learned authors *Van Winsen et al, Herbstein & Van Winsen*,⁴ opine that: “another relevant factor which the court must consider in the exercise of its discretion as to whether to grant or refuse an application of this nature is whether the appeal is frivolous or vexatious or that the appeal has been noted not with a genuine intention of seeking to reverse the judgment or order or award but for some indirect purpose e.g. as a delaying tactic and as a means of staving off evil day”

[42] In *Samir Diamond*⁵ the court spelt out the factors to be taken into consideration when dealing with applications of this nature, they are:

‘(a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted; the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused; the prospect of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention to reverse the judgment but for some indirect purpose, e.g. to gain time or to harass the other party and where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent ,the balance off hardship or convenience, as the case may be.’

[43] The applicant as soon as it became aware that the first respondent registered the award with the labour court, took steps to prevent the execution of the award. Its attorneys

⁴The Civil Practice of the Supreme Court of South Africa 4 ed 1977 at p895

⁵ Supra, footnote 2

wrote letters to the attorneys of the first respondent seeking an undertaking that the award will not be executed pending the finalization of the appeal, but the first respondent was not prepared to entertain such a request. The execution was reasonably imminent and the applicant then launched this application without delay and on the authority of *Hardap Regional council*, I accept that the application is urgent.

[44] The first respondent submitted that the grounds of appeal relate to factual findings and the applicant does not have a right to appeal factual findings. I disagree. The first respondent does not state which grounds are raised against factual findings nor does he say why. Having perused and considered the grounds of appeal, they appear to relate to appeal against findings on law. The grounds are also not frivolous nor vexatious. They are bona fide.

[45] On the issue of who will suffer irreparable harm, should the award be suspended or implemented, the first respondent proposed that the award can be paid in his attorney's trust account pending the finalisation of the appeal. The first respondent indicated that was to show his creditors that there are monies in his favour and they will be paid after the finalisation of the appeal that proposal was a clear indication that the first respondent was not going to utilise the monies immediately and he was prepared to wait until the finalization of the appeal. If indeed that was the case, the question that immediately arises is: what irreparable harm will the first respondent suffer if the implementation of the award is suspended pending the finalization of the appeal? The answer is none. If the aim was to buy time with his creditors, by showing them that there was monies in the trust account of his attorneys, in his favour, the same objective could have been achieved by showing his creditors that he has an award in his favour and that he will execute after finalisation of the appeal.

[46] The other factor to consider that mitigates the (against the) irreparable harm that the first respondent may suffer, is the fact that the first respondent is currently employed and earning an income. He can use the income to pay his debts.

[47] The first respondent has also not given any security that should the monies be paid and he uses the monies and the appeal succeeds, he will be able to pay back the monies.

The amount of close to one million is a huge amount and should the appeal succeed, the applicant will greatly suffer irreparable harm if the first respondent is unable to pay back the monies. In my respectful view, and having considered all those factors, the applicant will suffer irreparable harm if the award is implemented and not the first respondent.

[48] One matter remains. The applicant submitted that the first respondent be ordered to pay the costs of this application as his conduct in refusing to stay the execution was frivolous and vexatious. I disagree. His conduct was within his right as provided for in the Act.

Order

1. The application succeeds.
2. I order stay of execution and operation of second respondent's arbitral award dated 30 March 2022 pending the finalization of the applicant's appeal against that award.
3. There is no order as to costs.

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE APPLICANT:

Adv. Small (assisted by Mr Horn)
Instructed by Theunissen, Louw & Partners
Windhoek

FOR THE FIRST RESPONDENT:

Mr Olivier
Instructed by Ellis Shilengudwa Inc.
Windhoek