

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE No. LCA 32/2017

In the matter between:

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD

APPELLANT

and

ISMAEL SABAB

RESPONDENT

Neutral Citation: *QKR Namibia Navachab Gold Mine (Pty) Ltd vs Sabab*
(LCA 32/2017) [2019] NALCMD 15 (31 May 2019)

CORAM: MASUKU J

Heard: 20 July 2018

Delivered: 31 May 2019

Flynote: Labour Law – Unfair Labour Practice – What constitutes – Practices under section 50 (1) of Labour Act 11 of 2007 – Failure to identify section in Act – Improper – Arbitrator’s Award set aside.

Summary: The appellant appealed against the award of the arbitrator in a labour dispute between the appellant and the respondent. The arbitrator found that the appellant's failure to offer the vacancy to the respondent considering that he had applied for the vacancy, had been interviewed and selected to be the preferred candidate based on the score he obtained during the interview. The arbitrator did not identify the subparagraph in the Act upon which she

based her finding. Appellant contended that the dispute between the parties was a dispute of interest and that the arbitrator had no jurisdiction to conduct the arbitration. Arbitrator ordering the appellant to implement the decision of the interview panel and appoint the respondent into the position he had applied for.

Held: that an arbitrator cannot of his or her own accord, regardless of how strongly he or she feels about any conduct of an employer, or employer's organisation, start adding to what essentially are the "Ten Commandments" so to speak, set out by the Legislature, that should not be broken.

Held further that: Where the arbitrator is confronted with a complaint that there has been a possible violation of s.50 (1), he or she should look at the text and consider whether the conduct complained of falls within any the species mentioned there and that in the present circumstances, the conduct complained of is not one that falls within the prohibition mentioned in s.50 (1).

Held that: In any event, the appellant had acted properly in not appointing the respondent because he did not have two of the four qualifications advertised for appointment and the fact that he scored the highest marks does not detract from him falling below the threshold.

Held further that: the conduct of the appellant in promoting the candidate who may have not performed as well as the applicant in the interview was reasonable and justified, considering that that candidate fulfilled all the four requirements for appointment to the vacant post.

Court thus concluding that arbitrator can be properly regarded as having acted improperly as no reasonable arbitrator could have found the appellant guilty of contravening the provisions of s. 50 and setting aside arbitrator's award.

ORDER

- a) The appeal noted by the Appellant against the award issued by the Arbitrator Ms. Gertrude Usiku on 18 April 2017 succeeds.
- b) The aforesaid award is hereby set aside.
- c) There is no order as to costs.
- d) The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] At issue in this appeal is an award issued by the arbitrator, Ms. Gertrude Usiku on 18 April 2017 in favour of the respondent mentioned above. This award was a sequel to a labour dispute reported by the respondent, who alleged that the appellant was guilty of unfair labour practices.

[2] The appellant, dissatisfied with that award, has approached this court seeking an order that same be set aside on grounds that will be traversed shortly. The long and short of it, is that the appellant claims that the award is, in all the circumstances not supportable as it is perverse and therefor meet for the court to set it aside in its entirety.

The parties

[3] The appellant, QKR Namibia Navachab Gold Mine (Pty) Ltd, is a company duly incorporated in terms of the company laws of this Republic. It has its seat of business situate in Karibib. The respondent, on the other hand,

is a male adult Namibian who was in the employ of the appellant in the position of General Assistant.

The complaint

[4] The facts that give rise to this dispute are largely common cause and they may be summarised as follows: The respondent was employed by the appellant as General Assistant from the year 2010. In the course of time, the appellant advertised the vacant position of a HME Tools Store Man.

[5] It is further common cause that the respondent had acted in the newly advertised position from time to time when the incumbent was unable to attend to duty due to ill-health. Upon the advertisement of the post, the appellant threw his hat in the ring as it were and filed an application for the vacancy. The respondent was unsuccessful in the interview and accordingly reported a dispute of an unfair labour practice.

[6] In her award, the arbitrator found that the appellant was incorrect in not offering the vacancy to the respondent considering that he had applied for the vacancy, had been interviewed and selected to be the preferred candidate based on the score he obtained during the interview. The arbitrator, in view of the foregoing, concluded that the appellant was guilty of committing an unfair labour practice. She accordingly ordered the appellant to implement the decision of the interview panel and appoint the respondent into the position he had applied for.

[7] The appellant was further ordered to adjust the salary and other benefits accruing to the respondent in a way that matches his new appointment. The appellant was further ordered to pay the respondent the difference in salary between the position he had previously held and the new position in respect of which he was to be appointed in line with the award.

[8] Dissatisfied with the award, the appellant approached this court as it is entitled to, arguing that the award should be set aside on a number of grounds. In particular, the appellant submitted that the respondent did not

meet the minimum qualifications for appointment; that he was recommended by the first interview panel because he scored the highest marks in the interview; the recommendation for his appointment was rejected by the appellant's executives, who hold the final say on appointments. It was accordingly submitted that the respondent, upon whom the onus to prove an unfair labour practice, failed to discharge it and that in the circumstances, the appeal should be upheld and the award of the arbitrator set aside.

The argument

[9] In its heads of argument, the appellant submitted that the appeal should be upheld and in that connection, submitted that there were three sub-questions which needed an answer, namely, whether the arbitrator assumed jurisdiction in respect of a matter that she did not have jurisdiction by law; whether she did not exceed her authority by finding that the appellant committed an unfair labour practice without any facts supporting that finding and lastly, that even if it can be held that the arbitrator was authorised to deal with the dispute in question, a question still lingers, namely, whether on a proper evaluation of the evidence, the appellant had a rational basis for promoting a person who scored the highest but did not meet all the requirements for appointment to the post advertised.

[10] The respondent's argument was a different kettle of fish altogether. It supported not only the findings by the arbitrator, but also the approach she took to the issues before her. In this regard, the respondent submitted that the evidence before the arbitrator fully justified her conclusions and decision and that the court is not entitled to depart from her findings of fact, which the respondent claims were justified and should be upheld by the court.

[11] In concluding the argument in his heads of argument, the respondent submitted as follows:¹

'The question is whether the decision/order of the arbitrator is assailable in this appeal? We submit that the award adequately considered the facts and

¹ Para 95 of the respondent's heads of argument, p. 23.

principles of law that it was seized with. We therefore see no reason for this Honourable Court to interfere with the decision by the arbitrator. We submit that the award must not be set aside and/or assailed by this Honourable Court. We submit that the arbitrator, when faced with the evidence that was placed before the arbitrator was justified in making the award and on the grounds set out in the reasons for the award.'

[12] The main question, in the light of the disparate argument, is whether the law on the facts of this case? I proceed to answer that question in the paragraphs that follow below.

Discussion

[13] In the light of the issues raised by the appellant, I am of the view that it would be convenient to approach the judgment from the broad headings contained in the appellant's heads of argument. I do so presently.

Did the appellant's conduct complained of constitute an unfair labour practice?

[14] The first question for determination is whether the respondent, and consequently, the arbitrator were correct in law, in finding that the appellant had breached provisions of the Labour Act² that deal with unfair labour practice, taking into account the facts of the matter before the arbitrator. Was the conduct of the appellant complained of, placed in the correct pigeon hole? I will refer to the Labour Act as "the Act".

[15] When one has regard to the scheme of the Act, it becomes immediately clear that conduct falling within prohibition as 'unfair labour practice' are to be found in s 50 of the Act. The said provision, entitled, "Employer and employers' organisation unfair labour practices", reads as follows:

² Act No. 11 of 2007.

'50 (1) It is an unfair labour practice for an employer or an employer's organisation –

- (a) to refuse to bargain collectively when the provisions of this Act or a collective agreement require the employer or the organisation to bargain collectively;
- (b) to bargain in bad faith;
- (c) subject to subsections (2) to (7), to fail to disclose to a workplace union representative appointed in terms of this Act any relevant information that is reasonably required to allow the workplace union representative to perform the functions of that office under this Act;
- (d) subject to subsections (2) to (7), to fail to disclose to a recognised trade union any relevant information that is reasonably required to allow the trade union to consult or bargain collectively in respect of any labour matter;
- (e) to unilaterally alter any term or condition of employment;
- (f) to seek to control any trade union or federation of trade unions;
- (g) to engage in conduct that –
 - (i) subverts orderly collective bargaining; or
 - (ii) intimidates any person.'

[16] The question for determination at this juncture is whether the conduct of the appellant complained of, namely, not appointing the respondent to a position which he had applied for because, according to the appellant, he did not qualify, amounts to an unfair labour practice in terms of the provisions of the Act quoted above?

[17] The first issue of note is that the Act does not, in its definition section define what an unfair labour practice is. The only standard against which to gauge any conduct complained of, is to refer to the types of conduct mentioned in s 50 (1) (a) to (g). If the conduct in question does not fall within that category, it hardly lies in the power of the arbitrator or even this court for that matter, to enlarge the scope of offensive conduct.

[18] It has been drawn to my attention that in South Africa, the Legislature enacted s 186(2)(a) of the Labour Relations Act,³ (LRA), which provides that:

³ Labour Relations Act, No. 55 of 1996.

'an employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the promotion, demotion, probation or training of an employee.'

This provision, in my view, allows the arbitrator or the labour court for that matter, to widen the scope of what may be an unfair labour practice beyond the strict confines of a provision like s 50 in the case of Namibia.

[19] It must not be forgotten that the reason why the Legislature was prescriptive regarding the offensive conduct, was to ensure that employers and their organisation become aware of what types of conduct they should not engage in, for fear of legislative reprisals. By the same token, the prescriptive nature of the conduct and its enactment in the Act, was done to ensure that individual employees and their unions know what types of conduct are prohibited by statute. This would enable them to report any such conduct.

[20] In the premises, I am of the considered view that an arbitrator cannot of his or her own accord, regardless of how strongly he or she feels about any conduct of an employer, or employer's organisation, start adding to what essentially are the "Ten Commandments" so to speak that should not be broken. Where the arbitrator is confronted with a complaint that there has been a possible violation of s 50 (1), he or she should look at the text and consider whether the conduct complained of falls within any of the species mentioned there. If it is not, he or she may not then add the 'Eleventh Commandment' as that power resides solely and exclusively within the power and competence of the Legislative organ of State.

[21] The next question to consider is whether the conduct forming the basis of the respondent's complaint is one of those proscribed by s (50)(1). I have looked at the list of offensive conduct listed therein and I have come to the conclusion that the conduct complained of is not one that falls within the prohibition mentioned in s 50 (1).

[22] The question that follows the above answer then is this: What happens in a situation where the arbitrator finds an employer guilty of an unfair labour practice when the conduct complained of is not one stipulated in the Act? In

my considered view, there can be only one result in the circumstances, namely that the arbitrator can be properly regarded as having acted improperly as no reasonable arbitrator could have found the appellant guilty of contravening the provisions of s 50 in the circumstances.

[23] I accordingly agree with Mr. Maasdorp that if the arbitrator's characterisation of the appellant's conduct was wrong, namely that it did not fall within the prohibition in s 50, then the arbitrator could not, as a matter of law, properly come to the conclusion that the appellant committed a violation of s 50 and thus engaged in an unfair labour practice. For that reason, I am of the considered view that on this ground alone, the arbitrator did not act in accordance with the law which is in black and white and this aberration on her part, justifies this court in setting aside her award.

[24] I should emphasise that in these matters, the arbitrator has no business looking outside the four corners of s 50 in order to find out whether the conduct complained of is offensive or not. The section gives an exhaustive list or catalogue and all you need to do is to check the conduct complained of against the 'Ten Commandments'. Corruption, as ugly as it is, is not one of the ten and an arbitrator cannot seek to 'amend' the Scriptures. If she does, she must be ruled offside and her decision therefor being liable to be set aside as I hereby do. Nothing submitted by Mr. Phatela in this regard serves to change the outcome. It is just what it is.

Was the appellant wrong in law in not appointing the respondent?

[25] In the event one may have erred in the findings reached above, I am of the considered view that it is condign to consider the complaint on its merits, without necessarily confirming that the conduct complained of amounts to an unfair labour practice. The conclusion of the court on this score is very clear and unambiguous. I deal with this aspect only for the sake of completeness.

[26] As indicated earlier, the facts surrounding the respondent's non-appointment are common cause. The respondent had been employed as a General Assistant for a number of years. The position of Tools Storeman in

the Engineering Department became vacant and it was put up for advertisement. The respondent, it is also common cause, had acted in that position previously. He had a period of 8 months under his belt.

[27] The advertisement was clear regarding the requirements for the appointee. In particular, there were four key requirements, namely six months' previous experience in an engineering workshop; a valid BE driver's licence and a valid forklift operating permit. Last, but by no means least, was a Grade 10 Certificate.

[28] It is a matter of historical record that the respondent applied and he was shortlisted. He obtained the highest marks at the interview. Notwithstanding his brilliant performance, he had serious setbacks in that he lacked two of the four major requirements, namely that he did not have Grade 10 certificate and was also not a holder of a valid driver's licence.

[29] It would appear that the respondent heard from the grapevine that he had outwitted his three fellow competitors who made it to the interview, something that should not have happened as such matters have to be dealt with a measure of confidentiality. When he was not eventually appointed but person who had performed worse than him at the interview, the respondent felt aggrieved and accordingly lodged the complaint we are seized with.

[30] It is important to mention that the eventually successful candidate was third in performance at the interview. The candidate who came second, only met three of the four requirements, yet the one who was eventually appointed, although he came third, met all the four requirements.

[31] Having learnt through unofficial channels that he had performed better than his peers as the interview, the respondent lodged a grievance. His immediate supervisor presided over the hearing. The panel found against him and came to the view that the candidate eventually appointed was best suited as he met all the requirements for the vacancy.

[32] Still aggrieved by this decision, the respondent escalated his dispute and took it on appeal. He was successful in that the appellate panel held that his grievance was justified and that he recommended that the respondent should be appointed on the scale known as Patterson B2 Job Grade. The long and short of it is that the matter went to a Mr. Meier, the chairperson, who after listening to the submissions made to him, including those of the respondent. The buck stopped with the executive management of the establishment, which did not accept the recommendation for the respondent to be appointed on the scale suggested.

[33] Mr. Phatela cried foul, stating that the respondent had received a raw deal at the hands of his employer and that the court should, for that reason, not disturb the findings of the arbitrator in the award. I have carefully considered the argument and the case law so diligently referred to by Mr. Phatela in his detailed heads of argument. In my view, the question to be answered is whether in all the circumstances, the decision of the appellant was irrational. In this regard, the question to be posed is whether it can be said that the appellant's decision to appoint Mr. Bamm and not the respondent was unfair. It is to that question that I presently turn.

[34] Mr. Maasdorp submitted that the decision made by the company in not appointing the respondent was well justified and that the decision was in all the circumstances rational. In particular, he relied on the following passage of the decision by Mr. Meier:

'QKR Namibia's Navachab Gold Mine subscribes to the notion that selection is based on the evaluation of several aspects related to a candidate's suitability for a position. This includes, in addition to actual experience for the position, also other criteria (e.g. driver's license), as well as assessment by means of a panel interview. Considering this, together with what has been stated above, it is evident that although you might have been rated the best candidate for the interviews held, combining that outcome with the other requirements for the position, you were not found to be the most suitable candidate for the position.'

[35] I am of the considered view that the above position properly sums up the correct approach. I do not think that the appellant can be faulted in its decision. As a matter of fact, the respondent only met 50% of the requirements advertised and placed up front. The deficiencies he had, for instance, are not necessarily meaningless or inconsequential. It may well be, for instance that the person in that position may need to be given a company vehicle to perform other duties at odd hours for instance. His failure to meet all the requirements was properly allowed to pale into significance in the circumstances.

[36] It should also not be forgotten that there are many factors which may intervene during a panel interview. The candidate may become nervous and stressed and as a result, fail to answer questions properly or confidently. If he, or she, however, has met all the requirements, there is more hope for him or her than one who answers the questions well but does not meet all the qualifications stipulated.

[37] The reasons for which the appellant refused to accept the recommendation, commend themselves to me as having been rational and sensible, regard had to the respondent not meeting half the requirements, yet his co-candidate met all the prerequisite requirements. His was a case of a half full or half empty glass, depending on how one looks at it. It was never full.

[38] In the circumstances, I am of the considered opinion that the arbitrator laboured under a very serious misdirection in reaching the conclusion that she did. In the context of all the facts, I am of the view that her conclusion and award constituted a perverse conclusion thus justifying this court interfering with her award. The respondent was, in my view, at large not to follow the recommendation of the appeal panel. The reasons for not doing so are sensible and walk in company with reason and common sense.

[39] Mr. Maasdorp took his argument further. In this regard, he referred to s186 (2) of the LRA, of South Africa, to which reference has been made in this judgment. In this regard, he submitted that the approach of the courts in South

Africa, in dealing with issues of appointment, demotion, promotion was carefully set out by Zondo JP in *Department of Justice v CCMA*.⁴

[40] Although we do not have legislation as comprehensive as that of South Africa in this regard, I am of the view that the treatment of the respondent by the applicant would have passed muster even in South Africa, as the watchwords employed by the Legislature that negatively affect promotions, demotions, etc. are that the conduct of the employer should not exhibit signs that the latter did not apply his or her mind; or acted in bad faith; had an ulterior motive, or acted in a manner that can be regarded as grossly unreasonable.

[41] As I have indicated, the standards mentioned above do not apply in this jurisdiction but it would still be useful to consider whether one or more of these unacceptable motives or conduct, are apparent from the manner in which the respondent was treated by the appellant. As indicated above, on a fair-minded approach to the conduct of the appellant, I am of the considered view that the treatment of the respondent by the appellant did not smack of any of the epithets mentioned above. I am accordingly fortified in concluding that the appellant acted in a manner that was not unfair in the circumstances.

[42] To that extent, the conclusion that the arbitrator was wrong in her conclusions becomes unmistakable. The arbitrator reached some far-reaching conclusions that the appellant had 'discriminated' against the respondent. Whatever imperfections or criticisms the arbitrator may have noted against the appellant, do not, in my considered view, serve to detract from the conclusion that the appellant's conduct was perfectly legitimate and fair. Correspondingly, however, the arbitrator came to a conclusion that is perverse in all the circumstances of the case.

Conclusion

[43] In view of the foregoing considerations, it is this court's considered view that the appellant has made out a solid case that calls for the

⁴ [2004] 4 BLLR 297 (LAC) para 58.

interference with the award issued by the arbitrator. On all accounts, as discussed above, the arbitrator appears to have misconstrued the pertinent facts and therefor came to a wrong conclusion in law.

Order

[44] In the premises, the following order is condign:

- a) The appeal noted by the Appellant against the award issued by the Arbitrator Ms. Gertrude Usiku on 18 April 2017 succeeds.
- b) The aforesaid award is hereby set aside.
- c) There is no order as to costs.
- d) The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: R. Maasdorp
Instructed by Ellis Shilengudwa Inc. (ESI) Legal Practitioners

RESPONDENT: P.T.C. Phatela
Instructed by AngulaCo. Inc.