

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

<b>Case Title:</b>  INTERNATIONAL TRAINING COLLEGE - LINGUA // KNOWLEDGE RUSERE & OTHERS	<b>Case No:</b> HC-MD-LAB-MOT-GEN-2023/00027
	<b>Division of Court:</b> Main Division
	<b>Heard on:</b> 24 July 2023
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Delivered on:</b> 4 September 2023

**Neutral citation:** *International Training College–Lingua v Rusere* (HC-MD-LAB-MOT-GEN-2023/00027) [2023] NALCMD 42 (4 September 2023)

**Order:**

1. The application is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

**Reasons for order:**

PARKER AJ

Introduction

[1] The applicant seeks an order in terms of the notice of motion. Ms Shipindo represents the applicant, and Ms Amupolo the first respondent. The determination of the application turns on a

very short and narrow compass. It concerns the interpretation and application of s 87 (1)(b) of the Labour Act 11 of 2007. In sum, the questions that arise for determination are these:

1. Is the Labour Court competent to rescind an order which came into being by the application of s 87(1)(b) of the Labour Act (ie para 1 of the notice of motion)?
2. Is the Labour Court which is a division of the High Court competent to rescind the judgment (or award of an inferior tribunal) (ie para 2 of the notice of motion)?

[2] Plainly, the determination of the two questions set out in para 2 above rests on the interpretation of s 87 (1)(b) of the Labour Act. Fortunately, the Supreme Court has interpreted s 87 (1)(b) in *National Housing Enterprise v Maureen Hinda–Mbazira* thus:

'[58] Our view of the matter is that the provision enabling the person in whose favour an arbitrator makes an award is borne of the practical reality that without it being so made an order of court, execution thereon would be impossible. Had such a provision not existed, the awardee would have had to approach a court to make it binding on the party against whom it was awarded and to give it the legal force necessary for awardee to enforce it through execution. Thus, in the absence of s 87 of the Labour Act, an award of an arbitrator under the Labour Act would be no different from that by an arbitrator under a private arbitration in terms of the Arbitration Act 1965. It is trite that in order for an arbitration award under the Arbitration Act to be enforced, it requires an order of court making it binding on the parties. The reason for s 87 is to eschew the need for a party approaching a court to enforce an award. It clearly was not intended to have the effect contended for by the Respondent.

[59] Accordingly, there is no merit in the respondent's argument that the appellant first had to set aside the order of court before it could pursue an appeal against the award made by the arbitrator.

[60] Appellant's argument would have been valid if s 87 was worded similarly to s 158(1)(c) of the South African LRA. Section 87 should be read together with s 89 and 90. Both sections make reference to an arbitration award, in other words, even where the award has become an order of the Labour Court, in terms of s 87(1)(b) it remains the arbitration award. If it were an award made in terms of s 158(1)(c) of the South African Labour Relations Act, its weight would have been no different from the weight that any other order of Court bears.

[61] Therefore, when Unengu AJ purported to make the arbitration award an order of Court, he did so without jurisdiction, making that order invalid and since Parker J had jurisdiction to hear the appeal it was competent for the appellant to raise at that forum the concerns concerning the legitimacy or otherwise of

the award.’<sup>1</sup>

[3] Sadly, Ms Shipindo is not aware of that judgment. The *ratio decidendi* of the Supreme Court decision is that ‘even where the award has become an order of the Labour Court, in terms s 87 (1)(b) it remains the arbitration award’. Significantly the Supreme Court drew a distinction between Namibia’s s 87(1)(b) from South Africa’s s 158 (1)(c) of that country’s Industrial Relations Act 66 of 1995.

[4] In 2011, in *National Housing Enterprise v Maureen Hinda–Mbazira*<sup>2</sup>, Unengu AJ relied on the South African case of *Potch Speed Den v Rajah*<sup>3</sup>. But *Rajah* was interpreting s 158 (1)(c) of South Africa’s Labour Relations Act<sup>4</sup>. Indeed, in *National Housing Enterprises v Maureen Hinda–Mbazira*, the Supreme Court overturned Unengu AJ’s decision in *National Housing Enterprises v Maureen Hinda–Mbazira*<sup>5</sup>. But in 2015 in *Air Namibia Limited v Sheelongo*<sup>6</sup>, Ueitele J relied on Unengu AJ’s decision in *Maureen Hinda–Mbazira* which the Supreme Court had overturned in 2014.

[5] Additionally, *Transnamib Holdings Limited v Tjivikua*<sup>7</sup> decided in 2019 and referred to the court by Ms Shipindo, stands in the same boat of wrong decisions on the point under consideration.

[6] The irrefragable result is the following: This Labour Court is not competent to rescind the order of the Labour Court which came into being by virtue of s 87(1)(b) of the Labour Act. The award of the arbitrator ‘remains the arbitration award’ despite the award having become an order of the Labour Court.<sup>8</sup> Only the arbitration tribunal that made the award is competent, as the first - instant forum, to rescind the arbitration award in question.

[7] I know of no authority – and none was referred to me by Ms Shipindo – that a superior court is competent to rescind the decision (eg an award) of an inferior tribunal in the absence of a statutory provision giving to the superior court such power.

<sup>1</sup> *National Housing Enterprise v Maureen Hinda–Mbazira* 2014 (4) NR 1046 (SC).

<sup>2</sup> *National Housing Enterprise v Maureen Hinda–Mbazira* Case No. LC 20/2011 (1 April 2011).

<sup>3</sup> *Potch Speed Den v Rajah* (1999) 20 ILJ 2676 (LC).

<sup>4</sup> See *National Housing Enterprise v Hinda–Mbazira* footnote 1 para 60.

<sup>5</sup> See *National Housing Enterprise v Hinda–Mbazira* footnote 2.

<sup>6</sup> *Air Namibia Limited v Sheelongo* [2015] NALCMD 14 (17 June 2015).

<sup>7</sup> *Transnamib Holdings Limited v Tjivikua* [2019] NAHCMD 19 (21 June 2019).

<sup>8</sup> *National Housing Enterprise v Maureen Hinda–Mbazira* footnote 1 para 60.

[8] In any case, in our Labour Law, the rescission of judgment or order by the Labour Court is governed by rule 16, read with rule 7 of the Labour Court Rules ('the rules')<sup>9</sup>. Subrule (1) of rule 16 provides for the rescission or (the varying) of a judgment or order where judgment by default is given in terms of rule 7 of the rules. And rule 7 deals with the hearing of applications. The court has not given a judgment by default in an application brought in terms of rule 7 which the court could rescind in terms of rule 16, read with rule (7), of the rules.

[9] Based on these reasons, I hold that the instant application has not a tincture of merit and it fails. In the result, I order as follows:

1. The application is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>First Respondent:</b>
R Shipindo Of Shipindo & Associates Incorporated, Windhoek	M M Amupolo Of Jacobs Amupolo Lawyers & Conveyancers, Windhoek

<sup>9</sup> *Kapapero NO v Silumbu* [2023] NALCMD 30 (19 July 2023).