

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-LAB-APP-AAA-2022/00061

In the matter between:

TRANSNAMIB HOLDINGS LTD

APPLICANT

and

NUUYOMA NESHIKO

FIRST RESPONDENT

NDATEELELA HAMUKWAYA

SECOND RESPONDENT

Neutral citation: *TransNamib Holdings Ltd v Neshiko* (HC-MD-LAB-APP-AAA-2022/00061) [2023] NALCMD 16 (5 April 2023)

Coram: Schimming-Chase J

Heard: 3 February 2023

Delivered: 5 April 2023

Flynote: Labour Court – Appeal – Application to stay execution of arbitration award pending appeal – Irreparable harm – When balance of irreparable harm

favours the employee – Section 89(9) of the Labour Act.

Labour Court – Application for a stay of execution of award pending appeal – principles restated – Applicant bears the onus to prove reasonable prospects of success on appeal – Written record of proceedings not available at time of hearing – Applicant failing to discharge onus.

Summary: This is an application for the stay of an arbitration award pending the final determination of an appeal. The respondent employee authored a letter to the applicant's Executive Human Capital. The contents of the letter resulted in the respondent being charged with misconduct. An internal disciplinary hearing was held resulting in a strict final warning being issued against the respondent. The respondent appealed against the sanction. The chairperson of the appeal committee upheld the finding but decided to increase the penalty to one of dismissal. The respondent registered a labour complaint through the office of the Labour Commissioner and the matter went on arbitration. The arbitrator found in favour of the respondent, ordering reinstatement and payment of compensation. The applicant noted an appeal and launched an application to stay the execution of the arbitration award pending finalisation of the appeal in terms of s 8.

Held: on evidence presented, the irreparable harm favoured the respondent. His financial situation after 12 years of employment at the applicant had come to a complete standstill. Section 89(6) applied.

Held: no record of proceedings was presented. No facts were presented justifying a dismissal of the respondent after a disciplinary tribunal sanctioned a written warning. Applicant failed to discharge onus to prove reasonable prospects of success on appeal.

ORDER

1. The amount of N\$269,850 ordered by the arbitrator in case CRWK 1261-20 dated 31 August 2022 as compensation in favour of the first respondent shall immediately be paid into the trust account of Köpplinger Boltman.
2. The applicant is ordered to comply with the arbitrator's aforementioned award and to reinstate the first respondent in the same or comparable position pending finalisation of the appeal on or before 17 April 2023.
3. There is no order as to costs.
4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

SCHIMMING-CHASE J

Introduction

[1] This is an application to stay the execution of an arbitration award made under case CRWK 1261-20 dated 31 August 2022 pending final determination of an appeal noted by the applicant in terms of s 89 of the Labour Act ,11 of 2007 ("the Act").

[2] The applicant is TransNamib Holdings (Pty) Ltd ("TransNamib"), a state-owned enterprise with limited liability incorporated in terms of the provisions of the National Transport Service Holding Company Act, 28 of 1998. The first respondent is Mr Nuuyoma Neshiko, a major male person who was in the employ of TransNamib. Mr Neshiko opposes the application.

[3] The second respondent is the duly appointed arbitrator in the office of the Labour Commissioner. No opposition was entered by the second respondent.

[4] Mr van Greunen appears for TransNamib, and Mr Halweendo appears for Mr Neshiko.

Background facts

[5] Mr Neshiko was employed as a Sales Consultant at TransNamib since June 2004 until 13 August 2020, when his services were terminated subsequent to an internal disciplinary hearing and appeal.

[6] On 11 April 2019, Mr Neshiko addressed and delivered a letter of grievance to TransNamib's Executive, Human Capital - Mr Webster Gonzo. In this grievance letter, Mr Neshiko requested reasons why he was not shortlisted for the position of Manager: Business Development & Market Research which position he had formally applied for. Mr Neshiko was advised to refer his grievance to his direct line manager, and not Mr Gonzo, which he refused to do. This letter of grievance forms the crux of the issues brought to TransNamib's internal disciplinary committee for hearing, and the subsequent proceedings before the office of the Labour Commissioner.

[7] Some six months after delivery of Mr Neshiko's grievance letter, and on 23 October 2019, he was formally charged with seven forms of misconduct, namely:

- (a) refusal to obey lawful instructions;
- (b) non-compliance with established procedure/standing instructions;
- (c) abusive language;

- (d) insubordination;
- (e) disorderly behaviour;
- (f) discrimination; and
- (g) false evidence.

[8] At an internal disciplinary hearing, Mr Neshiko was found guilty of abusive language, insubordination and disorderly behaviour, non-compliance with established procedure with standing instructions, discrimination, and false evidence. A sanction of a written warning was issued to him by the internal disciplinary committee.

[9] On appeal by Mr Neshiko against the sanction of a written warning, the appeal chairperson found that the penalty issued should be increased, and Mr Neshiko's services were terminated on 13 August 2020. After engaging in a further internal review process, the appeal chairperson's findings were upheld, and Mr Neshiko's dismissal was confirmed.

[10] Mr Neshiko referred the matter to the office of the Labour Commissioner and, after hearing the respective parties, the arbitrator issued the following substantive ruling and award on 31 August 2022:

1. ... the applicant's dismissal was unfair in terms of procedural and substantive fairness;
2. the respondent reinstates the applicant Mr Nuyoma Neshiko in an equal or comparable position that he held effective from 1st October 2022;
3. The respondent is ordered to pay the applicant an amount equal to the monthly

remuneration for 12 months;

4. Compensation calculated as follows: N\$22,487.50 x 12months = N\$269,850.00;

5. The said amount must be paid on or before the 30th September 2022 proof of which must be forwarded to the Office of the Labour Commissioner, Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in this award at the same rate in terms of the Prescribed Rates of Interest Act, 1975 (Act No. 55 of 1975).'

[11] A perusal of the arbitrator's ruling shows that the arbitrator held that there was no provision in TransNamib's disciplinary policies that permitted an appeal chairperson to impose a sanction more severe than that imposed by the chairperson of the disciplinary proceedings. She further held that on the facts, and particularly the contents of the letter authored by Mr Neshiko, the misconduct complained of amounted to disorderly conduct that did not warrant dismissal.

[12] In addition, the arbitrator held that TransNamib had not made out a case that Mr Neshiko's conduct resulted in a breach of trust that made reinstatement impossible. Finally, the arbitrator ruled that the chairperson of the disciplinary proceedings did not apply judicially accepted principles when he failed to recuse himself upon formal application by Mr Neshiko without providing any reasons for his decisions.

[13] On 30 September 2022, TransNamib noted an appeal to this court against the arbitrator's award.

[14] No record of proceedings have been filed as at the hearing date of this application. From the grounds of appeal, it is TransNamib's contention that the arbitration award was made despite it being testified that Mr Gonzo (to whom the letter of grievance was addressed) was not Mr Neshiko's direct manager and that the letter of grievance should not have been addressed to him. In addition, TransNamib submits that the arbitrator wholly disregarded the evidence presented

by its witnesses in the arbitration proceedings. Further, that Mr Neshiko failed in his duty as employee to adhere to internal standards of operations, company policies and standing procedures by using abusive language despite being well-versed, given his tenure at TransNamib, with the company's internal standards of operation, particularly with regard to filing of grievance procedures.

[15] TransNamib also contended that the taking of disciplinary action and resultant sanctions remain a managerial prerogative and could only be interfered with if the sanction is not justified, and in this instance, the sanction was entirely justified.

[16] As regards the reinstatement order, TransNamib contends that the arbitrator misdirected herself when she ordered reinstatement without considering that a period of almost two years had elapsed, and that Mr Neshiko's position had been filled. Also, that there was no evidence before the arbitrator that reinstatement would be the applicable remedy.

[17] The amount of compensation is also raised as a ground of appeal (in the event that this court finds that the dismissal was unfair), as it is discordant with the alleged substantive unfairness of the dismissal, and because the arbitrator failed to take the nature and extent of Mr Neshiko's conduct and the seriousness of the charges into consideration.

[18] TransNamib also raised the ground that the arbitrator misdirected herself in essentially finding that an appeal chairperson is not entitled to impose a sanction that is graver or heavier than the sanction by the chairperson of the disciplinary committee.

[19] Thus, so TransNamib's argument went, the sanction of dismissal by the appeal chairperson was reasonable and fair in the circumstances.

[20] Insofar as the question of prospects of success are concerned, TransNamib submitted that it enjoys good prospects of success which are premised on its grounds of appeal as set out in its notice of appeal of 30 September 2022.

[21] TransNamib maintained that no evidence was proffered to suggest that reinstatement would be an appropriate remedy in the circumstances as Mr Neshiko's conduct towards Mr Gonzo resulted in a breakdown of a trust relationship which makes the work place intolerable as Mr Gonzo, as Executive Human Capital, 'is an integral part of [TransNamib's] operations and represents [TransNamib's] Human Resources'.

[22] In any event, reinstatement is no longer plausible as the award was made more than 23 months after Mr Neshiko's dismissal rendering reinstatement impractical, inappropriate and unfair to the employer.

[23] Furthermore, TransNamib contended that no evidence was led for compensation to be awarded and Mr Neshiko failed to place any evidence before the arbitrator that he attempted to seek employment.

[24] In opposition, Mr Neshiko stated that his dismissal was unreasonable and that the arbitrator was correct in her finding. Reliance was placed on the fact that Mr Neshiko was a first-time offender and that he had long service with TransNamib without incident, which was correctly viewed as a mitigating factor. He further submitted that management must ensure that where disciplining employees, an element of mercy and due regard to the seriousness of the offence must be considered objectively to enable a reasonable and fair decision to be reached. He pointed out that the sanction of the disciplinary tribunal was a written warning and that the appeal chairperson sanctioned a heavier penalty, without justification.

[25] Mr Neshiko contended that the four charges on which he was found guilty have no bearing on the breakdown of the trust relationship between himself and TransNamib. The issue was rather a personal one between Mr Gonzo and himself

that could have been better handled by TransNamib. Further, he contended that insufficient facts were placed before the arbitrator to establish a breakdown of the trust relationship between him and TransNamib and that the offences committed by him were not serious enough to result in dismissal, as correctly held by the arbitrator.

[26] In an effort to amicably resolve the issue of staying the execution of the arbitration award, TransNamib alleged that on 4 October 2022, its legal practitioners addressed correspondence to Mr Neshiko's legal practitioners requesting whether he was amenable to agree to stay the execution of the arbitration award pending the final outcome of the appeal. This request was refused.

[27] Mr Neshiko contended that his legal practitioners met with TransNamib's legal practitioners on 14 December 2022, and it was proposed that TransNamib makes payment of the compensation award into Mr Neshiko's legal practitioners trust account to keep the moneys secure pending the finalisation of the appeal.

The parties' arguments

[28] Mr van Greunen relied on the grounds of appeal summarised above. He argued that the major issue for TransNamib is that the grievance letter addressed to a superior was done in a disrespectful and discriminatory manner and Mr Neshiko was acting with insolence. Therefore, a breakdown of trust occurred between TransNamib and Mr Neshiko, and TransNamib is not inclined to reinstate Mr Neshiko in those circumstances.

[29] Mr van Greunen argued that the position previously occupied by Mr Neshiko has been filled and as such, reinstatement is not plausible. When questioned by this court on this aspect, Mr van Greunen conceded that the outcome of the appeal is not set in stone and a possibility existed that the appeal may be dismissed.

[30] Mr Halweendo, on behalf of Mr Neshiko, argued that a stay of execution of the arbitration award is a drastic step. He argued further that the court should consider the nature of the conduct by Mr Neshiko that led to the disciplinary enquiry in context. In this regard, it was emphasised that Mr Neshiko was aggrieved because he was not shortlisted for a promotion and addressed such grievance to the Executive Human Capital which should not have resulted in dismissal.

[31] As regards the charge of abusive language, Mr Halweendo argued that it was at best a lapse of judgment on the part of Mr Neshiko emanating from being unsuccessful in his quest for promotion. This lapse of judgment cannot be attributed to Mr Neshiko's long lasting clean record of 15 years.

[32] It was further argued that the issue of abusive language and false evidence was directed at the Executive Human Capital only, and as such, this is a personal issue between the Executive Human Capital and Mr Neshiko, which cannot be said to lead to a breakdown of trust between Mr Neshiko and TransNamib, therefore, no breakdown of a trust relationship existed, as correctly held by the arbitrator.

[33] Mr Halweendo argued that the financial implications of staying the arbitration award would be drastic to Mr Neshiko, who is currently unemployed. He argued that the arbitrator ordered Mr Neshiko's reinstatement and if Mr Neshiko is so reinstated pending the outcome of the appeal, neither party would be prejudiced pending the finalisation of the appeal. If reinstated, Mr Neshiko would be earning a monthly salary for his services, and able to pay debt.

[34] Mr Halweendo submitted that compensation may be paid into either of the parties' legal practitioners' trust bank accounts pending the finalisation of the appeal. TransNamib would then suffer meaningful prejudice in the event that the appeal succeeds.

Discussion

[35] In considering TransNamib's application, I am bound to consider the irreparable harm to both parties respectively if the award, or any part of it were suspended. If the balance of irreparable harm favours either TransNamib or Mr Neshiko, I must determine this application in favour of Mr Neshiko.¹

[36] In *Hardap Regional Council v Sankwasa and Another*,² Parker AJ held that:

[9] It was held in *Wood NO v Edwards & Another* 1966 (3) SA 443 (R) that where no question of irreparable harm arises from execution, the question whether execution should be ordered will depend on whether there are reasonable prospects of success on appeal; but if the entire object of the appeal would be nugatory if execution were to proceed, the Court has no right to deal with the matter on the basis of whether there are reasonable prospects of success on appeal. It would then be that the question before the Court "must be resolved on the respective potentiality for irreparable harm or prejudice being sustained by the applicant and the respondent respectively." (*Tuckers Land and Development Corporation v Soja* 1980 (1) SA 691 (W) at 696E-F). This proposition is predicated on "the purpose of the (common law) rule as to the suspension of a judgment on a noting of an appeal is to prevent irreparable damage from being done to the intending appellant ..." (*Soja* supra at 696G, approving *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545B-C).³

[37] In *Pupkewitz and Sons (Pty) Ltd v Muundjua*,³ the following principles were stated to be at play in applications of this nature:

- (a) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted;

¹ Section 89 (8) of the Labour Act No 11 of 2007.

² *Hardap Regional Council v Sankwasa and Another* (LC 15/2009) [2009] NALC 4 (28 May 2009) para 9.

³ *Pupkewitz and Sons (Pty) Ltd v Muundjua* (HC-MD-CIV-MOT-GEN-2022/00274) NAHCMD 690 (21 December 2022); *Samicor Diamond Mining Ltd v Hercules* 2010 NR 304 (HC) at para 31.

(b) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused;

(c) the prospect of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious not noted 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

(d) whether there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent.

[38] If I understand TransNamib's argument correctly, if the compensation is paid to Mr Neshiko, who has confirmed his unemployment, there is no guarantee that TransNamib will be repaid the compensation, in the event that the appeal is successful.

[39] Mr Halweendo argued that the compensation can be paid into either of the parties' legal practitioners' trust bank accounts pending the outcome of the appeal. His main thrust is predicated on Mr Neshiko's reinstatement in the interim, because if execution of the arbitration award is stayed, Mr Neshiko will suffer prejudice in that he is currently unemployed and not in a position to earn income and cover his expenses, and the arbitration award orders his reinstatement, which should be complied with.

[40] In my view, the balance of irreparable harm favour Mr Neshiko who went from a long standing employee to not being able to take care of himself. TransNamib is a state owned entity with the ability to survive until determination of the appeal.

[41] Mr van Greunen further maintained that there is a breakdown of trust

between TransNamib and Mr Neshiko, and thus, no reinstatement can effectively take place.

[42] It was Mr Halweendo's argument that the internal disciplinary committee sanctioned a strict written warning to Mr Neshiko, but on appeal, the appeal chairperson sanctioned the dismissal of Mr Neshiko. This, Mr Halweendo argued was done in violation of TransNamib's policies which provide that an appeal chairperson cannot order a higher sanction. Mr van Greunen, in response, argued that the record is not before the court and one must consider such an argument in the light of the arbitrator's interpretation of such policies.

[43] In considering the prospects of appeal, insofar as may be necessary the decision of *Cymot (Pty) Ltd v Cloete and Another*,⁴ provides guidance. Angula AJ (as he then was) held that in an application for a stay of execution pending a labour appeal, the applicant bears the onus to prove reasonable prospects on appeal. The absence of an appeal record weighed heavily against the employer in that matter.

[44] In this matter, the record of appeal was also not before court, meaning that this court is not in a position to evaluate the evidence which the arbitrator took into consideration.

[45] The court in *Cymot supra* also held, as regards the issue of reinstatement, stated the following:

[23] I now deal with the order of reinstatement. According to the applicant the chairperson of the internal disciplinary hearing found that the relationship between the applicant and the first respondent had been severely damaged. However, he recommended that the first respondent be issued with a written warning valid for 12 months; yet, the applicant ignored the recommendation of its self-appointed and independent chairperson and decided to impose a sanction of dismissal. The second

⁴ *Cymot (Pty) Ltd v Cloete and Another* 2007 (1) NR 325.

respondent was of the view that the applicant was being guided by emotion and further found that the sanction fell outside the parameters of the applicant's written disciplinary code. I got the impression that the applicant had already committed itself to dismissing the first respondent whatever the recommendation of the chairperson of the internal disciplinary hearing. It maintained the same attitude in these proceedings with regard to the intended outcome of the appeal. [...]

[25] The chairperson of the district labour court found that the applicant's disciplinary code did not make provision for dismissal, yet it decided to dismiss the first respondent. It has stated unequivocally that if it were to be unsuccessful with its appeal, it would not reinstate the first respondent but rather pay compensation to the first respondent.

[26] From this, I am inclined to infer that the applicant's appeal is not bona fide; it is aimed at making the life of the respondent as difficult as possible. In my view the facts upon which the charges of misconduct were founded, even if they were found to have been proven by the district labour court, would not and should not have been attracted a sanction of dismissal. I get the impression that the alleged damaged relationship is exaggerated. I further sense an element of vindictiveness in the applicant's approach to the whole matter.'

[46] One of my main concerns with the evidence presented in this matter is that Mr van Greunen was unable to present the court with any facts explaining why Mr Neshiko was dismissed on appeal when the initial sanction of a written warning was imposed. The internal policies of TransNamib were not even attached to the founding affidavit.

[47] John Grogan in his book *Workplace Law*,⁵ opined that an employer may not impose a more severe sanction than that imposed by the disciplinary chair. He stated the following at page of his seminal work:

'If employees have been acquitted at a disciplinary hearing, or if the presiding officer has imposed a penalty less severe than dismissal, the employee cannot be subjected to a second inquiry in respect of the same offence. Nor may the employer ignore

⁵ Grogan, John. *Workplace Law*. Juta 2nd Edition p 146.

the decision of a chairman of a properly constituted disciplinary hearing and substitute its own decision. Applicant's dismissal would invariably be unfair. A more severe penalty may not be imposed by an appeal tribunal.'⁶

[48] At this stage, based on the authorities quoted and the limited record, my view is that TransNamib's prospects of success are in any event diluted by the increase in severeness of the penalty.

[49] TransNamib remains steadfast in its argument that reinstatement cannot take effect as there is a breakdown of the trust relationship. It is apparent from the papers before me that the dispute commenced when a grievance letter by Mr Neshiko was addressed to Mr Gonzo, the Executive Human Capital, which was not the correct forum that Mr Neshiko should have elected according to TransNamib. It is also apparent to me that the correspondence forming the disciplinary enquiry was directed by Mr Neshiko to Mr Gonzo, and no one else. It cannot, at this stage, be gainsaid that no other person was involved other than these two gentlemen. As a result, I am also not satisfied, on the facts presented, that a breakdown of the trust relationship between TransNamib and Mr Neshiko occurred.

[50] Given the irreparable harm to Mr Neshiko, this application must be determined in his favour. In any event, prospects of success are not in TransNamib's favour for the reasons advanced. I have taken into consideration the fact that there is no dispute regarding payment of the award into the trust account of one of the legal practitioners.

[51] Section 89(9) of the Labour Act provides me with the discretion to suspend the arbitration award in part or wholly.

[52] In the result, I make the following order:

1. The amount of N\$269,850 ordered by the arbitrator in case CRWK

⁶ *Bhengu v Union Co-Operative* (1990) 11 ILJ 117 (IC).

1261-20 dated 31 August 2022 as compensation in favour of the first respondent shall immediately be paid into the trust account of Köpplinger Boltman.

2. The applicant is ordered to comply with the arbitrator's aforementioned award and to reinstate the first respondent in the same or comparable position pending finalisation of the appeal on or before 17 April 2023.

3. There is no order as to costs.

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

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT:

W van Greunen
of Köpplinger Boltman, Windhoek

FIRST RESPONDENT:

N Halweendo
of Nafimane Halweendo, Legal
Practitioners, Windhoek