



**REPORTABLE**

CASE NO: SA 34/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**DESERT FRUIT (PTY) LTD**

**Appellant**

and

**WAYNE SMITH**

**First Respondent**

**PHILLIP MWANDINGI N.O.**

**Second Respondent**

**LABOUR COMMISSIONER**

**Third Respondent**

**Coram:** SMUTS JA, HOFF JA and FRANK AJA

**Heard:** 10 July 2023

**Delivered:** 28 July 2023

**Summary:** In this appeal from the Labour Court – the first respondent (Mr Smith) was employed by the appellant (Desert Fruit) in 2005 as its chief executive officer until he was dismissed on 11 December 2019 (his gross monthly salary was N\$112 000). In April 2017, Mr Smith went on leave with the view to negotiate a separation package with Desert Fruit. He was however subsequently suspended without pay with effect from 1 October 2017 pending disciplinary proceedings which proceeded thereafter. Before the conclusion of the disciplinary enquiry, Mr Smith lodged a dispute of unfair labour practice (concerning his suspension without pay) against Desert Fruit with the

Office of the Labour Commissioner and the dispute was referred to arbitration. Desert Fruit in opposition applied for a stay in the arbitration proceedings, pending the finalisation of the incomplete disciplinary proceedings on the basis that the relief sought could be claimed once the disciplinary proceedings were finalised. The arbitrator granted the stay application in his award on 8 August 2019. Mr Smith applied to set aside the award on review to the Labour Court under s 89(4) read with s 89(5) of the Labour Court Act 11 of 2007 (the Act). It emerged during argument that Mr Smith had also filed a notice of appeal against the arbitrator's award – during case management, the presiding judge impermissibly required him to elect between the review and the appeal and he withdrew the appeal. At issue, as per the rule 20 statement of issues (of the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner), the parties referred to Mr Smith's claimed remuneration during suspension as being N\$112 000 per month. There was no mention of deductions in respect of income tax under the Income Tax Act 24 of 1981 or for loan repayments in respect of a N\$4 million loan advanced by Desert Fruit to Mr Smith. The parties had agreed in the loan agreement that deductions of N\$40 000 be made from Mr Smith's monthly salary to repay that loan.

The Labour Court found that the arbitrator's decision to 'decline to interfere with the ongoing disciplinary hearing' and failing to order payment during suspension or uplifting it amounted to an 'abdication of his jurisdiction' by declining 'to exercise the functions entrusted to him'. Further, the court declined to refer the matter back to the arbitrator and proceeded to order payment on the basis of the rule 20 statement and made no provision for deductions from its orders to pay the sum of N\$112 000 for each month of suspension. As for the costs order against Desert Fruit, the Labour Court found that there was no basis for the refusal to pay Mr Smith's salary during suspension. Despite efforts with reference to authority to persuade Desert Fruit otherwise, it persisted with that stance until written argument was filed on its behalf prior to the hearing before that court. The Labour Court found the persistence in that stance to be untenable and amounted to conduct which was frivolous and vexatious. The court proceeded to grant costs in favour of Mr Smith up to 16 July 2020 and did so on the most punitive basis. The appellant is appealing against the Labour Court's judgment and order except for para 1 of the order setting aside the arbitrator's order staying the dispute concerning the suspension without pay.

On appeal to this Court, three issues arise for determination. The first issue concerns whether the Labour Court's judgment was appealable without leave to appeal (to be determined is thus whether the Labour Court sat as a court of appeal or as a court of first instance for the purpose of s 18(2) of the High Court Act 16 of 1990). The second issue is the correctness of the court's order to direct payment of a gross salary amount without deductions. The third issue raised is the costs order granted by the Labour Court.

*Held that*, in determining whether the Labour Court sat as a court of appeal in this instance, two criteria would need to be met. The first concerns the actual nature and characterisation of the proceedings before the court below and whether they are appellate in nature. The second concerns whether the phrase 'as a court of appeal' necessarily contemplates from a court forming part of the judicial system or can also include appeals from other tribunals contemplated by Art 12 of the Constitution but not forming part of the judicial system.

*Held that*, the court below did not sit as a court of appeal in the sense contemplated by s 18(2) of the High Court. The fact that the court below did not entirely confine itself to the enquiry to establish one of the defects contemplated by s 89(5) does not assist Mr Smith. The proceedings are to be viewed within their statutory confines.

*Held that*, appeals and reviews from arbitration tribunals established under the Act would likewise not amount to the Labour Court sitting as a court of appeal for the purpose of s 18(2)(b) of the High Court Act. A decision reached by the Labour Court in those circumstances would be as a court of first instance and not one on appeal for the purpose of s 18(2), even though this Court had previously accepted the position to be to the contrary but without the point ever being argued and determined.

*Held that*, s 18(2) is not applicable to proceedings where the Labour Court determines an application for review from an arbitration tribunal established under the Act. The Labour Court sat as a court of first instance and leave to appeal is thus not required under s 18(2) of the High Court Act.

*Held that*, Desert Fruit's submission that the orders for payment are not authorised by s 89(10) and that this Court would be entitled to rectify an order which a court is not

empowered to make is sound. This Court is not only entitled to correct an order which is not competent or authorised by statute but is duty-bound to do so.

*Held that*, it is only in the case of appeals that the Labour Court may determine the dispute in the manner it considers appropriate. In the case of setting aside an award on review, s 89(10)(b) and (c) apply. The court can either refer the matter back to the arbitrator or direct that a new arbitrator be designated or make an order considered appropriate about the procedures to be followed to determine a dispute. The very confined remedies on review are in keeping with the confined nature of the review itself – only concerning narrowly defined defects relating largely to the conduct of the arbitrator and *not* the merits.

*Held that*, the appropriateness of these confined remedies is demonstrated by what transpired in this matter. The award reviewed was for a stay in a dispute. In response to that review, the court not only set aside the order to stay the dispute, but proceeded itself to determine the dispute thus stayed. Not only was that entirely inappropriate, but this plainly exceeded the powers of the court under s 89(10).

*Held that*, the court was not empowered – nor should it have in any event – to have made the orders directing payment. Those orders fall to be set aside for this reason alone. Plainly the court should have referred the dispute back to the arbitrator for determination after setting aside the award to stay the dispute. The arbitrator is also furthermore and in any event better placed to determine the dispute of fact concerning the repayment of the loan in the event Desert Fruit can persuade the arbitrator to revisit the rule 20 stated case. The arbitrator would then determine which deductions need to be made inclusive of tax deductions in order to make an order for payment which would then be enforceable in its own terms.

*It is held that*, for a Labour Court to make an order for costs on the most punitive scale, there would need to be further factors of an aggravating nature present in such conduct in order to justify a costs order on that particularly punitive scale. No further factors were raised in justification of the order on a most punitive scale. On the contrary, in the absence of a finding in respect of aggravating facts, it would appear that the court operated under the misapprehension that frivolous or vexatious conduct

would automatically result in a cost order on the most punitive scale. That is not what s 118 of the Act contemplates and amounts to a misdirection.

It thus follows that the cost order made by the court on the most punitive scale is to set aside and replaced with merely one of costs as is reflected in the order of this Court.

The appeal partially succeeds.

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## APPEAL JUDGMENT

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SMUTS JA (HOFF JA and FRANK AJA concurring):

### Introduction

[1] In this appeal from the Labour Court, three issues arise for determination. They concern whether that court's judgment was appealable without the leave of that court. Secondly, the correctness of the court's order to direct payment of a gross salary amount without deductions is in issue. The third issue raised is the cost order granted by the Labour Court. These issues arise in the following way.

### Background facts

[2] The first respondent in this appeal, Mr Smith, was employed by the appellant (Desert Fruit) as its chief executive officer until he was dismissed on 11 December 2019. His gross monthly salary at the time was N\$112 000.

[3] Mr Smith's employment with Desert Fruit started in 2005. During April 2017, Mr Smith went on leave with a view to negotiate a separation package with his employer. He was however subsequently suspended without pay with effect from 1 October 2017, pending disciplinary proceedings which proceeded thereafter.

[4] Prior to the conclusion of the disciplinary enquiry and on 2 August 2018, Mr Smith lodged a dispute of an unfair labour practice (concerning being suspended without pay) against Desert Fruit with the Office of the Labour Commissioner. The dispute was referred to arbitration.

[5] On 15 October 2018, Desert Fruit applied for a stay in the arbitration proceedings, pending the finalisation of the incomplete disciplinary proceedings, said to be at an advanced stage, on the basis that the relief sought could be claimed once the disciplinary proceedings were finalised.

[6] Under rule 20 (of the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner), the arbitrator is required to attempt to assist the parties to shorten arbitration proceedings by (essentially requiring them) to set out agreed facts and those in dispute and the issues the arbitrator is required to decide, as well as a range of procedural issues needed to be dealt with such as exchanging documents and other matters.

[7] The parties prepared a statement of issues under rule 20 in respect of both the dispute relating to suspension without pay and the stay application. In the rule 20 statement, the parties referred to Mr Smith's claimed remuneration during suspension as being N\$112 000 per month. There was no mention of deductions in respect of income tax under the Income Tax Act 24 of 1981 or for loan repayments in respect of a N\$4 million loan advanced by Desert Fruit to Mr Smith. The parties had agreed in the loan agreement that deductions of N\$40 000 be made from Mr Smith's monthly salary to repay that loan. To facilitate these loan repayments, his salary was increased at the time from N\$67 000 per month to N\$112 000 per month.

### The arbitration proceedings

[8] On 8 August 2019, the arbitrator essentially granted the stay application. His award is entitled 'preliminary point ruling' in which he stated that he declined to 'interfere with the ongoing disciplinary hearing and instead urge(d) the parties to expedite the process to ensure [a] speedy finalisation of the disciplinary hearing'.

### Proceedings before the Labour Court

[9] On 9 September 2019, Mr Smith applied to set aside that award on review to the Labour Court under s 89(4) of the Labour Court Act 11 of 2007 (the Act). In that application, he sought a further order directing that Desert Fruit make payments of N\$112 000 in respect of his salary for each of the several months of his suspension without pay. The order sought to direct payment of that sum for each month of unpaid suspension but did not make provision for any deductions – whether for tax or anything else. Interest was sought on each outstanding amount as well as an order for costs under s 118 of the Act.

[10] During argument, it emerged that Mr Smith had also filed a notice of appeal against the arbitrator's award (which would appear to be the more appropriate course). During case management, the presiding judge impermissibly required him to elect between the review and the appeal. Mr Smith under protest withdrew his appeal.

[11] Much of the background factual matter which is material to the review was not in dispute, except concerning repayment of the loan agreement. Desert Fruit claimed that Mr Smith's failure to repay the loan triggered the acceleration clause and rendered the full outstanding balance payable. It also pointed out that any order for payment of outstanding salaries should be subject to the deduction of loan repayments in the sum

of N\$40 000 per month as provided for in the loan agreement. In the answering affidavit, it was also stated on behalf of Desert Fruit that the omission to refer to loan repayments in the rule 20 statement was by accident and it was asserted that these repayments should be taken into account in any order to be given. This was disputed in reply. Mr Smith on the other hand referred to the rule 20 agreed statement of what was in dispute before the arbitrator where it was agreed that Mr Smith's monthly salary to be paid would be N\$112 000 without reference to the loan repayments or any other deductions.

[12] The review grounds contended for were more in the nature of grounds of appeal although it was submitted in the founding affidavit that they each constituted a gross irregularity and in certain instances it was contended that they resulted in depriving Mr Smith of his constitutional right to a fair trial.

[13] It was contended that it was irregular for the arbitrator to hold that by ordering payment of salary during the suspension would amount to him 'interfering' in the disciplinary process and that this approach also amounted to an abdication of his powers. It was also said that it was irregular for the arbitrator to find that the absence of an opposing affidavit to the stay application meant that it was unopposed, despite a notice of opposition having been filed. Having assumed that the stay application was unopposed and was to be granted by virtue of that, it was contended that the arbitrator's approach that he was *functus officio* on that issue amounted to a gross irregularity, as did the other irregularities contended for, or that they amounted to misconduct for the purpose of s 89(5) of the Act.



[14] At the stage of filing written heads of argument in advance of the hearing in the Labour Court on 16 July 2020, counsel on behalf of Desert Fruit correctly conceded that Mr Smith would, on the facts, be entitled to being paid his salary during suspension. Counsel for Desert Fruit however argued that deductions for the repayment of the loan were to be provided for in any court order (as well as deductions for income tax as pay as you earn). Mr Smith's counsel argued that the statement of agreed facts embodied in the rule 20 statement bound Desert Fruit to that amount (of N\$112 000) and disposed of that contention. The Labour Court found that payments of N\$112 000 set out in the rule 20 statement were to be paid, even though this was disputed by Desert Fruit in its answering affidavit in the review application.

#### Approach of the Labour Court

[15] Although Desert Fruit's counsel specifically argued that Mr Smith had not established that there was a defect in the proceedings as contemplated by s 89(4) read with s 89(5) of the Act, the Labour Court concluded that the arbitrator's decision to 'decline to interfere with the ongoing disciplinary hearing' and failing to order payment during suspension or uplifting it amounted to an 'abdication of his jurisdiction' by declining 'to exercise the functions entrusted to him'. This would appear to be the basis upon which the Labour Court reviewed and set aside the award to stay the arbitration proceedings.

[16] The court below at Mr Smith's instance declined to refer the matter back to the arbitrator and proceeded to order payment on the basis of the rule 20 statement and made no provision for deductions from its orders to pay the sum of N\$112 000 for each month of suspension.

[17] As for costs, the Labour Court found that there was no basis for the refusal to pay the salary during suspension. Despite efforts with reference to authority to persuade Desert Fruit otherwise, it persisted with that stance until written argument was filed on its behalf prior to the hearing before that court. The Labour Court found the persistence in that stance to be untenable and amounted to conduct which was frivolous and vexatious. The court proceeded to grant costs in favour of Mr Smith up to 16 July 2020 and did so on the most punitive basis.

[18] The Labour Court on 1 April 2001 thus reviewed and set aside the arbitrator's award to stay the arbitration. The court further ordered Desert Fruit to pay Mr Smith N\$112 000 together with interest for each month or part thereof from the date of his suspension to the date of his dismissal on 11 December 2019. The court further directed that Desert Fruit pay Mr Smith's costs up to and including 16 July 2020, including the costs of two instructed counsel and one instructing counsel on the most punitive scale as between legal practitioner and own client.

#### This appeal

[19] Desert Fruit appealed against the judgment and order of the Labour Court except for para 1 of the order setting aside the arbitrator's order staying the dispute concerning the suspension without pay. Desert Fruit accepts that the Labour Court was correct in holding that it was not entitled to suspend Mr Smith without pay and does not appeal against the court's holding to that effect. That concession is correctly made and the court was entirely correct in holding that Desert Fruit could not without any contractual or other basis suspend Mr Smith without pay pending the disciplinary hearing against him. Given Mr Smith's entitlement to be paid during suspension, Desert Fruit did not appeal against the setting aside of the arbitrator's decision to stay

the proceedings even though the Labour Court made no express finding that any of the review grounds raised amounted to a gross irregularity or misconduct or exceeding powers as is required by s 89(4) read with s 89(5) of the Act in order to set aside the decision on review.

[20] Desert Fruit attacked the orders directing payment of the sums of N\$112 000 on the grounds that the court failed to state that these amounts were subject to deductions for income tax and secondly for monthly instalments of N\$40 000 as loan repayments. In the third instance, Desert Fruit appealed against the punitive cost order against it.

[21] Desert Fruit filed security for costs outside the time limit provided for in the rules and brought an application for condonation and for reinstatement of the appeal. That application was opposed by Mr Smith on the basis that Desert Fruit needed leave to appeal which had not been sought or granted and that the appeal itself lacked prospects of success. The reasonableness of the explanation for the delay in complying with the rule in question was not placed in issue. The parties accepted that if leave to appeal were not required and if the appeal were to enjoy prospects of success, condonation and reinstatement should be granted. It is thus not necessary to further refer to the condonation application except in the orders to be granted one way or the other.

#### Issues for determination

[22] It follows that the issues to be determined on appeal concern whether leave to appeal was required in respect of the Labour Court's judgment in reviewing an arbitrator's award. Secondly, whether the court's orders of payment of N\$112 000

without deductions for tax or loan repayments were correct and thirdly, whether the Labour Court failed to exercise its discretion judicially in respect of the punitive costs order.

Is the order appealable without leave?

[23] Desert Fruit, as appellant, was alerted to the position taken by Mr Smith (that leave to appeal is required) in the answering affidavit to the condonation application. The parties thus provided full and detailed written and oral submissions on the issue for which we are grateful.

[24] Section 18(2) of the High Court Act 16 of 1990 forms the basis to the position taken on behalf of Mr Smith. It provides:

- '(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie –
- (a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;
  - (b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.'

[25] It was contended on behalf of Mr Smith that the Labour Court was not a court of first instance as contemplated by s 18(2)(a) and that it sat as a court of appeal as contemplated by s 18(2)(b) where leave to appeal is required. Reliance was placed on *S v Delie*<sup>1</sup> where this Court interpreted 'on appeal' in the Criminal Procedure Act 51 of 1977 to include review proceedings.

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<sup>1</sup> *S v Delie* 2001 (1) NR 286 (SC).

[26] Counsel for Mr Smith referred to three judgments<sup>2</sup> of this Court which reflect that leave to appeal was obtained from the Labour Court where reviews to that court were ultimately taken on appeal to this Court.

[27] Counsel for Desert Fruit contended that the Labour Court sat as a court of first instance which meant it had the right to appeal to this Court. Counsel further argued that the meaning of s 18(2)(b) is clear and applies only if the High Court sat as a court of appeal. Counsel further contended that *Delie* and *Sita*<sup>3</sup> relied upon by the respondent were distinguishable. *Delie* related to a review from a magistrate's court, which is a court and part of the judicial structure, relying upon *National Credit Regulator v Lewis Stores (Pty) Ltd (NCR)*.<sup>4</sup> Counsel pointed out that *Sita* was in effect an appeal on a question of law.

[28] To be determined is thus whether the Labour Court sat as a court of appeal or as a court of first instance for the purpose of s 18(2).

[29] Counsel for Mr Smith correctly pointed out that arbitration tribunals established under s 85 of the Act are tribunals for the purpose of Art 12 of the Constitution.<sup>5</sup>

[30] In determining whether the Labour Court sat as a court of appeal in this instance, two criteria would in my view need to be met.

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<sup>2</sup> *Atlantic Chicken Co (Pty) Ltd v Mwandingi* 2014 (4) NR 915 (SC) 917; *National Housing Enterprise v Hinda-Mbasina* 2014 (4) NR 1046 (SC) 1063; *Swartbooï v Mbengela* NO 2016 (1) NR 158 (SC) 163.

<sup>3</sup> *Sita & another v Olivier N.O. & another* 1967 (2) SA 442 (A).

<sup>4</sup> *National Credit Regulator v Lewis Stores (Pty) Ltd (NCR)* 2020 (2) SA 390.

<sup>5</sup> As provided for in s 85 (1) of the Act. See also *Swartbooï* para 33.

[31] The first concerns the actual nature and characterisation of the proceedings before the court below and whether they are appellate in nature. The second concerns whether the phrase ‘as a court of appeal’ necessarily contemplates from a court forming part of the judicial system or can also include appeals from other tribunals contemplated by Art 12 but not forming part of the judicial system.

[32] These issues are dealt with in turn. What served before the Labour Court was a review brought in terms of s 89 of the Act. That section provides for both appeals and reviews from arbitration tribunals established under the Act. The parts of s 89 which are relevant for present purposes are the following:

- ‘(1) A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of Section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78 –
  - (a) on any question of law alone; or
  - (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law. [Subsection (1) is amended by Act 2 of 2012].
  
- (2) . . .
  
- (3) . . .
  
- (4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award –
  - (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or
  - (b) if the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption.

- (5) A defect referred to in subsection (4) means –
- (a) that the arbitrator –
    - (i) committed misconduct in relation to the duties of an arbitrator;
    - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
    - (iii) exceeded the arbitrator's power; or
  - (b) that the award has been improperly obtained.

....'

[33] The form of review contemplated by s 89(4) read with s 89(5) is narrow and confined to a defect in the arbitration proceedings as defined and is to be considered within the overall dispute resolution regime brought about by and envisaged by the Act.<sup>6</sup> As is made clear by this Court in *Swartbooi*, the Act brought about far reaching changes from a dispute resolution system embedded in the court structure to alternative dispute resolution through conciliation and, where necessary, arbitration by specialised arbitration tribunals under the auspices of the Labour Commissioner. The statutory intention was to bring about a speedy determination of disputes and to achieve finality in them as expeditiously as possible whilst doing so fairly and with a minimum of formality.<sup>7</sup> In the context of this statutory intention, appeals are limited by s 89(1) to questions of law alone.

[34] In keeping with this statutory intention, reviews of arbitration tribunal proceedings under s 89(4) are confined to defects in the arbitration proceedings as narrowly defined by s 89(5). These are misconduct on the part of the arbitrator,

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<sup>6</sup> See *Swartbooi* paras 27-31.

<sup>7</sup> Section 86 of the Act.

commission of a gross irregularity in conducting those proceedings, exceeding an arbitrator's powers or an award being improperly obtained.

[35] Those proceedings are very confined to establishing one or more of the defects as narrowly defined in s 89(5). *That* is the nature of the enquiry before the Labour Court on review – determining whether conduct on the part of the arbitrator or possibly participants amounts to a defect as defined and not considering or addressing the merits of the dispute in any way. It is entirely unlike the broad enquiry as to irregularities in reviews of criminal proceedings in magistrates' courts as raised in *Delie*. The approach in *Sita* relied upon by counsel for Mr Smith also does not assist his position. In that matter a superior court presided over an application for a declaratory order and an interdict relating to proceedings in a regional court, essentially seeking to set aside a decision of that court. The (then) Appellate Division in *Sita* found that the nature of the relief sought in the proceedings which, even though brought as a declaratory, essentially amounted to an appeal on a question of law.

[36] Having regard to the essential nature of the proceedings before the court below, the review under s 89(4) is in essence confined to the conduct of the arbitrator (or a party participating) and is not appellate in the real sense of that term and unlike a review in criminal proceedings addressed in *Delie* or the proceedings in *Sita*.

[37] It follows in my view that the court below did not sit as a court of appeal in the sense contemplated by s 18(2) of the High Court. The fact that the court below did not entirely confine itself to the enquiry to establish one of the defects contemplated by s 89(5) does not assist Mr Smith. The proceedings are to be viewed within their statutory confines.



[38] There is a further reason why the proceedings in the court below was not sitting as a court of appeal. That is because those proceedings emanated from a tribunal which is not a court or part of the judicial system.

[39] In *NCR*, Wallis JA in the South African Supreme Court of Appeal held the decision made on an appeal from an independent statutory tribunal to a High Court would not amount to a decision made 'on appeal to it' for the purpose of similar statutory provision in South Africa regulating appeals and the requirement of leave for them.

[40] In his closely reasoned judgment, Wallis JA held that such a tribunal (in that case an appeal from the National Consumer Tribunal to the High Court) is not part of the judicial system and that the tribunal does not exercise judicial authority under that country's constitution even though it is an independent and impartial tribunal whose role is adjudication.<sup>8</sup> Wallis JA in this context proceeded to hold:

'Within the framework of the judicial system, a decision by a court on appeal to it within the meaning of s 16(1)(b) of the SC Act is either an appeal from a magistrates' court or an appeal from a High Court sitting at first instance. The question raised by this case is whether such appeals are the only appeals with which s 16(1)(b) is concerned, or whether it applies equally to statutory appeals from persons, bodies or tribunals falling outside the judicial system.'<sup>9</sup>

[41] Wallis JA proceeded to consider statutes other than the National Credit Act (which provided for the appeal in that matter) which also provide for appeals to the High Court from decisions of administrative officials or tribunals. He concluded that the

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<sup>8</sup> *NCR* para 42.

<sup>9</sup> *NCR* para 43.

provision in question (dealing with appeals in the Supreme Court Act) should be confined to applications for leave to appeal against decisions by the High Court given on appeal to it from other courts within the judicial system, that is from magistrates' courts.<sup>10</sup> In reaching this conclusion, Wallis JA referred to the fundamental differences between an appeal from a court and an appeal from a body outside the judicial system.<sup>11</sup>

[42] I agree with the approach articulated in *NCR*. Namibia's legislation regulating the passage of appeals and when leave is required draws upon principles developed in the context of similarly worded South African legislation.

[43] Article 78 of the Namibian Constitution, makes it clear that power is vested in the courts, comprising of this Court, the High Court and lower courts of Namibia. A statutory tribunal, such as that established by s 85 of the Act does not form part of the judicial system envisaged by the Constitution.

[44] It would follow that appeals from arbitration tribunals established under the Act would likewise not amount to the Labour Court sitting as a court of appeal for the purpose of s 18(2)(b) of the High Court Act. A decision reached by the Labour Court in those circumstances would be as a court of first instance and not one on appeal for the purpose of s 18(2), even though this Court had previously accepted the position to be to the contrary but without the point ever being argued and determined.

[45] The position with regard to appeals in criminal matters is unaffected by this judgment. Section 18(2) only concerns civil appeals and decisions on review or appeal

<sup>10</sup> *NCR* para 50.

<sup>11</sup> *NCR* para 51.

in criminal matters which are from magistrates' courts which form part of the judicial system and where a review is accorded a wide meaning.

[46] It follows that s 18(2) is not applicable to proceedings where the Labour Court determines an application for review from an arbitration tribunal established under the Act. The Labour Court sat as a court of first instance and leave to appeal is thus not required under s 18(2) of the High Court Act.

Was the Labour Court's order directing payment without deductions for tax or loan repayments competent?

[47] In the grounds of appeal raised by Desert Fruit, it is contended that the Labour Court erred in two different and separate respects in failing to make provision for the deduction of income tax from the monetary orders made by the court. In the second instance, it is contended that the court erred by failing to take into account deductions for loan repayments from the payment ordered to Mr Smith.

[48] Desert Fruit pointed out that both deductions were referred to in evidence in the review proceedings before the Labour Court. In respect of the deduction for tax, it was argued that this arises by operation of the Income Tax Act.

[49] Counsel for Mr Smith conceded that deductions for tax (pay as you earn) are to be applied to the payments ordered by the Labour Court and that those are implied by that statute in the court orders directing payment of N\$112 000 for each month of suspension without pay. There was thus no need for the Labour Court to make provision for that deduction, according to counsel for Mr Smith, because it follows automatically by statute.

[50] The court's order however directs payment of the sum of N\$112 000 together with interest on *that* amount in respect of each month. There is no reference to any deduction. It is thus without qualification. Mr Smith is entitled to execute upon that order. Even though the court made reference to tax deductions in its judgment and was aware of the need for them, its order should have reflected that and made provision for them. The orders cannot stand in their present formulation.

[51] As for the complaint that loan repayments are not reflected, the court also referred to this issue and appeared to consider itself bound by the rule 20 statement of issues. There was however evidence before it that this deduction was by accident omitted from the rule 20 statement and that these deductions were in accordance with the loan agreement and were payable.

[52] It is not clear that this issue could have been resolved on the papers before the Labour Court and is more appropriately dealt with in a factual enquiry by an arbitrator on that issue.

[53] This would arise because of another issue raised in argument on behalf of Desert Fruit, even though not one of the grounds of appeal.

[54] Counsel for Desert Fruit argued that the orders for payment are not authorised by s 89(10) and that this Court would be entitled to rectify an order which a court is not empowered to make. That submission is sound. This Court is not only entitled to correct an order which is not competent or authorised by statute but is duty-bound to do so.

[55] Section 89(10) sets out the powers of the Labour Court when setting aside an award of an arbitrator. It is to be read with s 89(9). These provisions are in the following terms:

'(9) The Labour Court may –

- (a) order that all or any part of the award be suspended; and
- (b) attach conditions to its order, including but not limited to –

- (i) conditions requiring the payment of a monetary award into Court;  
or
- (ii) the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.

(10) If the award is set aside, the Labour Court may –

- (a) in the case of an appeal, determine the dispute in the manner it considers appropriate;
- (b) refer it back to the arbitrator or direct that a new arbitrator be designated; or
- (c) make any order it considers appropriate about the procedures to be followed to determine the dispute.'

[56] It is clear from s 89(10)(a) that it is only in the case of appeals that it may determine the dispute in the manner it considers appropriate. In the case of setting aside an award on review, subparas (b) and (c) apply. The court can either refer the matter back to the arbitrator or direct that a new arbitrator be designated or make an order considered appropriate about the procedures to be followed to determine a dispute. The very confined remedies on review are in keeping with the confined nature of the review itself – only concerning narrowly defined defects relating largely to the conduct of the arbitrator and *not* the merits.

[57] The appropriateness of these confined remedies is demonstrated by what transpired in this matter. The award reviewed was for a stay in a dispute. In response to that review, the court not only set aside the order to stay the dispute, but proceeded itself to determine the dispute thus stayed. Not only was that entirely inappropriate (as is also demonstrated by the clear dispute of fact on the papers as to whether there should be a deduction of loan repayments), but this plainly exceeded the powers of the court under s 89(10).

[58] It follows that the court was not empowered – nor should it have in any event – to have made the orders directing payment. Those orders fall to be set aside for this reason alone. Plainly the court should have referred the dispute back to the arbitrator for determination after setting aside the award to stay the dispute. The arbitrator is also furthermore and in any event better placed to determine the dispute of fact concerning the repayment of the loan in the event Desert Fruit can persuade the arbitrator to revisit the rule 20 stated case. The arbitrator would then determine which deductions need to be made inclusive of tax deductions in order to be able to make an order for payment which would then be enforceable in its own terms.

#### The Labour Court's punitive cost order

[59] It was submitted on behalf of Desert Fruit that the Labour Court erred and misdirected itself in awarding Mr Smith costs as well as in awarding costs on a punitive scale.

[60] Counsel for Mr Smith relied upon the approach of the Labour Court in finding that Desert Fruit's persistence in its stance of refusing to pay Mr Smith during his

suspension as untenable, in the face of contractual provisions and authority to the contrary. That finding is sound. There was no employment provision permitting it. Nor was there any other tenable basis put forward to support it or even some form of process which would have been required which was entirely absent. The persistence in withholding pay during his suspension was indeed untenable.

[61] Section 118 provides:

‘Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.’

[62] The statutory intention behind s 118 was that costs would not ordinarily be awarded in proceedings before the Labour Court and to permit parties ‘a measure of freedom’ in litigating ‘without (them) being unduly hampered by the often inhibiting factor of legal costs’.<sup>12</sup> That is the principle governing costs in proceedings in the Labour Court. The exception is where a party ‘acted’ in a frivolous or vexatious manner by instituting or carrying on proceedings or defending those proceedings. Once this exception is established, then a court may make an order for costs. Without making a finding that this threshold has been met, an order of costs may not be made.

[63] The finding of the court that this untenable stance met the threshold of vexatiousness in s 118 can thus not be faulted.

[64] For a Labour Court to make an order for costs on the most punitive scale, there would need to be further factors of an aggravating nature present in such conduct in

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<sup>12</sup> *National Housing Enterprise v Beukes* 2009 (1) NR 82 (LC) paras 87-88.

order to justify a costs order on that particularly punitive scale. No further factors were raised in justification of the order on a most punitive scale. On the contrary, in the absence of a finding in respect of aggravating facts, it would appear that the court operated under the misapprehension that frivolous or vexatious conduct would automatically result in a cost order on the most punitive scale. That is not what s 118 contemplates and amounts to a misdirection.

[65] It follows that the cost order made by the court on the most punitive scale is to set aside and replaced with merely one of costs as is reflected in the order of this Court.

#### Costs of appeal

[66] The appellant (Desert Fruit) has been substantially successful in this appeal and costs in the appeal should follow that result.

#### Order

[67] It follows that the appeal in large part succeeds, and the following order is made:

1. Condonation for the late filing of security for costs is granted and the appeal is reinstated.
2. The appeal succeeds in part.
3. The order of the Labour Court in para 1 is confirmed.
4. The order in para 2 is set aside and replaced with the following:



'2. The dispute in respect of the applicant's claim is referred back to the arbitrator or another arbitrator designated by the Labour Commissioner to determine the monthly amounts payable to Mr Smith during his suspension without pay.'

5. The order of the Labour Court in para 3 is varied to read:

'3. The first respondent shall pay the applicant's legal costs up to and inclusive of 16 July 2020 which shall include the costs of two instructed legal practitioners and one instructing legal practitioner.'

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**SMUTS JA**

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**HOFF JA**

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**FRANK AJA**

## APPEARANCES

APPELLANT:

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Windhoek

FIRST RESPONDENT:

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Instructed by Koep & Partners,  
Windhoek