HIGH COURT OF NAMIBIA: MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 222/2015

In the matter between:

USAKOS TOWN COUNCIL **APLLICANT**

And

JOSEPH ESAU JANTZE **FIRST RESPONDENT**

GETRUDE USIKU N.O **SECOND RESPONDENT**

THE DEPUTY SHERIFF
USAKOS DISTRICT **THIRD RESPONDENT**

Neutral citation: *Usakos Town Council v Jantze* (A 222-2015) NAHCMD 225 (16 September 2015)

Coram: UEITELE,J

Heard on: 02 September 2015

Delivered on: 16 September 2015

Flynote: ***Practice*** - Applications and Motions – Jurisdiction of High Court (sitting as High Court) raised *in limine* – Consequently, Court not competent to deal

with issues of urgency and merits of application, unless jurisdiction challenge has first been determined.

Labour law - Interpretation of section 117(1) of the Labour Act, 2007 **-**Labour Court – Exclusive jurisdiction in terms of s 117 (1) (i) of Labour Act, 2007.

Summary: The applicant brought an urgent application to the High Court, sitting as such, to declare the notice of attachment of applicant's property to be *null and void* and of no force and effect in law, alternatively setting it aside; and –an order interdicting the respondents from selling the property of the applicant by public auction on 28 August 2015.

The arbitrator in an arbitration award, granted on 29 December 2012, ordered the applicant to pay N$ 401 360.60 to the first respondent. On 7 February 2013, applicant filed a notice of appeal against the arbitration award, but failed to prosecute the appeal. On 24 April 2015, the arbitration award was made an order of the Labour Court under Case no LC 69/2015. On 27 April 2015, applicant and his legal representative was duly notified of the Labour Court order. On 29 July 2015, a writ of execution was issued against applicant and it's movables were attached and a sale in execution thereof was arranged for 28 August 2015. Applicant approached the High Court, sitting as such, on the 22 August 2015 on an urgent *basis* to declare the notice of attachment of the applicant's property to be *null and void* ; and an order interdicting the respondents from selling applicant's property by public auction.

Held that the High Court sitting as such, does not have jurisdiction to adjudicate a matter in respect of s 117(1)(i) of the Labour Act, 2007 which confers exclusive jurisdiction to the Labour Court.

Held further that applicant's urgency was self created, therefore the Court declined to condone applicant's non-compliance with the Rules of Court to hear this application as one of urgency.

Held furthermore that applicant has attempted to throw whatever obstacle it could lay its hand onto, to frustrate the first respondent's claim. It left the Court with the indefinable feeling that something is 'amiss'. Court therefore deems it just and

equitable that first respondent should not be out of pocket. Court grants a cost order in favor of first respondent on an attorney/client scale.

ORDER

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[1] The High Court sitting as such does not have jurisdiction to adjudicate a matter in respect of s 117(1)(i) of the Labour Act, 2007 as that section confers exclusive jurisdiction to the Labour Court.

[2] The court declines to condone the applicant's non compliance with the rules of this Court and to hear this application as an urgent one.

[3] The applicant's application is struck from the roll.

[4] The applicant must, pay the first respondent's costs for opposing this application on the scale as between attorney and client.

JUDGMENT

UEITELE, J

Introduction and Background

[1] On 22 August 2015 the Council for the Town of Usakos (I will in this judgment refer to the Town Council of Usakos as the applicant) lodged an application on an urgent basis seeking the following relief.

> '1.1 An order condoning Applicant's non-compliance with the Rules of this Honourable Court and hearing this application on an urgent basis as is provided for in Rule 73(3) of the High Court and in particular, but not limited to, condoning the abridgement of time periods and dispensing, as far as may be necessary, with the forms and service provided for in the Rules of this Honourable Court.

1.2 That a *Rule Nisi* be issued calling upon the Respondents to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court why an order should not be made in the following terms;

1.2.1 An order declaring the notice of attachment to be *null and void* and of no force and effect in law, alternatively setting same aside;

1.2.2 An order interdicting the respondents from selling the property of the Applicant by public auction on 28 August 2015;

1.3 Ordering the respondents to pay the costs of this application jointly and severally the one paying the other to be absolved;

1.4 That prayers 1.2.1 and 1.2.2 above shall operate as an interim interdict with immediate effect pending the return day of this order.

1.5 Such further and/or alternative relief as this Honourable Court may deem fit.'

[2] Mr. Joseph Esau Jantze, who is cited as the first respondent (I will, in this judgment, refer to him as such) in the application, opposes the application based on preliminary points of law as well as on the merits. Before I deal with the dispute I find it appropriate to briefly set out the events that led to the Town Council launching this application.

[3] On 01 November 2006 the first respondent was appointed as the Chief Executive Officer of the applicant for a period of five years. The contract would thus have terminated on 31 October 2011. The first respondent did, however, not serve out his full term of five years as he was, on 18 May 2011, suspended due to allegations of misconduct. The first respondent was, however, only charged with misconduct three months later. He received the charges of misconduct leveled against him on 13 July 2011. On 15 July 2011 the first respondent received a notice in terms of s 27(3)(b)(i) of the Local Authorities Act 1992[1] informing him that the applicant will not renew his contract of employment when it expires on 31 October 2011.

[1] (Act No 23 of 1992)

[4] Up until the end of September 2011 (i.e. five months after the first respondent was suspended) the applicant had not arranged or caused to be held any disciplinary hearing for the first respondent to answer to the allegations of misconduct leveled against him. The first respondent consequently, on 03 October 2011, referred a dispute of amongst others, unfair dismissal to the Office of the Labour Commissioner. The Labour Commissioner, in terms of the Labour Act, 2007[2] appointed Ms. Gertrude Usiku, who is cited as the second respondent in this application (I will in this judgment refer to her as the arbitrator), to conciliate and arbitrate the dispute referred to his office by the first respondent. The arbitrator concluded the arbitration proceedings on 26 November 2012 and on 29 December 2012 issued an arbitration award. In terms of the arbitration award the applicant was, amongst others, ordered to pay to the first respondent an amount of N$ 401 360-60.

[5] The applicant was not happy with the award and on 07 February 2013 the applicant filed a Notice of Appeal against the arbitration award. It is now common cause that the appeal, which the applicant lodged on 07 February 2013, has, to the date (i.e. 22 August 2015) that these proceedings were lodged, not been prosecuted. During the period May 2013 to 24 April 2015, the first respondent impressed upon the applicant to comply with the arbitration award. I will briefly set out what the first respondent attempted during this period. On 08 May 2013, first respondent's legal representatives addressed a letter to the applicant's legal representative in which letter they drew the attention of the applicant to s 89(6) of the Labour Act, 2007. The first respondent gave an undertaking that if the money was paid into a Trust Account or into court, he will not insist that the applicant comply with s 89(6) of the Labour Act, 2007. Applicant simply ignored the letter and never responded to that letter.

[6] On 19 June 2014 the first respondent's legal representative addressed a letter to the applicant's legal representatives, in which letter reference is made to the undertaking given during May 2013 to the effect that first respondent will not insist on the compliance with s 89(6)(b) of the Labour Act, 2007 on condition that the applicant pays the amount awarded (per the Arbitration Award of 29 December

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[2] (Act No.11 of 2007). Section 85 (5) of the Labour Act, 2007 read with Regulation 20(2) of the Labour General Regulations

2012) into that legal practitioner's trust account or into court. In the letter of 19 June 2014 the following is, amongst other things, stated:

> 'In the premises, we are instructed to demand, as we hereby do, that the Usakos Town Council complies with the arbitration award issued in this matter as a matter of urgency. We hence expect payment to our client in terms of the arbitration award to be made to our offices within seven (7) days from date hereof. We record that our instructions are to take any and all action required and/or necessary in law to protect and enforce the rights of our client herein in the event of a failure to comply with the award as aforesaid.
>
> We await your urgent reply herein.'

[7] The applicant's legal practitioners did not reply to the letter of 14 June 2014, as a result the first respondent's legal representative directly addressed a letter, on 17 September 2014, to the applicant. The letter to the applicant was a replica of the letter of 14 June 2014. Again no reply was forthcoming either from the applicant itself or from its legal representative. On 12 March 2015, the first respondent's legal representatives addressed a further letter which was again not replied to. In the letter of 12 March 2015 the following is, amongst other things, stated:

> *"*In the premises kindly take note that we will now take further legal action against Council and without any reference to you and will hold Council liable for any and all costs occasioned as a result thereof.'

[8] On 24 April 2015 the first respondent's legal representatives gave notice to the applicant's legal representatives of the fact that the original arbitration award is presented to the Labour Court in terms of s 87(1)(b)(i) of the Labour Act, 2007. The applicant's legal representatives again decided to ignore the letter. On 24 April 2015 the arbitration award was made an order of the Labour Court under case number LC 69/2015. On the 27th of April 2015 the first respondent's legal representatives again notified the applicant's legal representatives that the arbitration award has been made an order of the Labour Court under case number LC 69/2015. The notification that the award is made an order of court was also forwarded directly to the applicant. Again no response came from either the applicant or its legal representative.

[9] On 16 July 2015 the first respondent's legal representatives approached the office of the Registrar for issuing a writ of execution. The writ of execution was issued on 29 July 2015. On 30 July 2015 the Deputy Sheriff for the District of Usakos served the writ of execution on the applicant and attached the property of the applicant which property consists of four (4) motor vehicles. On 10 August 2015 the first respondent's legal representatives issued a notice for the sale in execution of the applicant's properties which were attached by the Deputy Sheriff. The sale in execution was then advertised in both the '*Die Republikein'* and the '*The Namibian'* newspapers. The notices clearly state that the sale in execution will take place on 28 August 2015. It is the notices of sale in execution which prompted the applicant, to, on 22 August 2015, approach this Court on an urgent basis for the relief that I set out above in this judgment.

[10] The first respondent opposes the applicant's application. The first respondent raised three points *in limine.* The first point *in limine* which the first respondent raised relates to the jurisdiction of the High Court. The first respondent submitted that the High Court, sitting as such, does not have jurisdiction to adjudicate a matter on which the High Court, sitting as the Labour Court, has exclusive jurisdiction in terms of section 117 (1) of the Labour Act, 2007. The second point *in limine* relates to the urgency of the matter, the first respondent argues that if there is any urgency the applicant created that urgency, the third point *in limine* relates to a point of non-joinder. The first respondent argues that since the applicant relies on the allegation that the property attached is State property, the failure to join the Government or Government Minister is fatal. Before I consider whether or not to grant the applicant the relief which it seek, I will first deal with the preliminary objections.

Points *in limine.*

[11] In the matter of *Haidongo Shikwetepo v Khomas Regional Council and Others*[3] Parker J said:

> '…if the jurisdiction of this Court, sitting as the High Court, was being challenged at the threshold, it would not be competent for this Court to determine anything else without first deciding the issue of jurisdiction; that is, without deciding whether it has

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jurisdiction, in the first place, to determine anything about the application, including whether it should be heard on urgent basis.'

In view of the above statement I find myself duty bound to start off with the question of whether or not this Court has jurisdiction to hear the matter.

Jurisdiction

[12] The jurisdiction and powers of the Labour Court are set out in s 117 of the Labour Act, 2007. The legislature vested that court with exclusive jurisdiction to hear certain matters listed in the various sub-sections of s 117. The exclusive powers of that court are clearly limited to those specific items enumerated in the sub-sections. Mr. Kasper relied on s117 (1) to argue that the that the High Court, sitting as such, does not have jurisdiction to adjudicate a matter on which the High Court, sitting as the Labour Court, has exclusive jurisdiction. Section 117(1) of the Labour Act, 2007 amongst others provides as follows:

'(1) The Labour Court has exclusive jurisdiction to-

(a) determine appeals from-
  (i) decisions of the Labour Commissioner made in terms of this Act;
  (ii) arbitration tribunals' awards, in terms of section 89; and
  (iii) compliance orders issued in terms of section 126.

(b) review-
  (i) arbitration tribunals' awards in terms of this Act; and
  (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of-
    (aa) this Act; or
    (bb) any other Act relating to labour or employment for which the Minister is responsible;

(c) review, despite any other provision of any Act, any decision of anybody or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;

(d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;

(e) to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;

(f) to grant an order to enforce an arbitration agreement;

(g) determine any other matter which it is empowered to hear and determine in terms of this Act;

(h) make an order which the circumstances may require in order to give effect to the objects of this Act;

(i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.'

[13] The starting point is the interpretation of s 117(1) of the Labour Act, 2007. In the matter of in *Jacob Alexander v The Minister of Justice and others*[4]: Parker J said:

'… it is trite that in interpreting statute, recourse should first be had to the golden rule of construction. In *Paxton v Namibia Rand Desert Trails (Pty) Ltd* 1996 NR 109 at 111A-C, and *Sheehama v Inspector-General of Namibia Police* 2006 (1) NR 106 at 114G-I, this Court relied on the restatement of the golden rule by Joubert, JA in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804B-C in the following passage:

"The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result

4 An unreported judgment of this Court Case No.:A210/2007 delivered on at p.18

contrary to the legislative intent. See *Venter v Rex* 1907 TS 910 at 913-14, *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 813-14, *Senker v The Master and Another* 1936 AD 136 at 142; *Ebrahim v Minister of The Interior* 1977 (1) SA 665 (A) at 678A-G.'

In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, which Hannah, J cited with approval in *Engels v Allied Chemical Manufacturers (Pty) Ltd and another* 1992 NR 372 at 380F-G, Evershed, MR said:

"Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context."…'

[14] This court in the matter of *Classic Engines CC v Nghifkofa*[5] held that the alternative dispute resolution procedure laid down in s 86 of the Labour Act, which requires a complainant to first refer a dispute for conciliation/arbitration, did not make provision for damages and that a claim for damages in the employment context did not constitute unlawful dismissal and therefore fell outside the compulsory alternative dispute resolution process of s 86 and that the High Court was the competent forum to entertain such a dispute. The decision of the High Court was confirmed by the Supreme Court. See *Nghikofa v Classic Engines CC*[6] where O' Regan AJA, who delivered the Court's judgment said:

'[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above s 86(2) of the Act provides that a party *may* refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fed life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation…

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.'

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5 2013 (4) 659. (HC)
6 2014 (2) NR 314 (SC).

[15] In the matter of *Meatco v Namibia Food and Allied Workers Union and Others*[7], Smuts J (as he then was) recognized that s 117(1)(*d*) of the Labour Act, 2007 (to the extent that it limits the court to granting declaratory relief in circumstances where declaratory relief is the only relief sought) is 'anomalous' but does not translate into a manifestly absurd result. He said:

> '[12] In the first instance, the respondents took the point that it would not be open to the applicant to seek the declaratory relief contained in the notice of motion by virtue of the provisions of s 117(1)(d) of the Act. This subsection confers upon this court its jurisdiction to grant declaratory relief. But it contains a proviso that this jurisdiction can only be exercised if the declaratory relief is the only relief sought. This anomalous provision was dealt with in an earlier unreported judgment by this court[8] where the following was said:
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> '[26] This overall approach and underlying intention would appear to have inspired the provisions of s 117(1)(d). Both sets of counsel questioned the wisdom behind it. They correctly contended that the proviso may well give rise to anomalies. But this does not translate itself into manifestly absurd results. In the absence of the latter, I am obliged to give effect to the unambiguous terms of proviso. It means that this court can only grant a declaratory order if it is the only relief sought.
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> [27] In this application, the declaratory relief sought in paragraph 2 was not the only relief sought in the application. The applicants also sought interdictory relief in paragraphs 3 and 4 of the notice of motion. The fact that it became the only relief sought when the matter was ultimately argued before me would not in the face of the clear wording of s 117(1)(d), avail the applicant.
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> [28] It follows that s 117(1)(d) obliges me to decline the declaratory relief sought in paragraph 2 of the notice of motion on jurisdictional grounds."…'

[16] In the matter of *Trustco Group International (Pty) Ltd v Katzao*[9], Smuts J (as he then was) came to the conclusion that for the High Court to decline to exercise its jurisdiction, the legislature must have provided for the exclusion of the jurisdiction in

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7. 2013 (3) NR 777 (LC) at 780
8 *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia and Others an* unreported judgement of the Labour Court Case No. LC103/2011 delivered on 13 April 2012.
9 An unreported Judgment of this Court Case No. *I 3004-2007) [2011] NAHC 350 delivered on 24 November 2011. At para 14-18*

unequivocal language and for that unmistakable purpose. After reviewing all the above cited authorities Damaseb JP in the matter of *Katjiuanjo v The Municipal Council of the Municipality of Windhoek*[10] said:

> '[7] …For the High Court not to entertain a matter, it must be clear that the original and unlimited jurisdiction it enjoys under Article 80 of the Constitution and s 16 of the High Court Act, 1990[11] has been excluded by the legislature in the clearest terms.
>
> [13] …The issue in my view is not so much whether the Labour Court does have jurisdiction, but whether the legislature intended to exclude the High Court's jurisdiction in the kind of dispute now before court.'

[17] I fully agree with the conclusion by Damaseb JP and am thus of the view that the legislature intended to exclude the jurisdiction of the High Court in the instances contemplated in s 117(1) (a)-(i). The only question to be answered in the instant case being whether the relief sought by the applicant falls within the category of remedies where the High Court's jurisdiction is clearly excluded.

[18] Mr. Rukoro argued that in this application, the High Court is not being asked to make any determination on the rights and obligations of the parties emanating from their employment. He argued that what this application pertains to, is simply the setting aside of an irregular process namely the attachment and consequent sale in execution of State property. He submitted that the High Court vested with inherent jurisdiction does have the requisite jurisdiction to adjudicate in this matter and that as a matter of law the High Court's jurisdiction was not ousted by s 117(1)(i) of the Labour Act, 2007 and the High Court thus have concurrent jurisdiction. In support of

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10 An unreported judgment of this Court Case No. (I 2987/2013) [2014] NAHCMD 311 delivered on 21 October 2014.

11 Section 16 reads as follow:
'**Persons over whom and matters in relation to which the High Court has jurisdiction**
The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power-
(a) to hear and determine appeals from all lower courts in Namibia;
(b) to review the proceedings of all such courts;
(c) .....
[Para (c) deleted by sec 2 of Act 10 of 2001.]
(d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

his argument Mr. Rukoro referred me to the case of *Katzao v Trustco Group International (Pty) Ltd*[12] where mention was made[13] that the special plea in respect of the High Court's jurisdiction to hear the matter emanating from a labour dispute was dismissed. During the oral arguments I asked Mr. Rukoro what the *ratio decidendi* for the decision handed down on 24 November 2011 was. Mr. Rukoro could not give me the *ratio* of that decision because he has not read the case.

[19] I digress here to mention that, it is not the first time I experience a situation where a legal practitioner in the course of argument refers me to an authority which that legal practitioner has not read. I am of the view that such practice borders on unprofessional conduct and must be desisted with. The conduct may even more so be unprofessional when a legal practitioner, dismissively and contemptuously persists to press the argument, as Mr. Rukoro did after being reminded that he cannot rely on a case he has not read. I afterwards read the matter of *Trustco Group International (Pty) Ltd v Katzao*[14] . In that matter, the plaintiff's action was for payment of two claims sounding in money arising from alleged breaches of the employment agreement between the parties. As I indicated above, the High Court in that matter found that it had jurisdiction to hear the dispute, because it found that there was no provision in the Labour Act, 1992[15] which authorized the Labour Court to make an order of the kind sought by the plaintiff. In other words, the jurisdiction of the High Court was not specifically excluded.

[20] I now return to the facts of the present matter. This matter started off as a referral of a complaint of unfair dismissal to the Labour Commissioner. That fits in very well with the scheme envisaged by the Labour Act, 2007 to expeditiously resolve labour disputes. In terms of s 86(1) & (2), read with the relevant provisions of s 86 of the Labour Act, 2007, the resolution of a dispute generally starts with the dispute being referred by the Labour Commissioner to a conciliator to conciliate in the dispute. If conciliation fails to resolve the dispute, the dispute is referred by the

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12 An unreported judgment of this court Case No. A 108/2014 [2014] NACHMD 175 delivered on 04 June 2014.

13 In paragraph [9] of that judgment. Paragraph [9] of that judgment reads as follows:
'[9] After the closure of the pleadings, the special plea was set down in the course of judicial case management. It was argued on 25 October 2011 and judgment was delivered in respect of the special plea on 24 November 2011, dismissing the special plea. An appeal to the Supreme Court was noted, but the appeal lapsed'.

14 *Supra* footnote No. 9

15 Act No. 6 of 1992

Labour Commissioner to an arbitrator for resolution of the dispute by arbitration. The arbitrator is, in terms of s 86(15) empowered to make certain orders including an order for the payment of monetary amounts. Section 87 of the Act provides that an arbitration award (made under Part C, ss 84-90, of the Labour Cat, 2007) is binding unless the award is advisory and becomes an order of the Labour Court on filing of the award in the Labour Court by any party affected by the award; or the Labour Commissioner. Section 88 provides for the variation or rescission of arbitration awards. Section 89 provides for appeals against arbitration awards or review of arbitration awards and s 90 provides for the enforcement of arbitration awards. That section (i.e. s 90) reads as follows:

> '**90 Enforcement of awards**
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> A party to an arbitration award made in terms of this Part may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of that person.'

[21] I remind myself of the fact that s 117(1)(i) of the Labour Act, 2007 clearly provides that the Labour Court *'has **exclusive jurisdiction** to generally deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.'* The validity or otherwise of the enforcement of an arbitration award is in my view certainly covered by the wide wording 'any labour matter' and is furthermore covered by the words 'incidental to its functions under the Act'. The first respondent in this matter followed the process set out in Part C of the Labour Act, 2007.

[22] Stripped of all its clothes, the true and naked relief which the applicant seeks in this matter, is a declaration that the enforcement of an arbitration award is invalid and to prohibit the first respondent from enforcing the arbitration award. I therefore share the views expressed by O'Linn JA in the matter of *Beukes and Another v CIC Holdings*[16] when he said:

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16 2005 NR 534 (SC) at 542

> '… there was no legally justifiable reason for excising one aspect of a dispute and taking it to the High Court on the ground that that aspect of the dispute constitutes a delict. By doing so, the crux of the dispute was left unresolved
>
> It was never the intention of the Labour Act to allow a piecemeal resolution of different aspects of what essentially was and remains a labour dispute and to allow those aspects to be decided in different courts, namely, the Labour Courts, on the one hand and the High Court on the other.

[23] In oral arguments Mr. Rukoro argued that, Rule 18 (1) of the Labour Court Rules[17] conferred concurrent jurisdiction on the High Court with the Labour Court on matters relating to the enforcement of arbitration awards. Rule 18 (1) reads as follows;

> '**18 Execution of judgments and awards**
>
> (1) Without derogating from section 90 of the Act, any judgment or order of the court and any award of an arbitration tribunal sounding in money may be enforced in accordance with the rules applicable in civil proceedings in the High Court, as if such judgment or order or award is a judgment or order or award given in a civil action in the High Court.'

[24] With the greatest deference to Mr. Rukoro, Mr. Rukoro's argument is based on a wrong premise. First, the Rules of Court do not confer any substantive rights to a litigant, but as the rules[18] themselves state, they are the 'rules for the conduct of proceedings in the court and for giving effect to the provisions of Article 12(1) of the Namibian Constitution.' Secondly, equation does not mean, nor is it synonymous to conversion. It follows that the fact that the rules provide that an 'order of the court and any award of an arbitration tribunal sounding in money may be enforced in accordance with the rules applicable in civil proceedings in the High Court, as if such judgment or order or award is a judgment or order or award given in a civil action in the High Court' does not mean the arbitration award is converted into a civil award. All that the rule says is that an arbitration award sounding in money may be enforced following the same procedure one would follow when enforcing a civil judgment.

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17 Published under Government Notice No. 279 in Government Gazette No. 4175 of 2 December 2008 but which came into effect on 15 January 2009.

18 In Rule 1(2).

[25] I am accordingly of the view that the plain meaning of the language in s 117 (1)(i) of the Labour Act, 2007 is that the legislature, has clearly excluded the High Court's jurisdiction in the kind of dispute now before court and that the Labour Court enjoys jurisdiction in terms of the Labour Act, 2007 *to the exclusion of* all other courts, including the High Court, *sitting as* the High Court.

[26] The conclusion I arrived at disposes of this application. It is strictly unnecessary for me to apply my mind to the other points *in limine* raised by the first respondent, particularly the question whether I could condone the applicant's non compliance with the Rules of court and hear this application on an urgent basis. I nevertheless, in view of the order that I intend to make as regards the costs of this application have decided to indicate my views, however briefly as regards the urgency of the matter.

Urgency

[27] The requirements for determining whether a matter can be heard on an urgent basis have been stated by this Court many a times. The relevant rule governing urgent applications is rule 73[19]. Rule 73 (1) & (4) provides the following:

> '(1) An urgent application is allocated to and must be heard by the duty judge at 09h00 on a court day, unless a legal practitioner certifies in a certificate of urgency that the matter is so urgent that it should be heard at any time or on any other day.
>
> (2) …
>
> (4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –
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> (a) the circumstances which he or she avers render the matter urgent; and
>
> (b) the reasons why he or she claims he or she could not be afforded substantial redress at a hearing in due course.'

[19] Rules of the High Court of Namibia: High Court Act, 1990 promulgated by the Judge President in the Government Gazette No. No. 5392 of 17 January 2014 but which came into operation on 16 April 2014.

[28] It is worthy to note that Rule 73(4) uses the word *'must'* in setting out what a litigant who wishes to approach the court on urgency must do. The rule places two requirements on an applicant regarding the allegations he or she must make in the affidavit filed in support of the urgent application. It stands to reason that failure to comply with the mandatory nature of the burden cast may result in the application for the matter to be enrolled on urgency being refused.[20] In the matter of *Nghiimbwasha v Minister of Justice*[21] this Court said:

> '[12] The first allegation the applicant must "explicitly" make in the affidavit relates to the circumstances alleged to render the matter urgent. Second, the applicant must "explicitly" state the reasons why it is alleged he or she cannot be granted substantial relief at a hearing in due course. The use of the word "explicitly", it is my view is not idle nor an inconsequential addition to the text. It has certainly not been included for decorative purposes. It serves to set out and underscore the level of disclosure that must be made by an applicant in such cases.
>
> [13] In the English dictionary, the word "explicit" connotes something "stated clearly and in detail, leaving no room for confusion or doubt." This therefore means that a deponent to an affidavit in which urgency is claimed or alleged, must state the reasons alleged for the urgency "clearly and in detail, leaving no room for confusion or doubt". *This, to my mind, denotes a very high, honest and comprehensive standard of disclosure, which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency*.' {Italicized and underlined for emphasis}

[29] One of the authoritative cases emanating from this Court, on the interpretation of Rule 6(12)(a)&(b) (now Rule 73 (4) (a) & (b)) is the matter of *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*[22] where the full bench said the following:

> 'Rule 6(12)(b)[23] makes it clear that the applicant must in his founding affidavit explicitly set out the circumstances upon which he or she relies that it is an urgent

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20 See the matter of *Salt and Another v Smith* 1990 NR 87 (HC), *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC)

21 An unreported judgment of this Court Case No.*(A 38/2015) [2015] NAHCMD 67 (20 March 2015)* per Masuku AJ

22 2012 (1) NR 331 (HC)

23 The equivalent of this Rule is rule 73(4)(b)

matter. Furthermore, the applicant has to provide reasons why he or she claims that he or she could not be afforded substantial address at the hearing in due course.
It has often been said in previous judgments of our courts that failure to provide reasons may be fatal to the application and that 'mere lip service' is not enough. (*Luna Meubel Vervaardigers v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Salt and Another v Smith* 1990 NR 87 (HC) at 88 (1991 (2) SA 186 (Nm) at 187D – G).

[20] The fact that irreparable damages may be suffered is not enough to make out a case of urgency. Although it may be a ground for an interdict, it does not make the application urgent. (*IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma (Pty) Ltd v Hypermarket (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 113E – 114B.)

[21] An applicant has to show good cause why the time limits provided for in rule 6(5) should be abridged and why the applicant cannot be afforded substantial redress at the hearing in due course. (*IL & A B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* supra 110H – 111A.)

[22] In *Twentieth Century Fox Films Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G, Goldstone J had to deal with what has been described as 'commercial interest' where there is no threat of life or liberty. The learned judge said that commercial interest may justify the implementation of rule 6(12) no less than any other interest, but that each case must depend on its own circumstances. For the purpose of deciding urgency, the court's approach is that it must be accepted that the applicant's case is a good one and that the respondent was unlawfully infringing the applicant's rights. (See also *Bandle Investments (Pty) Ltd v Registrar of Deeds and Others* 2001 (2) SA 203 (SE) at 213A – F.) The other side of the coin is that because the matter is one of a commercial nature it does not entitle the applicant to have his matter treated on an urgent basis. (*Prest Law and Practice of Interdicts* 261.)

[23] In this court in the case of *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48 (HC) at 49H – 50A, Maritz J (as he then was) approved what was said in the cases *Twentieth Century Fox Films Corporation supra*; and *Schweizer-Renecke Vleis Maatskappy (Edms) Bpk* v *Minister van Landbou en Andere* 1971 (1) PH F11 (T), namely that:

"when the applicant, who is seeking the indulgence, has created the emergency, either mala fides or through her culpable remissness or inaction, he cannot succeed on the basis of urgency."

[24] An applicant should not delay in approaching the court and wait until a certain event is imminent and then rely on urgency to have his/or her matter heard.

"When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonably possible after the cause thereof has arisen."…'

[30] The affidavit filed in support of the application, was deposed to by Mr. Kaumbi the legal practitioner of record of the applicant. In that affidavit Mr. Kaumbi deals with the matters which he alleges renders the matter as urgent as follows; I quote verbatim from the supporting affidavit:

'11.1 As stated above the conduct of the respondents is unlawful and I submit that such unlawfulness constitutes a ground for urgency.

11.2 Upon receiving instructions on 14 August and consulting client I wrote a letter to the 1st Respondent's legal practitioners with the firm hope and belief that they would come to their senses and realize the unlawfulness of their threatened action…

11.3 The said legal practitioners replied on 19 August 2015 informing me in no uncertain terms that they would proceed with the sale…

11.4 As stated above I received instructions on 14 August 2015 and needed time to consult and take further instructions. As applicant is not in Windhoek this took some time as well.

11.5 I also needed to make the necessary arrangements and to instruct counsel in this matter.

11.6 I therefore respectfully submit that that this matter is extremely urgent and that there has been no inordinate delay bringing this application.'

[31] I have, above, quoted from the matter of *Nghiimbwasha* where it was held that the requirement in Rule 74(4)(a) that an applicant, in an application such as the present one, must explicitly set out the circumstances which renders the matter urgent denotes *a very high, honest and comprehensive standard of disclosure,* which in a sense results in the deponent taking the court fully in his or her confidence; neither hiding nor hoarding any relevant and necessary information relevant to the issue of urgency. I am of the view that the affidavit deposed to by Mr. Kaumbi falls short of this requirement.

[32] In my view Mr. Kaumbi does not honestly and comprehensively deal with the circumstances surrounding this application. He did not disclose to this Court that the first respondent's legal practitioners of record as early as May 2013 alerted him of the fact that even if the applicant had appealed against the arbitration award, the applicant is not exempted from complying with the arbitration award. He also failed to disclose to this Court that the first respondent as early as July 2014 threatened to take the necessary 'legal action' to protect their client's interest. Mr. Kaumbi as legal practitioner should be conscious of the objects of the Labour Act, 2007, one of which is to expeditiously and in an informal way resolve labour disputes. Mr. Kaumbi does not tell this court what he or the applicant did over the past thirty months to advance that objective.

[33] Mr. Kaumbi, both in his affidavit and in the heads of argument, seem to imply that the event which gave rise to the urgency of this application is the attachment of the applicant's property on 31 July 2015 and the notice to sell the property so attached on 28 August 2015. In argument Mr. Rukoro, who appeared on behalf of the applicant, said the following:

> '16.1 The conduct that gave rise to this application is the attachment of the ''State'' property in violation of the law.
>
> 16.2 It was prudent for the applicant to implore the respondents to refrain for their unlawful conduct before approaching the court which happened by way of a letter dated on 18 August 2015 after consultations.
>
> 16.3 On 19 August 2015 the 1st respondent made it clear that he will proceed with the sale.

16.4 On 22 August the urgent application was lodged.

16.6 It is therefore respectfully submitted that this matter is extremely urgent and that there has not been any inordinate delay in bringing this application.'

[34] I do not agree with either Mr. Kaumbi or Mr. Rukoro that the event which gave rise to this matter is the attachment of the applicant's property. I have no hesitation to agree with Mr. Kasper, counsel for the first respondent, who argued that the applicant's attempt to limit the events around this matter to the attachment and the notice of sale in execution, is calculated to hide or shield its inaction in the matter. In my view, the event that gave rise to this application, is the arbitration award which was granted by the arbitrator on 29 December 2012. The applicant does not offer any explanation why it delayed from December 2012 when it became aware of the award to resort to the procedure contemplated in s 89(9)[24] of the Labour Act, 2007 to have the enforcement of the award stayed.

[35] The applicant, for a period of more than thirty months, was implored to comply with the arbitration award, but has failed to do so. In the supporting affidavit, Mr. Kaumbi does not say a single word why the arbitration award has not been complied with. The applicant was not only implored to comply with the arbitration award, it also had the benefit of legal advice throughout that period. I am of the view that the applicant in this matter had no right to delay the stay of execution of the arbitration award until such time that it's property was attached and advertised for sale. It is that delay, attributable to the applicant's inaction that has caused the matter to become urgent. I am therefore of the view that the urgency in this application is self-created by culpable remissness on the part of the applicant. Hence, even if I am wrong in my conclusion that I, siting as the High Court ,do not have jurisdiction to hear this matter I decline to condone the applicant's non-compliance with the Rules of Court or to hear this application as one of urgency.

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[24] Section 89((9) reads as follows:
'(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.

Costs

[36] I now turn to the issue of costs. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court.[25] It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and an equitable one.[26] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised, is a party ordered to pay costs on a punitive scale.

[37] The basis for attorney and client costs was accurately stated by Tindall JA in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*[27] in the following words:

> 'The true explanation of awards of attorney and client costs not expressly authorized by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

[38] In the matter of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[28] Fabricius J said the following:

> 'I think it is the wrong approach to analyse each and every criticism of the launching of the attachment application individually, and then deciding whether or not it, by itself, ought to result in a special costs order. In my view a balanced view of the whole of the proceedings and the relevant facts ought to be taken. If a court is then left with that indefinable feeling, which feeling must, however, be based on rational

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25 *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

26 See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045

27 1946 AD 597

28 2014 (3) SA 265 (GP) at 290

analysis of the facts and legal principles, that something is 'amiss', if I can put it that way, it may justify that feeling by deciding that the opposing party ought not to be out of pocket as a result of the application having been launched.'

[39] This Court in the matter of *Erf Sixty-Six, Vogelstrand v Municipality of Swakopmund*[29] per Damaseb JP stated:

'[22] The second respondent asked for costs on attorney and client scale. In order to grant such an order, I must (i) be satisfied that the conduct of the applicant justifies such an order, and (ii) that a party-and-party-cost order will not be sufficient to meet the expenses incurred by the innocent party. Although I am satisfied as to the first requirement, the second respondent has not placed evidence before me to satisfy me that a cost order on the normal scale will not be sufficient to meet its costs in opposing the review. I will accordingly not grant a punitive costs order against the applicant.'

[40] I have in the introductory part of this judgment set out the deleterious approach and total disregard and contempt for the law that the applicant has displayed in its dispute with the first respondent. Taking a balanced view of the whole of the proceedings and the relevant facts in this matter I am left with the indefinable feeling, that something is 'amiss'. The indefinable feeling, that something is 'amiss' which I get in this matter is the feeling that the applicant is intended to throw whatever obstacle it could lay its hands onto, to frustrate the first respondent's enforcement of the award.

[41] In adopting an overall and balanced view of all the material facts, I am of the view that the first respondent ought not to be out of pocket in these proceedings. I deem it therefore just and equitable that I make the following order:

[1] The High Court sitting as such does not have jurisdiction to adjudicate a matter in respect of s 117(1)(i) of the Labour Act, 2007 as that section confers exclusive jurisdiction to the Labour Court.

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29 2012 (1) NR 393 (HC) para [22], at 400 F-G.

[2] The court declines to condone the applicant's non compliance with the rules of this Court and to hear this application as an urgent one.

[3] The applicant's application is struck from the roll.

[4] The applicant must, pay the first respondent's costs for opposing this application on the scale as between attorney and client.

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Ueitele SFI,
Judge

APPEARANCES

APPLICANT	Mr. S Rukoro Instructed by JR Kaumbi Inc
	.
1st RESPONDENT	G Kasper Of Murorua & Associates
2nd & 3rd RESPONDENTS	No Appearance