REPUBLIC OF NAMIBIA

OFFICE OF THE LABOUR COMMISSIONER

WINDHOEK

AWARD

CASE NO: CRWK 23-25

IN THE MATTER BETWEEN:

MATHIAS SHANGHALA KASHINDI — **APPLICANT(S)**

and

THE MINISTER OF JUSTICE AND LABOUR RELATIONS — **1st RESPONDENT**

THE EXECUTIVE DIRECTOR OF THE MINISTRY OF JUSTICE AND LABOUR RELATIONS — **2nd RESPONDENT**

Arbitrator: **M. SIBEYA**

Heard: **20 & 21 November 2025**

Delivered: **21 April 2026**

Flynote: Labour Law – Dispute of Right – Leave gratuity – Acting allowance – Section 37 of the Labour Act 11 of 2007 – Witness Protection Act 10 of 2017 – Public Service Act 13 of 1995 – *Oudekraal* Principle.

Summary: On the 04th of November 2025, the parties entered into an agreement in terms of Rule 20 of the Rules Relating to the Conduct of Conciliation and Arbitration Proceedings before the Labour Commissioner, which agreement serves the purpose of narrowing issues and shortening proceedings and further limiting the issues that are made relevant to such arbitration proceedings for determination.

It was by agreement of both parties that some of the main issues this Tribunal was at task to decide on are:

i. Whether the monetary value of the applicant's leave gratuity is N$323,675.51 or N$380,000.00.

ii. Whether the respondent is entitled to deduct (set-off) an amount of N$224,457.66 from the applicants leave gratuity as unauthorized payment for non-compliance with section 8(2)(a) of the Witness Protection Act No. 10 of 2017 and the relevant provisions of the Public Service Act 13 of 1995 and regulations and rules made thereunder.

iii. Whether the applicant was entitled to remuneration in the amount of N$50,000.00 plus N$17,613.37 as his acting allowance as the Acting-Director of the Witness Protection Unit.

Evidence was presented before this Tribunal by way of the applicant's representative leading evidence through one witness and further by the respondents representative leading evidence through two respective witnesses for consideration and analysis by this Tribunal in adjudicating the dispute at hand. Further, important to note is that despite this Tribunal being hosted under the line Ministry under the care of the 1st respondent and further having been, at some instance, under the accounting authority of the 2nd respondent, the parties took no issue with such arrangement in the adjudication of this matter and neither did this Tribunal.

ORDER

In the result, it was ordered that:

1. The respondents are ordered to pay the applicant the deducted monies his leave gratuity in the amount of N$224,457.66.

2. The respondents are further ordered to pay the applicant his acting allowance for March 2025 in the amount of N$67,613.37.

3. The respondents are thus liable and must ensure payment in the cumulative amount of **N$292,071.03** to the applicant, less only such statutory deductions as are permitted by law.

4. As per section 87 (2) of the Labour Act (Act 11 of 2007), the above amounts at order no. 3 attract interest from **21 April 2026** at the same rate prescribed by the Prescribed Rates of Interest Act 55 of 1975.

5. I make no order as to costs.

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

AWARD

A. INTRODUCTION

1. This is an arbitration award in the matter between Mathias Shanghala Kashindi (hereinafter the "applicant") an adult male person, resident at 1085 Sando Road,

Rocky Crest, Windhoek, Namibia against The Minister of Justice and Labour Relations (hereinafter the "1st respondent") in his official capacity as the head of the Ministry and The Executive Director for Justice and Labour Relations (hereinafter the 2nd respondent") in his official capacity as the administrative head and Accounting Officer of the Ministry (*albeit* there being two Executive Directors under the Ministry at the issuance of this award and the relevant being that responsible for the department of Justice), under the care of the Office of the Government Attorney with its principal place of operations located at 145, Sanlam Centre (2nd floor), Independence Ave, Windhoek, Namibia. The 1st and 2nd respondents will where necessary be jointly referred to as "the respondents".

2. The applicant in this case referred a dispute in terms of section 86(2) of the Labour Act (Act 11 of 2007)[1] on 20 August 2025. The dispute was then officially designated to myself and accordingly set down for 29 September 2025 whereby post the none resolution of the dispute at conciliation it was subsequently set down from the 20th to the 21st of November 2025 for purposes of arbitration.

3. On the scheduled dates referred to *supra,* both parties duly availed themselves before this Tribunal in adherence with the notice of set down, where post the conclusion of proceedings the parties were required to file their respective heads of arguments by the 5th December 2025 before the dispute could be considered to have been laid prostrate on this Tribunals canvas for determination. Save to mention that the respondents only filed their respective heads of arguments on 08 December 2025.

B. EVIDENCE & ARGUMENTS BY THE APPLICANT

Testimony and Evidence

Mr. Mathias Kashindi

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[1] Labour Act 11 of 2007.

4. In a nutshell, the applicant being the *dominus litis* party (which stance was also outlined in the Rule 20 report[2]), testified as the sole witness in making out his case whereby *inter alia* he informed this Tribunal that he was employed in the Public Service since May 2006 until his retirement on 31 March 2025. He stated that at the time of his retirement, he was substantively employed as Chief: Law Reform, Policy and Legislation (from 22 August 2022 to 31 March 2025) and had also acted as the Director for the Witness Protection Unit from 2 December 2024 until his retirement.

5. He testified that upon the termination of his employment, he was paid his final salary (less the acting allowance), social security benefits and retirement lump sum, but his leave gratuity in respect of accrued vacation leave days remained outstanding. According to him, he had accrued approximately 97 leave days with a monetary value of about N$380,000.00. He testified that officials in the Human Resources division refused to give him written confirmation of his leave balance, allegedly on instructions of the 2nd respondent, despite being allowed to view a document reflecting the said leave days and value, which corresponded with a document similarly issued to him in November 2023 which was tendered into evidence as Exb. 3.

6. In amplification of his retirement lump sum payment less acting allowance, the applicant testified that he was not paid his acting allowance for March 2025 in the amount of N$67,613.37, consisting of a secondment allowance and a personal non-pensionable allowance. He stated that the non-payment had adverse tax implications for him. He maintained that the failure to pay his leave gratuity and acting allowance caused him serious prejudice and constituted unlawful conduct by the respondents.

7. He testified that although the 2nd respondent (then Ms. Gladice Pickering) made enquiries in February 2025 regarding the payment of acting allowances to himself and his predecessor, a certain Dr. John Shimaneni, neither one of the respondents

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[2] Rule 20 report filed of record on 04 November 2025.

ever communicated with him in regards to any alleged indebtedness. He stated that he was never afforded an opportunity to be heard before the respondents decided to withhold or offset any amounts, which he contended violated his constitutional right to be heard and further deviated from the common standard practise in which the debt recovery procedures are executed under the public service.

8. The applicant further testified to the principle of *functus officio* in that the 1st respondent (then Ms. Yvonne Dausab) attempted to reverse its own decision, approving the remuneration package for the office of the Director of the Witness Protection Unit (Exb. 6). He contended that once the decision was made and communicated, the 1st respondent became *functus officio* and could not lawfully reverse or downgrade that decision, save for correcting clerical or arithmetic errors. He relied on the Oudekraal principle to support this contention.

9. He proceeded to testify that, without agreement or explanation, an amount of N$99,217.85 (Exb. 7) was paid into his account several months post his retirement, despite such being a bone of contention in a matter under adjudication and pending finalization before this Tribunal and in this very suit. He disputed the correctness of this payment, denied owing the Ministry any money, and stated that no explanation was given as to how the amount was calculated or how tax was applied. He maintained that even if overpayment was alleged, the offsetting was done in bad faith and without lawful basis.

10. The applicant testified that the respondents' conduct violated section 37 of the Labour Act,[3] as well as Public Service Staff Rule D.II,[4] which provides for the payment of leave gratuity upon exit from the Public Service. He further testified that there was no legal basis in the Witness Protection Unit Act[5] for the deduction or offsetting of his leave gratuity, and that an alleged downgrading of the Acting Director's remuneration, contrary to earlier approvals that have since not been set aside as provided for in law was unlawful.

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[3] Labour Act 11 of 2007.
[4] Public Service Act 13 of 1995.
[5] Witness Protection Act 11 of 2017.

11. He stated that efforts were made to resolve the matter amicably, including the issuing of a letter of demand in April 2025, but no substantive response was received despite extensions requested by the Office of the Attorney-General. As a result, a dispute was ultimately referred to this Tribunal in August 2025.

12. In the premise, the applicant testified that the respondents failed to provide reasons, failed to afford him a hearing, unlawfully withheld and/or offset amounts due to him, and caused him unnecessary legal costs. He seeks payment of his outstanding leave gratuity and acting allowance, interest thereon, and a special cost order against the respondents.

Arguments

13. On leave gratuity, the applicant relies on his retirement notice, which expressly confirms his entitlement to payment of accrued leave gratuity in terms of Public Service Staff Rule D.11[6]. He contends that despite this undertaking, he was not paid his leave gratuity upon retirement and that a payment of N$99 217.85 made months later is disputed and unexplained. Mr Kashindi maintains that he accrued approximately 97 leave days valued at N$380,000.00, as reflected in records he viewed at the Human Resources office which is further supported by a prior document issued to him.

14. He argues that the respondents failed to properly verify or prove the calculations of the amount paid as leave gratuity on 06 November 2025 and further so in the absence of the required verification process where accuracy may be disputed. As leave gratuity is a statutory entitlement under section 37 of the Labour Act[7] and Staff Rule D.11[8], the applicant submits that any set-off or deduction therefrom without due notice and right to be heard is unlawful.

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[6] Ibid.

[7] Ibid 3.

[8] Ibid.

15. Regarding the acting allowance, the applicant argues that he was lawfully appointed as Acting Director of the Witness Protection Unit and held such capacity from December 2024 to March 2025 and further that he was paid an acting allowance in accordance with an approval granted by the 1st respondent on 4 October 2023, pegging the Director's remuneration to that of a High Court Judge. He submits that section 5(7) of the Witness Protection Act[9] confers a statutory right on an Acting Director to receive the salary attached to the office during the acting period.

16. The applicant contends that the respondents' assertion that the payments were unlawful due to non-compliance with section 8(2)(a) of the Act[10] is unsupported by evidence, as no witness testified to such unlawfulness. He further relies on the evidence of respondents' witnesses, who confirmed that the payments were processed and approved in the ordinary course based on ministerial approval and that they are unaware of any indebtedness notice that was given to the applicant.

17. It is submitted that the 1st respondent's attempt to reverse the approval of 04 October 2023 in March 2025 is invalid in law. He argues that the 1st respondent became *functus officio* once the approval was granted and communicated, and that the decision continues to have legal effect until set aside by a competent court, in line with the *Oudekraal* principle. The purported reversal neither lawfully removed his statutory entitlement nor determined an alternative lawful remuneration scale.

18. On the *audi alteram partem* principle, the applicant submits that he was never notified of any alleged unlawful payment or indebtedness, nor afforded an opportunity to be heard before the respondents stopped his acting allowance and set off amounts from his leave gratuity. He contends that this conduct violates constitutional principles of procedural fairness, supported by authority

[9] Witness Protection Act, No. 11 of 2017.
[10] ibid.

including *Phillemon v Minister of Justice*[11] and *Katjivena v Prime Minister of the Republic of Namibia*[12], where deductions without compliance with the *audi alteram partem* were held to be unlawful.

19. Moving on to sought special order for costs, the applicant argues that the respondents acted frivolously and vexatiously by failing to respond to his letter of demand, withholding statutory payments without lawful basis, and forcing him into unnecessary litigation. He submits that the requirements for a special cost order are met in terms of the Labour Act[13], given the respondents' failure to follow lawful procedures and their lack of a genuine defence.

20. In conclusion, the applicant submits that he is entitled to full payment of his leave gratuity in the amount of N$380,000.00, payment of his acting allowance for March 2025 in the amount of N$67,613.37, interest thereon, and a special cost order against the respondents, together with any further and/or alternative relief.

C. EVIDENCE & ARGUMENTS BY THE RESPONDENT

Testimony and Evidence

21. In essence, the respondent adduced its evidence by way of the testimony of two witnesses being Ms. Likando and Ms. Kapoffi whereby summarily the following was averred:

Ms. Hendrina Namasiku Likando

22. The witness testified under oath that she has been employed by the Ministry of Justice at its head office as a Chief Accountant prior to her substantive employment to the Witness Protection Unit as of 01 September 2023. She testified

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[11] (HC-MD-CIV-MOT-REV-2023/00178) [2023] NAHCMD 100 (8 March 2023).
[12] (A 265/2014) [2016] NAHCMD 146 (18 May 2016).
[13] No. 11 of 2007.

that she was seconded to the Witness Protection Unit by the 2nd respondent for purposes of assisting with the establishment and operationalisation of the Unit.

23. She explained that a secondment ordinarily carries financial implications, particularly where there is a disparity between the employee's substantive salary and the remuneration attached to the position to which the employee is seconded, including benefits and allowances. She testified that the Witness Protection Unit was in the process of developing its own organisational structure and remuneration framework where a consultancy exercise was conducted by PricewaterhouseCoopers (PwC), which yielded recommendations and presentations relating to job grading and salary structures. However, she testified that the 2nd respondent subsequently placed the implementation of the PwC recommendations on hold. She further confirmed that all remuneration payments at the Unit were processed through the established government payroll systems.

24. Ms Likando testified with reference to Exb. 5, being a correspondence addressed to her as well as the written response thereto, concerning a query regarding the payment of an acting allowance equivalent to the salary of a Judge of the High Court of the office of the Director of the Witness Protection Unit. She confirmed that such acting allowance was paid to the then Acting Director, Dr John Shimaneni, and that the same acting allowance was subsequently paid to the applicant when he assumed the acting role.

25. She testified that the payments made to the Acting Director were not based on the PwC recommendations, but rather on a letter dated 3 October 2023, which preceded the PwC recommendations and presentations. According to her testimony, that letter approved that the remuneration of the Director: Witness Protection Unit be pegged at the level of a Judge of the High Court. She stated that she assumed all requisite due diligence had been conducted, as the approval emanated from the highest oversight authority, namely the Minister.

26. Ms Likando further testified that the applicant's receipt of the acting allowance followed the same basis as that of his predecessor and arose from the continuation of the remuneration arrangement previously submitted, approved and implemented. She testified that it later emerged that concurrence from the Minister of Finance was required for the authorisation of such acting allowance, whereby and resultantly during a meeting held in February 2025, a decision was taken to cease payment of the acting allowance to the applicant.

27. She further testified that, to date, no formal remuneration structure has been adopted for the Witness Protection Unit. She stated that there is currently an Acting Director who is being paid an acting allowance *albeit* such acting allowance being pegged to a Grade 2 position as opposed to that of a Judge of the High Court.

28. During cross-examination, Ms Likando conceded that the acting allowance payments to the applicant took effect immediately upon his appointment and that, at the time, it was assumed that due diligence had been satisfied in terms of the ministerial approval for such salary scale in respect of the office of the Witness Protection Unit Director. She further testified that the issue of due diligence was only raised in February 2025 when the decision was taken to discontinue the payments. She also acknowledged that the payment of an approved acting allowance is provided for in law in terms of section 5(7) of the Witness Protection Unit Act[14].

Ms. Meriam Kapoffi

29. The witness testified under oath that she is employed by the Ministry of Justice and is stationed at the Witness Protection Unit in the capacity of Chief Human Capital with effect from August 2023. Prior this portfolio, she was employed within the same Ministry as a Chief Human Resource Practitioner. She testified that she

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[14] Ibid 9.

was nominated for secondment by the 2nd respondent to the Witness Protection Unit.

30. She further testified that the Witness Protection Unit was required to develop its own organisational structure and remuneration framework. To this end, PwC was appointed as an approved consultant to develop proposed salary structures. She stated that although PwC made presentations and recommendations, such proposed salary structures were never approved or implemented and were resultantly deemed as parked up until the time of the adducing of her testimony before this Tribunal.

31. Ms Kapoffi testified that she received a letter approved by the 1st respondent authorising the implementation of the applicant's acting allowance. On the strength of that Ministerial approval, she assumed that all necessary due diligence had been conducted prior to the issuance of her approval for its implementation in her capacity as the Senior Human Resources official. She confirmed that she was aware of the applicant's letter of appointment and testified that the applicant received an acting allowance based on the validity of the ministerial approval which sanctioned the salary scale attached to the position of Acting Director.

32. She testified that during a meeting held in February 2025 it was concluded that due diligence had not been undertaken in respect of the ministerial approval of the remuneration recommendation for the office of the Director of the Witness Protection Unit. As a result, a decision was communicated to the meeting participants to discontinue the payment of the approved acting allowance and to recover amounts paid out as acting allowance on the basis that the approval was irregular.

33. Ms Kapoffi in her testimony clarified that the "due diligence" to which she testified related specifically to the consultation with, and concurrence from, the Minister of Finance in respect of the authorisation of the applicant's acting allowance.

34. She further testified that, in terms of section 5(7) of the Witness Protection Act, she initially believed that both the applicant and his predecessor were entitled to receive acting allowance payments.

35. It was testified to that it was only after the February 2025 meeting, when she became aware that the requisite due diligence had allegedly not been undertaken, at which she formed a different view. She further testified that she was not aware of whether the applicant had been notified of the decision to discontinue the payment of his acting allowance nor recover same from him.

36. When questioned as to whether any steps had been taken to recover acting allowance payments from the applicant's predecessor, or whether any consequences were imposed upon him, Ms Kapoffi testified that she had no knowledge thereof. When asked what subsequently transpired in relation to the ministerial approval, she testified that the approval was effectively parked and regarded as invalid by the order of the letter of 09 March 2025.

37. In regards to the leave gratuity, she testified with reference to Exb. 12, which concerns the calculation of accrued vacation leave days where she stated that accrued vacation leave balances are carried over from one leave cycle to the next. During cross-examination, Ms Kapoffi testified that the approval of vacation leave rests with senior Human Resources officials and that she could not testify as to the accuracy of the calculation of the applicant's leave days.

Arguments

38. The respondents in their gauzing and taping commenced by contending that the applicant alleged an entitlement to 97 accrued leave days amounting to N$380,000.00 but failed to lead any credible evidence explaining how this figure was calculated. The applicant relied on information allegedly provided by an unnamed Human Resources official, who was neither identified nor called to testify. In contrast, the respondents rely on Exb. 12, which reflects a calculation

of 90 accrued leave days valued at N$323,675.51 that this Tribubal is argued ought to accept as correct. This argument was held up by the corner ropes of the ring, finding its footing in the authority of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[15].

39. With regard to the acting allowance, the respondents submit that the applicant was never contractually entitled to such allowance. It is argued that the applicant's appointment letter as Acting Director of the Witness Protection Unit makes no reference to any acting allowance and further that the applicant conceded under cross-examination that the issue of an acting allowance was not discussed at the time of his appointment. Furthermore, the substantive post of Director of the Witness Protection Unit was graded at the same level as the applicant's substantive position, rendering any acting allowance unjustified.

40. The respondents further submitted that the acting allowance paid to the applicant was based on a flawed submission initially made by his predecessor and approved by the 1st respondent without the required concurrence of the Minister of Finance, as mandated by section 8(2)(a) of the Witness Protection Act[16]. In addition, the 2nd respondent, as the accounting officer, was not consulted or did not approve the payment as required by the Public Service Staff Rules[17] hence lacking in due diligence.

41. It is therefore the respondents' case that in terms of section 16 of the Public Service Act[18], the respondents were entitled to discontinue the benefit and recover the overpaid amounts. Given that the applicant is no longer in public service, the respondents submit that recovery by way of deduction from the applicant's leave gratuity was lawful and permissible.

42. In the 12th round, the respondents to the applicant's reliance on the *Oudekraal* and *functus officio* principle, argue that these are principles of administrative law

[15] 1977 (3) SA 534 (A) at 548A-C.
[16] Ibid 6.
[17] Ibid.
[18] Ibid.

and fall outside the scope of arbitration proceedings under the Labour Act and as this Tribunal lacks jurisdiction to determine administrative law issues, and the applicant's reliance on those principles should be rejected.

43. Concerning the claim for a special costs order, the respondents submit that the applicant failed to meet the statutory threshold under section 86(16) of the Labour Act.[19] The applicant is an admitted legal practitioner who elected to appoint legal representation by choice, not necessity. The respondents deny having acted frivolously or vexatiously and submit that they defended the matter on *bona fide* and reasonable grounds, supported by statutory provisions and evidence. Reliance is placed on *Mineworkers Union of Namibia v Sinomine Tsumeb Smelter (Pty) Ltd* and *Swartz v NamWater Corporation Ltd*.

44. Resultantly, the respondents pray that the applicant's claims be dismissed in their entirety, that this Tribunal finds the applicant's leave gratuity to be N$323,675.51, that the deduction of the acting allowance was lawful in terms of section 16 of the Public Service Act,[20] and lastly that the applicant is not entitled to payment of an acting allowance for March 2025.

D. FINDINGS

45. Despite the commendable chronology portrayed in the arguments advanced in respect of the prosecution and defending of this suit, this Tribunal's wisdom summons for its commencement by determining the catalysing act/s by the 1st respondent, midwifed by the "approved as amended" submission which serves before this Tribunal. Important to curtail at this juncture is that there spans no dispute before this Tribunal that speaks to what the supposed amendments at approval were nor their effects on this dispute and such, despite the respondents'

[19] Labour Act 11 of 2007.
[20] Public Service Act 13 of 1995.

invitation at their para. 27 into these uncharted waters, their depths shall not be explored.

The Acting Allowance

46. As a point of departure, it is common cause that the applicant held the position of an Acting Director of the Witness Protection Unit whilst such position was vacant from 02 December 2024 to 31 March 2025. It is further common cause that according to section 5 (7) of the Witness Protection Act[21] 'a person acting as Director while the position of the Director is vacant is entitled to the salary attached to that office for the period that he or she so acts.' There is no evidence before this Tribunal that indicates that there is need for a prior communique encapsuled in an appointment letter before the stated provisions of the Act can take effect.

47. Now, stemming from the applicant's arguments, it is prudent to note that the principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[22], has since been consistently applied in both South African and Namibian jurisprudence. It establishes that an administrative act, even if irregular or unlawful exists in fact and has legal consequences until such time as it is set aside by a competent court. In this matter, the court held *verbatim* that:

> *"[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not.*

[21] Act 11 of 2017.
[22] (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).

<u>Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked</u>. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. <u>No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside</u>.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter Administrative Law at 355: "<u>There exists an evidential presumption of validity expressed by the maxim omnia praesumuntur rite esse acta; and until the act in question is found to be unlawful by a court, there is no certainty that it is</u>. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.

[30] Lord Hoffmann drew the same distinction in Regina v Wicks 1998 AC 92 (HL) when he said the following at 117A-C: 'The statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices.

[31] Thus the proper enquiry in each case – at least at first – <u>is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts</u>. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court." (underlined for own emphasis)

48. Similarly, in *Adler v Master of the High Court,*[23] Christian AJ discuses the principle as follows:

> *"[33] The court in the Oudekraal matter essentially requires organs of State to apply for the review and setting aside of their own erroneous decisions upon learning of them, where applicants for the decisions wish to rely upon them. These principles are further in line with the principle underlying the term functus officio, which entails that once an administrator has made a decision it has no power to change it or set it aside."*

49. The essence of the Oudekraal principle is thus that administrative decisions are not self-voiding. They are not rendered nugatory by internal doubts, subsequent administrative disagreement, or later-discovered procedural defects. To permit organs of state to unilaterally disregard or retrospectively invalidate their own decisions would undermine legal certainty, the rule of law, and orderly public administration.

50. A fuming question that deserves to be extinguished at this juncture is whether or not the act by the 1st respondent was administrative in nature. Now, it was discussed and held in the authority of *Kapia v Minister of Regional and Local Government and Others*[24] by Ueitele, J that:

> *"[16] In* **Disciplinary Committee for Legal Practitioners v Makando and Another, Makando v Disciplinary Committee for Legal Practitioners and Others[4]** *Parker, J observed that:*
>
> *'administrative bodies and administrative officials are State institutions who form the Bureaucratic Executive, which, together with the Political Executive, constitute the Executive organ of State in our system of constitutional governance based on the trias politica of the doctrine of separation of powers; and administrative officials are, as a matter of course, the personnel who man those institutions that fall within the Bureaucratic Executive.'*

[23] (HC-MD-CIV-ACT- OTH-2021/03237) [2023] NAHCMD 128 (17 March 2022).

[24] (A333/2012) [2014] NAHCMD 4 (24 January 2014).

[17] I thus have no doubt in my mind that the Minister is an administrative official. As to whether his decisions or actions are 'administrative' depends, as Ngcobo, J[5] said, on a number of factors which include '(a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest'. In Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others[6] Nugent, JA said:

'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'

[18] Although stated in a different Constitution setting, I accept and endorse the pronouncements by Ngcobo J and Nugent JA. The decision taken by the Minister to approve the designation of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community was taken in pursuance of the provisions of the Act, and was exercised by him carrying out the daily functions of the State, which have direct and immediate consequences for individuals or groups of individuals. I therefore, furthermore, have no doubt that the decision taken by the Minister to approve the designation of of Mr Manase Meundju Zeraeua as Chief of the Zeraeua Traditional Community is an administrative decision as contemplated in Article 18 of the Namibian Constitution."

51. This Tribunal, in consideration of the 1st respondent's approval decision of 04 October 2023, is convinced on a balance of probability that such decision was administrative in nature as the Minister exercised a power in pursuance of the

provisions of the Witness Protection Act[25], and was exercised by her carrying out the daily functions of the State, which have direct and immediate consequences for individuals or groups of individuals as in this instance. Save to state that the approval and/or decision was not for a particular individual but rather for the public office of the Director: Witness Protection Unit.

52. On the hind side, being alive to the authority of *Haukambe v National Disability Council of Namibia*[26] (an authority in which the representative of the applicant contributed immensely as Counsel for the appellant) this Tribunal cannot afford to shun away from considering this seemingly contrary stance in law in the regards to the application of the *Oudekraal* principle to the practice of Labour Law. It was held by the Honourable Justice Masuku J, in this authority, amidst other elements that severed before court, that:

> *"[50] I am not convinced that the argument regarding the Oudekraal principle avails the appellant in this case. This is because when properly characterised, this principle is one sounding in public law, ie, administrative law. It must be recalled that the instant matter is one sounding in private law, namely, the law of contract. It cannot, in those circumstances be argued that if an employer decides to dismiss an employee, the Oudekraal principle applies, meaning that the employment remains valid until set aside the order of a competent court.*
>
> *[51] In this case, the issue is that the appointment, was done in violation of the law and the appellant cannot seek umbrage under the realms of administrative law. In any event, one cannot overlook the fact that the appellant's appointment, whether or not it was valid, is no longer extant. It was not extended in terms of the applicable legislation."*

53. Prudent to outline is that this Tribunal is aligned with this binding authority in that the principle under consideration is one that concerns itself with the branch of public law rather than private law, under which there may exist a conception that labour law vests under the branch of private law. In having sight of the sentiments outlined in the matter of *Masule v Prime Minister of the Republic of*

[25] Ibid.

[26] (HC-MD-LAB-APP-AAA-2023/00025) NALCMD 51 (26 October 2023).

Namibia[27] one can rather quickly appreciate that labour law, without any misconception, is *sui generis* in that while it operates in the private sphere, it can be considered a hybrid area because it is heavily regulated by public legislation. In cementing this analogy, the cited authority states as follows:

> "*[34] It is not disputed that the initial act of promoting the Applicant falls within the scope of functions of the Prime Minister under section 5(1) of the Act. The relationship between the Applicant and the Public Service, which is headed by the Prime Minister, is one of employee/employer and in its nature, a labour relationship. The fact that this relationship is regulated by legislation does not change the character of the relationship and although decisions taken by the Prime Minister in this instance is mandated (or not) by legislation does not take these decisions outside the sphere of the Labour Act, 11 of 2007. As shown above, these decisions can be reviewed by the Labour Court applying the fair administrative principles guaranteed by Article 18 of the Constitution.*" (underlined for emphasis)

54. Now with the appreciation in that article 18 of the Constitution[28] is one that concerns itself with primarily with public law and further that such article squarely finds premise in labour law, the natural conclusion is that, depending on the elements at hand, the *Oudekraal* principle may or may not apply. As for the matter of *Haukambe v National Disability Council of Namibia*[29] it is clear that the elements that served before the Honourable Court were those primarily of private law, governed by the principles of contract law and as such not accommodative of the Ouderkraal principle, hence the evident outcome. However, in this dispute, considering this Tribunal's finds at para. 68 *supra,* it becomes evident in that elements of public law exits, resultant in that the principle nests its outcome.

55. Before I proceed in what may seem to be a dominos effect from this juncture onwards, I find it necessary to remove the thorn from the flesh prior to proceedings on this journey. Indeed, this Tribunal has no jurisdiction to entertain the

[27] (HC-MD-CIV-MOT-GEN-2020/00290) [2020] NAHCMD 446 (28 September 2020).
[28] Constitution of the Republic of Namibia of 1990 as amended.
[29] Ibid.

administrative challenge arising from an administrative act such as that of the 1st respondent, however prudent to note is that this Tribunal is not being asked to review or pronounce upon the legality of the ministerial decision in the abstract. Rather, the Tribunal is required to determine the labour-law consequences flowing from an administrative act that remained extant at the time it was implemented.

56. To permit the respondents to retrospectively deny the applicant the benefits flowing from an approval that was valid and operative at the time would amount to imposing the consequences of alleged administrative irregularities on an employee who neither procured the decision nor exercised control over the approval process. The *Oudekraal* principle thus serves as a bulwark against precisely such injustices. It ensures that individuals who act in good faith pursuant to administrative decisions are not unfairly prejudiced by later shifts in administrative stances or internal governance failures.

57. In this matter, the 1st respondent's approval authorising the remuneration for the Director: Witness Protection Unit remained extant and operative throughout the applicant's acting period, and it has not been placed in evidence by the respondents that applicant acted upon it with *mala fide*. No court judgment was placed before this Tribunal setting aside the ministerial approval. Accordingly, on the authority of *Oudekraal* principle and its Namibian endorsements, the approval continued to have legal effect, and the applicant's entitlement to the acting allowance for the period in question must be recognised.

58. For purposes of this dispute, I find that the ministerial approval retained full legal effect throughout the applicant's acting period, and the respondents were not entitled to disregard it unilaterally or treat it as void, and further to that it may be deemed that such administrative decision lives on despite its perceived and functus acknowledgment of invalidity by its life giver, which life it may persist to enjoy *albeit* under the auspices of the *memento mori*.

59. I accordingly find that the applicant is entitled to payment of his acting allowance for the tenure that he served as the Acting Director: Witness Protection Unit.

Leave gratuity

60. The respondents tendered evidence through Ms. Meriam Kapoffi, the Chief Human Capital Practitioner of the Witness Protection Unit. According to her testimony the calculation reflected in Exb. 12 was prepared in accordance with established Human Resources procedures, approved internally, and confirmed that the calculations are as good as approved. While Ms. Kapoffi conceded that she did not personally compute the figures and cannot testify to the accuracy of the calculation of leave days, her testimony was clear that the calculation emanated from the competent Human Resources authority and was verified in the ordinary course of administration.

61. The applicant, on the other hand, did not tender any documentary evidence substantiating the alleged 97 leave days. His version was premised on a document allegedly shown to him by a Human Resources Practitioner which was said to be of a similar nature as that of Exb. 3. No witness was called to corroborate his assertion, nor was any evidence led to demonstrate that Exb. 12 was incorrect.

62. Now, in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 548A-C,* Corbette JA discusses the distinction between the burden of proof and the evidential burden as follows:

> *"As was pointed out by DAVIS, A.J.A, in Phillay v Krishna and Another, 1946 AD 946 at pp. 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent."*

63. It is trite that a party who disputes a quantified claim must adduce evidence sufficient to displace the version supported by documentary proof. The applicant

failed to do so. Resultantly and on a balance of probability, this Tribunal accepts the respondents' evidence and finds that the applicant accrued leave days valued at N$323,675.51 of which, according to Exb. 7 as well as the Rule 20 agreement, N$ 99,217.85 was paid.

64. It is common cause that the applicant retired from the Public Service on 31 March 2025. Section 37 of the Labour Act, read together with Public Service Staff Rule D.11, entitles an employee to payment of accrued leave upon termination of employment. What follows is that the respondents effected a deduction in the amount of N$ 224,457.66 from the applicant's leave gratuity on the basis that acting allowance payments to him were allegedly resultant of an unlawful decision by the 1st respondent and as such were subject to be recovered.

65. The starting point is section 12(1) of the Labour Act 11 of 2007,[30] which provides verbatim as follows:

> *"12. (1) An employer must not make any deduction from an employee's remuneration unless -*
>
> *(a) the deduction is required or permitted in terms of a court order, or any law; or*
>
> *(b) subject to subsection (2), the deduction is -*
>
> *(i) required or permitted under any collective agreement or in terms of any*
>
> *arbitration award; or*
>
> *(ii) agreed in writing and concerns a payment contemplated in subsection (3)."*

66. The provisions relied on by the respondents (as is stated in its heads of arguments at para. 34 and 35) in effecting such deductions read to state that:

"(2) If an incorrect salary or scale of salary or any other benefit on appointment, promotion or transfer, or an incorrect advancement of salary within the scale of salary

[30] Labour Act 11 of 2007.

applicable to his or her grading, or an incorrect salary or scale of salary at the time of a general or specific revision thereof, was awarded or granted to a staff member or member of the services, or was awarded or granted at the correct salary or scale of salary but at a time when or in circumstances under which it should not have been awarded or granted to him or her, the executive director concerned shall, notwithstanding the provisions of section 14 and notwithstanding the fact that the staff member or member of the services concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary or scale of salary or other benefits, correct his or her salary or scale of salary or withdraw any other benefit with effect from the date on which the incorrect salary or scale of salary or salary advancement or other benefit commenced.

i. If a staff member or member of the services has in respect of his or her salary, including any portion of any allowance or other remuneration, or any other benefit calculated on his or her basic salary or scale of salary or awarded to him or her by reason of his or her basic salary -

(a) *been underpaid or not received any such other benefit due to him or her -*

(i) *an amount equal to the amount of the underpayment shall be paid to him or her;*

(ii) *such other benefit shall be awarded to him or her as from a current date; or*

(b) *been overpaid or received any such other benefit not due to him or her -*

(i) *an amount equal to the amount of the overpayment shall be recovered from him or her by deducting it from his or her salary in such instalments as the executive director concerned may, after consultation with him or her and with the approval of the Treasury, determine if he or she is in the Public Service, or, if he or she is not so in service, by deducting it from any moneys owing to him or her by the State or by way of legal proceedings or partly in the former manner and partly in the latter manner;*

(ii) *such other benefit shall be*[31] *discontinued or withdrawn as from a current date, but the staff member or member of the services concerned has the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal."*[32] *(underlined for own emphasis)*

67. One may argue that in terms of section 12(1) (a) the deduction is that which would ordinarily be deemed as one required or permitted in terms of a court any law, being the Public Service Act[33] in this instance. Now with this being in the full-frontal view of this Tribunal, allow me to digest the provisions of this law presented before this Tribunal as the justification for the deduction in the following manner:

Section 16 (2) – "*If an **incorrect** salary or scale of salary or any other benefit on appointment, promotion or transfer, or an incorrect advancement of salary within the scale of salary applicable to his or her grading, or an **incorrect** salary or scale of salary at the time of a general or specific revision thereof, was awarded or granted to a staff member or member of the services…*". This provision generally requires incorrectness.

Section 16 (3) (b) – "*…been **overpaid** or received any such other benefit **not due to him or her***". This provision generally speaks to being overpaid or receiving of a benefit not due.

Section 16 (3) (b) (i) – "*… deducting it from his or her salary in such instalments as the executive director concerned may, **after consultation with him or her** and with the approval of the Treasury, determine if he or she is in the Public Service, or, if he or she is not so in service, by deducting it from any moneys*

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[31] Labour Act No. 11 of 2007.
[32] Section 16 (2) & (3) of the Public Service Act No. 13 of 1995.
[33] Ibid.

owing to him or her by the State or ***by way of legal proceedings*** *or* ***partly in the former manner and partly in the latter manner***". This provision concerns its self with methodologies of deduction depending on whether this person from whom the deduction is to be made is a member of the Public Service. The compliances for deduction are set out to be: after consultation; by way of legal proceedings or both after consultation and by way of legal proceedings.

Section 16 (3) (b) (ii) – "*...the staff member or member of the services concerned has the* ***right to be compensated by the State for any patrimonial loss*** *which he or she has suffered or will suffer* ***as a result of that discontinuation or withdrawal***". This provision deals with a right to seek remedy for discontinued or withdrawn earnings or benefits from the State for patrimonial loss resultant thereof.

68. This Tribunal now proceeds to apply the facts before it to the above provisions as well as their respective interpretations in determining whether or not the deduction was one that would ordinarily be deemed as that which was required or permitted in terms of the Public Service Act[34].

a. Incorrectness

With the incorrectness being premised on an allegation of an unlawful administrative action, being the approval actioned by the 1st respondent, which administrative action has not been declared unlawful nor has it been set aside by a competent court, can it be said that the applicant incorrectly earned an acting allowance and incorrectly enjoyed any other benefit related thereto. In the face of the findings of this Tribunal regarding the applicant's entitlement to acting allowance during his tenure, I find on a balance of the probabilities of the evidence before this Tribunal that such element has not been satisfied.

[34] Ibid.

b. Overpaid or receiving of a benefit not due

Having found that the element of incorrectness has not been satisfied, can it reasonably be said that the payments and/or benefits received by the applicant constituted an over payment or a benefit not due to him? I find definitely not.

c. Consultation and legal proceedings

In this regard, without need for holding a magnification glass over the modality in which deductions may be effected, of course post the satisfaction of points "a" and "b" above (which satisfaction is lacking) its is required that prior to such deductions being effected, a consultation/s are to be held (compliance with the *mora* principle) with the person against whom such deduction is to be made and further so with the approval of the Treasury. Another method is that deductions be made by legal proceedings, with the last method being a concussion of both. I similarly find that this point c has also not been complied with by the respondents.

I shall not bore the reader hereof any further with addressing a point "d" as at the failure of satisfying point "a" alone, the address on the latter requirements becomes but an academic exercise.

69. It needs to be made clear that the mere alluding to that the applicant is longer in the public service at para. 35[35], that there was a meeting held in February 2025 to recover monies from the applicant at para. 38[36] and further that the applicant was informed through his legal practitioners (not consulted) that deductions would be made at para. 40[37] simply does not have the effect of checking off the boxes of compliances in order for deductions to have been said to been in terms of section 16 of the Public Service Act[38].

35 Respondent's heads of arguments of 05 December 2025.
36 Ibid.
37 Ibid.
38 Ibid.

70. This position is firmly supported by the Labour Court decision in *Methealth Namibia Administrators (Pty) Ltd v Matuzee,*[39] where the Court held:

> "[32] *In the instant case, I find that the words – all the words, in ss 11 & 12 are clear, plain and unambiguous and so they should be given their literal and grammatical meaning and, in my opinion that will not lead to any manifest absurdity, inconsistency, hardship or a result that is contrary to the legislative intent and purpose. The legislative purpose behind the sections is as clear as the day, it seeks to ensure that employers must pay the employees timeously for the services that they have rendered and to disallow employers from deducting moneys from an employee's remuneration except where the deduction is authorized by law. I thus find that the arbitrator did not err in law when he found that in the present matter the appellant did not have the sanction of the law, a court order or an agreement with the employees when it deducted moneys from the respondents' remuneration and as such acted in violation of s12 the Act."*

71. Even if the respondents bona fide believed that the acting allowance constituted an overpayment, such belief does not clothe them with the authority to bypass the statutory protections afforded to employees nor does it negate the requirement to have such enabling vehicle (the approval and/or decision) parked by a competent court.

72. I therefore find that the deduction of N$ 224,457.66 from the applicant's leave gratuity was unlawful and stands to be set aside.

Costs

73. It is trite that costs in labour matters are only awarded on the basis of a party or their representative's acts that amount to frivolous or vexatious acts. While the respondents acted unlawfully in effecting the deduction, I am not persuaded that their conduct rises to the level of frivolous or vexatious litigation as contemplated in section 86(16) of the Labour Act. The parties have conducted themselves in a rather commendable manner and have advanced worthy arguments in addressing their respective standpoints.

[39] Methealth Namibia Administrators (Pty) Ltd v Matuzee (LCA2/2014) [2015] NALCMD 5 (18 March 2015)

E. CONCLUSION

74. In exercising my duties and upon consideration of the conclusions stated herein above, this Tribunal is of the considered view that the respondents make good on its errors in judgment and the applicant be paid that which is rightfully bestowed him. This Tribunal notes that there were no preliminaries raised by the parties in regards to the cited parties nor their apparent citations.

F. AWARD

75. In the result, it is ordered that:

    1. The respondents are ordered to pay the applicant the deducted monies his leave gratuity in the amount of N$224,457.66.

    2. The respondents are further ordered to pay the applicant his acting allowance for March 2025 in the amount of N$67,613.37.

    3. The respondents are thus liable and must ensure payment in the cumulative amount of **N$292,071.03** to the applicant, less only such statutory deductions as are permitted by law.

    4. As per section 87 (2) of the Labour Act (Act 11 of 2007), the above amounts at order no. 3 attract interest from **21 April 2026** at the same rate prescribed by the Prescribed Rates of Interest Act 55 of 1975.

    5. I make no order as to costs.

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

This Arbitration Award is final and binding on both parties and may be filed by any party with the Labour Court in terms of section 87 of the Labour Act (Act 11 of 2007).

This Arbitration Award may further be varied and/or rescinded, appealed and/or reviewed in terms of section 88 and 89 of the Labour Act (Act 11 of 2007).

Signed at **WINDHOEK** on the **21st** day of **APRIL 2026**.

Mushoke Sibeya
Arbitrator
Office of the Labour Commissioner

REPUBLIC OF NAMIBIA
OFFICE OF THE
LABOUR COMMISSIONER
21 APR 2026
PRIVATE BAG 13367
WINDHOEK

APPEARANCES:

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FOR THE RESPONDENTS:	**Mr. D.K. Ndana**
In the care of:	OFFICE OF THE GOVERNMENT ATTORENY