REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

CASE NO: HC-MD-LAB-MOT-GEN-2021/00136

In the matter between:

FISHERIES OBSERVER AGENCY **APPLICANT**

and

WILLIE STANISLAUS EVENSON **FIRST RESPONDENT**
THE DEPUTY SHERIFF OF WALVIS BAY **SECOND RESPONDENT**
ELSIE SCHICKERLING N.O.
(THE REGISTRAR OF THE HIGH COURT) **THIRD RESPONDENT**

Neutral citation: *Fisheries Observer Agency v Evenson* (HC-MD-LAB-MOT-GEN-2021/00136) [2022] NALCMD 44 (04 August 2022)

Coram: UEITELE J
Heard: **04 AUGUST 2022**
Delivered: **04 AUGUST 2022**

Flynote: Practice — Judgments and orders — Interpretation of order — Order relating to retirement of member of professional practice and payment of his member's interest in practice.

Summary: The first respondent was employed by the applicant as the head of the human resources department since October 2005. During the year January 2018

and pursuant to a disciplinary hearing the first respondent was dismissed from the employment of the applicant.

Aggrieved at the outcome of the disciplinary hearing and the result of his subsequent appeal, the first respondent filed a complaint with the Office of the Labour Commissioner claiming that he was unfairly dismissed. The arbitrator found in his favour, holding that the dismissal was substantively unfair, in that there was no valid reason justifying his dismissal. Accordingly, the arbitrator ordered that first respondent be re-instated and compensated for his loss including benefits. On 15 January 2019, the respondent made the arbitration award an order of the Labour Court. The applicant, was aggrieved by the award, and on 03 May 2019, appealed to the Labour Court against arbitrator’s award. On 07 August 2019, the Labour Court handed down its judgment, and dismissed the appeal, and amended the arbitrator’s award for the payment of the respondent’s monthly salary.

The parties, were at odds as to the interpretation of the arbitration award read with the order of the Labour Court, and ultimately what the respondent’s entitlements were, and despite this, the respondent proceeded to have a writ issued for the attachment of the applicant’s movable property on 19 April 2021.

During May 2021, the applicant, on an urgent basis, approached this Court and amongst other reliefs sought, in part A of its application, a *rule nisi* calling upon the respondents to show cause, if any, as to why the respondents must not be interdicted and restrained from making any further attachments of the applicant's property, and in part B sought certain declarations as to the entitlements now owed to the first respondent.

This court on 23 August 2021 granted the applicant the orders that it sought in Part A of its urgent application and postponed the matter to September 2021, in order to determine the forward management of the matter. This matter has now been placed before this court to determine the relief which the applicant seeks in Part B of the urgent application.

Held that, once a court has duly pronounced final judgment or order, it has itself no authority to correct, alter or supplement it.

Held that, in the present matter the applicant has not come to this court seeking the clarification of its judgment it has come to court to seek a declarator.

Held that, the order of the Labour Court stripped of all its semantics and read in its context is clear and unambiguous.

Held that, the applicant has failed to demonstrate that on a proper interpretation, the meaning order or judgment the order or judgment remains obscure, ambiguous or otherwise uncertain. For that reason, the applicant's application was dismissed.

ORDER

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1) The rule nisi issued out of this court on 13 August 2021 is discharged.

2) The applicant's application for the main relief contained in part B of its notice of motion is refused.

2) There is no order as to costs.

3) The matter is regarded as finalised and removed from the roll.

EX-TEMPORE JUDGMENT

UEITELE J:

Introduction

[1] The applicant is Fisheries Observer Agency, a statutory body duly incorporated in terms of the provisions of the Marine Resources Act 27 of 2000.

[2] The first respondent is Mr Willie Stanislaus Everson, an adult male person who was employed by the Fisheries Observer Agency as its human resources manager for the period October 2005 to January 2018, when he was, on that date, dismissed pursuant to an internal disciplinary process.

[3] The second respondent is the Deputy Sheriff of Walvis Bay, cited in his official capacity and the third respondent is the Registrar of the Labour Court, cited herein in her official capacity. The third respondent is cited by virtue of any interest she may have in the matter and no relief is sought against her.

[4] Both the second and third respondents did not participate in these proceedings, I therefore in this judgment refer to the Fisheries Observer Agency as the applicant and to Mr Willie Stanislaus Everson as the respondent.

<u>Background</u>

[5] The respondent was employed by the applicant as the head of the human resources department since October 2005. During January 2018, and pursuant to a disciplinary hearing the respondent was dismissed from the employment of the applicant.

[6] Aggrieved at the outcome of the disciplinary hearing and the result of his subsequent appeal, the first respondent filed a complaint with the Office of the Labour Commissioner claiming that he was unfairly dismissed. The arbitrator found in his favour, holding that the dismissal was substantively unfair, in that there was no valid reason justifying his dismissal. Accordingly, the arbitrator ordered that the respondent be re-instated and compensated for his loss including benefits. The award reads as follows:

> '1. The respondent, Fisheries Observer Agency must reinstate the applicant to his former position with all his benefits which he used to get before his dismissal on the 21st of January 2018.
>
> 2. The applicant, Mr Willie Stanislaus Evenson, should resume duty on the 17th December 2018 at his usual time he used to start work.

3. The respondent, Fisheries Observer Agency must compensate the applicant, Willier Stanislaus Evenson's full salary (including the benefits he used to get) from the 22nd January 2018 until the 16th December 2018 – (calculated at N$61,000 per month – total cost to company) i.e. N$61,000 times 10 months plus N$30,000 (half a month).

4. The above amount of N$645 500 should be paid on or before the 16th of December 2018 to the applicant.'

[7] On 15 January 2019, the respondent made the arbitration award an order of the Labour Court in terms of section 87(1)(*b*) of the Labour Act 11 of 2007 by registering the award under case number HC-MD-LAB-AAA-2019/00014.

[8] The applicant, was aggrieved by the award and on 3 May 2019 appealed to the Labour Court against arbitrator's award. On 7 August 2019 the Labour Court handed down its judgment and order and ordered as follows:

'1. The appeal is dismissed.

2. The arbitrator's order insofar as compensation is concerned is varied to read:

"The appellant is ordered to pay the respondent his monthly salary that he would have earned from the date of his dismissal to the date of this court order."

3. There is no order as to costs.

4. The matter is removed from the roll and considered finalised.'

[9] The parties, were at odds as to the interpretation of the arbitration award and ultimately what the respondent's entitlements were. As a result, of the Labour Court's judgment being handed down on 07 August 2019, the parties' legal practitioners engaged in correspondences each setting out its interpretation of the Labour Court's Order.

[10] Despite the fact that a dispute existed between the applicant and the respondent's legal practitioners as regard the interpretation of the Labour Court's judgment, the respondent's legal practitioners caused a writ of execution to be issued and attached the applicant's movable property on 19 April 2021.

[11] During May 2021, the applicant on an urgent basis, approached this court and amongst other reliefs sought, in part A of its application, a *rule nisi* calling upon the respondents to show cause, if any, as to why the respondents must not be interdicted and restrained from making any further attachments of the applicant's property (movable or otherwise) in terms of (and or on the strength of) the writ of execution issued on 17 March 2021 under case HC-MD-LAB-AAA-2019/0001, and also why the respondent must not be interdicted and restrained from removing or selling in execution any of the applicant's assets (movable or otherwise) which the second respondent has placed under judicial attachment pursuant to (and or on the strength of) the aforementioned writ of execution issued on 17 March 2021 under case HC-MD-LAB-AAA-2019/00014.

[12] This court on 23 August 2021 granted the applicant the orders that it sought in part A of its urgent application and postponed the matter to September 2021, in order to determine the forward management of the matter. This matter has now been placed before me to determine the relief which the applicant seeks in part B of the urgent application which the applicant launched during May 2021.

[13] In Part B of the application the applicant seeks the following orders:

'1. Declaring that upon a proper construction of the arbitration award in case CRWB48/18 as varied by the Labour Court in case HC-MD-LAB-APP-AAA-2018/00063 the applicant is only obliged to pay the first respondent an amount of N$324,095.01.

2. Declaring that the first respondent has been paid in full in terms of the arbitration award in case CRWB48/18 as varied by the Labour Court in case HC-MD-LAB-APP-AAA-2018/00063 and has no further claims against the applicant.

3. Setting aside all writs of execution and all judicial attachments and removals issued and/or conducted and/or executed under case HC-MD-LAB-APP-AAA-2019/00014.

4. That the costs of this application be awarded in favour of the applicant in the event of any.'

Discussion

[14] The general principle, now well established in our law is that once a court has duly pronounced final judgment or order, it has itself no authority to correct, alter or supplement it. The reason for that general principle was articulated about 96 years ago in the matter of *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd,*[1] where the court stated that once the court has pronounced a judgment it becomes *functus officio*.

[15] In the case of *Firestone South Africa (Pty) Ltd v Gentiruco AG,*[2] the court opined that there are, however, a few exceptions to that rule and which are mentioned in the old authorities and have been authoritatively accepted by this court.[3] Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(a) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant. This exception is clearly inapplicable to the present case, for the applicant does not seek any such supplementation.

(b) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains <u>obscure, ambiguous or otherwise uncertain</u>, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order.

[16] In the present matter the applicant has not come to this Court seeking the clarification of its judgment, it has come to court to seek a declarator to the effect that

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1 *West Rand Estates, Ltd v New Zealand Insurance Co, Ltd*? 1926 AD 173 at pp176, 178, 186-187 and 192.

2 *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A).

3 See the case of *Fischer v Seelenbinder and Another* 2021 (1) NR 35 (SC) and *Communications Regulatory Authority of Namibia v Mobile Telecommunications Company of Namibia* 2021 (4) NR 1039 (SC).

the applicant is only obliged to pay the first respondent an amount of N$ 324 095.01. and that the respondent has been paid in full in terms of the arbitration award in case CRWB48/18 as varied by the Labour Court in case HC-MD-LAB-APP-AAA-2018/00063, and that the respondent and has no further claims against the applicant.

[17] I have earlier set out the order which accompanies the judgment of the Labour Court in respect of which the applicant is now seeking a declarator. I have also, relying on earlier authorities indicated that the court may only clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous, or otherwise uncertain.

[18] In the matter of *Fischer v Seelenbinder,*[4] the Supreme Court stated that the starting point thus is to determine whether the order is clear and unambiguous, because if it is, and the context does not indicate a different meaning, that is the end of the matter. The Supreme Court relying on the authorities of *Firestone,*[5] and *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others,*[6] said:

'The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it . . . .'

[19] In the present matter the Deputy Judge President did, in paragraphs [63]-[69] set out the reasons for the order that he made. I will for in full repeat those reason here and they are as follows:

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4 *Ibid.*

5 *Supra* at 304D – F.

6 *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others* 2019 (1) SA 370 (CC) (2018 (12) BCLR 1533; [2018] ZACC 37) paras 52 – 53.

‘Computation of remuneration ordered by arbitrator.

[63] It is argued on behalf of the appellant that the evidence in respect of compensation was hearsay, in that there was no evidence placed before the arbitrator, in respect of the benefits lost and subsequently included in the amount for compensation. On the other hand, it was argued on behalf of the first respondent that this is a question of fact and not law alone; save to mention that this ground was not captured in the notice of appeal or the grounds of appeal.

[64] In *Pep Stores (Pty) Ltd v Iyambo*, Gibson J said, ‘it is common cause that the respondents had all been in the appellant's employment’. The question of what the appellant paid the respondents was not in issue. It was a circumstance which could easily be ascertained without the need for formal evidence from the respondents as it lay exclusively within the purview of the appellant's domain. The failure to lead the formal details is more of a technicality. There cannot be prejudice to the appellant in mere failure to depose to the salaries paid to the workers.

[65] It is trite law that if the amount determined as compensation includes loss of certain benefits, such as, medical benefits, then the employee must establish by evidence what the losses entail. In ‘ordering compensation to an employee who has been unfairly dismissed, regard to the loss suffered or the amount the dismissed employee would have been paid had he not been dismissed. Further, in determining the compensation amount, the court should have regard to all the circumstances of the case, such as, but not confined to (a) the employee’s contribution to his or her dismissal or (b) alternative employment for the duration of his or her dismissal. The amount so determined is compensatory and should not place the employee in a position better off then he would have been in had he not been dismissed. It is for this reason that an employee is required to prove that he had suffered financial loss as a result of the dismissal and that he or she had taken reasonable steps to mitigate his or her losses.

[66] Upon my consideration of the record, I could not find that first respondent at any point during the arbitration proceedings adduced evidence that he had suffered losses as a result of his dismissal. Judging from his claim form for re-instatement and compensation, he indicated some losses he has suffered as a result of the loss of his remuneration. However, there is no evidence on record regarding the loss he had suffered as a result of the loss of benefits subsequent upon his dismissal. There is also no evidence that he mitigated, if at all he did, his losses, nor was there any evidence led on whether or not he had found alternative employment during the duration of his dismissal.

[67] According to Parker AJ, 'compensation consists of: (a) an amount equal to the remuneration that the employer ought to have paid the employee, had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice, and (b) an amount equal to any losses suffered by the employee because of the dismissal or other disciplinary action or other labour injustice'.

[68] Therefore, in the absence of evidence to support an order for benefits included in the compensation amount, no reasonable arbitrator would have made a determination on compensation inclusive of an amount for loss of benefits. Under these circumstances, non-interference by this court with regard to the compensation order would be a grave injustice to the employer and would amount to punishing the employer, which is not the purpose of compensation in labour matters. That finding of the arbitrator was perverse and cannot be allowed to stand.

[69] The above principles hold true in this matter. The first respondent was in the employment of the appellant; therefore first respondent's monthly remuneration amount is known to the appellant. However, where loss of benefits are included in the amount for remuneration, particularly where no evidence was adduced, it would be inappropriate for this court to allow the compensation order to stand as it is in its present form. Taking into account the foregoing principles, I therefore propose to amend part of that order as it appears below.' (My underlining for emphasis)

[20] In my view the order of the Labour Court stripped of all its semantics and read in its context is clear and unambiguous, namely that, what the learned Deputy Judge President ordered is that the applicant must pay the respondent his monthly remuneration that he would have earned from the date of his dismissal to the date of this court's order. Nowhere in his judgment did the Deputy Judge President make mention of the fact that respondent is only entitled to his basic pay. In fact in paragraph [69] the Deputy Judge President states that the respondent's *monthly remuneration* is known to the applicant.

[21] I have thus come to the conclusion that the applicant has failed to demonstrate that on a proper interpretation, the meaning of the order or judgment is obscure, ambiguous, or otherwise uncertain. For that reason the applicant's application must as I hereby do, be dismissed.

<u>Order:</u>

1. The rule nisi issued out of this court on 13 August 2021 is discharged.

2. The applicant's application for the main relief contained in part B of its notice of motion is refused.

3. There is no order as to costs.

4. The matter is regarded as finalised and removed from the roll.

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UEITELE S F I

Judge

APPEARANCES:

APPLICANT:	R Maasdorp Instructed by Cope & Partners Windhoek
FIRST RESPONDENT:	N Tjombe Instructed by Tjitemisa & Associates Windhoek