

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

PRACTICE DIRECTIVE 61

Case no: HC-MD-LAB-MOT-REV-2022/00195

In the matter between:

MINISTER OF EDUCATION, ARTS & CULTURE	1ST APPLICANT
OFFICE OF THE PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	2ND APPLICANT
PUBLIC SERVICE COMMISSION OF NAMIBIA	3RD APPLICANT

and

DIONYSIUS LOUW	1ST RESPONDENT
LABOUR COMMISSIONER	2ND RESPONDENT
RESPICIA KAUSEB	3RD RESPONDENT

Neutral Citation: *Minister of Education, Arts & Culture v Louw* (HC-MD-LAB-MOT-REV-2022/00195) [2024] NALCMD 11 (5 April 2024)

Coram: OOSTHUIZEN J
Heard: 6 September 2023
Delivered: 5 April 2024

ORDER

IT IS ORDERED THAT:

1. The whole arbitration award issued by the first respondent (the "arbitrator") on 22 August 2022 under case number SSRMA 71-21 is hereby reviewed and set aside in terms of s 89(4) of the Labour Act 11 of 2007 (the "Labour Act").
2. The decision/award issued by the arbitrator that the legal counsel for the applicants shall pay the costs of the third respondent for the opposition of the recusal application *de bonis propriis* and on the scale as between attorney and client, is reviewed and set aside.
3. No order in respect of costs of this review application is made.
4. The matter is regarded as finalised and removed from the roll.

REASONS

OOSTHUIZEN J:

- [1] The third respondent referred a labour complaint against the applicants to the labour commissioner during September 2021.
- [2] The labour commissioner appointed the first respondents, Mr Louw, as arbitrator.
- [3] The applicants raised points *in limine* which the arbitrator eventually dismissed.
- [4] The applicants initially did not challenge the ruling of the arbitrator.

[5] Shortly before the arbitration was scheduled to commence on the merits the legal practitioner for the applicants applied for the recusal of the arbitrator on the ground that the arbitrator is perceived to be biased and not impartial.

[6] I am of the considered view that the arbitrator could have declined the recusal application without becoming subjectively involved in settling a perceived dispute between the third respondent and the applicants, whereas the recusal application was clearly against the arbitrator.

[7] The award of 22 August 2022 on what should have been a mere interlocutory ruling evolved in a full-fledged judgment consisting of 68 pages¹ and evidencing personal animosity towards the legal practitioner of the applicants and ill feelings toward the Deputy Labour Commissioner.

[8] The award by the arbitrator reads as follows:²

(1) The application of Counsel N.O Ilovu is thrown out with both hands because for lack of merit and because it was raised in *vacuo*.

(2) The Deputy Labour Commissioner, Mrs. Kyllikki Sihlahla must file submissions within 30 days of receipt of this Ruling, advancing reasons as to why she should not be joined as a party to proceedings — failure of which an adverse inference will be drawn that she wanted to be joined as a party to proceedings — and she will be so joined.

(3) A copy of this Ruling must be filed on the Labour Commissioner, Mr Henri Kassen because it is important to determine whether Mrs Kyllikki Sihlahla was on a frolic of her own or whether she acted in concert with him when she deposed to and file her Confirmatory Affidavit.

(4) For the reasons set out above, Counsel N.O. Ilovu is ordered to pay the Applicant's costs for this application as envisaged under section 86(16) of the Labour Act read with Rule 37(3) of our ConArb Rules *de bonis propriis* on a scale as between attorney and client.

¹ Hearing Bundle Index, at 184 to 242.

² Hearing Bundle Index, at 241 and 242.

(5) The above amounts must be paid to the Applicant within 30 days from the date of receipt of this Ruling.

(6) The date of the Arbitration hearing will be issued in due course.

(7) Under section 87(2) of the Labour Act, the said amount attracts interest from the date of the award at the same rate prescribed by the Prescribed Rates of Interest Act, 1975 (Act no. 55 of 1975).

ANY PARTY AGGRIEVED BY THIS RULING MAY EXERCISE ITS RIGHTS UNDER SECTION 89 OF THE LABOUR ACT.'

[9] The applicants for recusal (respondents in the main case) filed a Notice of Motion (LC38) for the recusal of the arbitrator and for an alternative arbitrator to be appointed by the Labour Commissioner. This Notice of Motion is dated 16 June 2022.³

[10] On 24 June 2022 the third respondent, in her answering affidavit, paragraph 29 thereof⁴ declares as follow:

'29. In the premise above, I pray that the order for the dismissal of the Recusal Order by granted with costs, for the frivolous and vexatious litigation by the Respondent's Representative.'

[11] Only on 11 July 2022 the third respondent took the cost issue against the legal practitioner for the applicants further. Mr Dias, the representative for the third respondent submitted as follows and sought the following relief:⁵

'[53] Costs to be issued in the name of both the Respondents and their legal Representative jointly and severally, for wasted costs for 11th - 15th July 2022. An amount of N\$4400.00 as per Rule 37(2) schedule A of the magistrates' court tariff, prescribed in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).'

³ Hearing Bundle Index, at 84 and 85.

⁴ Hearing Bundle Index, at 164.

⁵ Hearing Bundle Index, at 180.

and

'PRAYER/RELIEF SOUGHT

1. Dismiss the recusal application raised by Respondents Representative;
2. Order that the Arbitrator is neutral to arbitrate the matter;
3. Issue a costs order in terms of section 86(16)(b) for this vexatious and frivolous points *in limine*; Recusal Application.
4. Any other relief: Remit/Set down the matter for Hearing in terms of section 86(4), under LC 28.'

[12] The rulings of the arbitrator on the points *in limine* dated 23 December 2021 was not definitive for the respondents in the main case (applicants for recusal and for the review now before me). If the ruling of the arbitrator on the points *in limine* was against the applicant in the main case (the third respondent in this proceedings), it would have been final and definitive against the third respondent (applicant in the main case) and necessitated an appeal to the Labour Court. For the third respondent and her representatives to submit that the applicant's recusal application was a veiled appeal, is nonsensical.

[13] Back to the Award of 22 August 2022. The arbitrator's use of language and his *modus operandi* to pose questions to himself and the reader and to use the third respondents as his alter ego, are, to say the least, pretentious and disturbing.

[14] The fact that the arbitrator issued orders and made awards not requested from him and not argued before him cast a reasonable shadow of doubt over his open mindedness to such an extent that reasonable people in the position of the applicants and their legal practitioner, would reasonably apprehend that the arbitrator will not be impartial in adjudicating their case or defence. The arbitrator himself has dislodged the presumption of judicial impartiality.

[15] The above finding is based on inter alia —

- (a) the *ipsissima verba* of the arbitrator and orders made by the arbitrator on 22 August 2022;⁶
- (b) no argument or prayers (relief) concerning the Deputy Labour Commissioner and whether she acted in concert with the Labour Commissioner were advanced;⁷
- (c) the third respondent did not request/pray for an order (award) that counsel for applicants alone pay the costs *de bonis propriis* on an attorney client scale;⁸
- (d) case law which find application;⁹ and
- (e) The Labour Act 11 of 2007.¹⁰

[16] I therefore order that —

1. The whole arbitration award issued by the first respondent (the "arbitrator") on 22 August 2022 under case number SSRMA 71-21 is hereby reviewed and set aside in terms of s 89(4) of the Labour Act 11 of 2007 (the "Labour Act").

2. The decision/award issued by the arbitrator that the legal counsel for the applicants shall pay the costs of the third respondent for the opposition of the recusal application *de bonis propriis* and on the scale as between attorney and client, is reviewed and set aside.

3. No order in respect of costs of this review application is made.

⁶ *Vide* para 8 hereof.

⁷ *Vide* para 8, orders (2) and (3), *supra*.

⁸ *Vide* para 8, order (4) together with para [10] and [11] *supra*.

⁹ *S v Lameck and Others* 2017 (3) NR 647; *Minister of Safety and Security and 5 others v Kennedy and another* (SA 69-2020) [2023] NASC (18 July 2023), para 6 and 7. *S v Shackell* 2001(4) SA (SCA). *Christian v Judicial Service Commission* (HC-MD-CIV-MOT-REV-2020/00025) [2020] NAHCMD 466 (9 October 2020). *Agricultural Bank of Namibia Limited v Gaya* (SA 42-2023) [2023] (28 July 2023) at para 30 and the authorities quoted there.

¹⁰ Sections 85(6), 86(7), (15) and (16), 89 (4) and (5) and 118.

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

G H OOSTHUIZEN
JUDGE

APPEARANCE

APPLICANTS: T Kasita
Instructed by Government Attorney, Windhoek

3RD RESPONDENT: R Silungwe
Silungwe Legal Practitioners, Windhoek