



**CASE NO.: LC 5/2010**

**REPORTABLE**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**PURITY MANGANESE (PTY) LTD**

**APPLICANT**

VS

**COMMISSIONER TUULIKKI MWAFUFYA-SHIKONGO N.O.**

**1<sup>ST</sup> RESPONDENT**

**THE OFFICE OF THE LABOUR COMMISSIONER  
ERNELIUS KAROKOHE & 155 OTHERS**

**2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> AND FURTHER  
RESPONDENTS**

CORAM: MILLER, AJ

Heard on: 11 October 2011, 04 November 2011

Delivered on: 15 June 2012

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**JUDGMENT**

**MILLER, AJ:** [1] The history of this litigation goes back to July 2009. The trigger which set the process in motion was seemingly a minor scuffle between two employees of the applicant over a cell phone. Following that incident the management of the applicant suspended one of the protagonists, Mr. Nguvititza, pending the outcome of disciplinary proceedings.

[2] The other person involved in the scuffle, Professor Pressman was initially not suspended. This latter fact had the result that the applicant's employees stopped the mining plant and stopped work.

[3] Whether or not in those circumstances the actions taken by the employees amounted to an illegal strike, became a further bone of contention. The upshot of all this was that the third respondent and the further 155 respondents, all employees of the applicant, were charged at an internal disciplinary hearing with various contraventions all of which were related to what the applicant perceived to be as an unlawful strike. All of them were found guilty and dismissed from their employment with the applicant.

[4] The employees who were dismissed thereupon approached the office of the Labour Commissioner before whom they launched mediation and arbitration proceedings. In the end a lengthy arbitration ensued before the first respondent. A reading of the record of those proceedings, reveals that they were more in the nature of an adversarial process rather than the more informal process of arbitration designed and envisaged in the Labour Act, Act 11 of 2007. The record of these proceedings ran to some 1675 pages.

[5] Ultimately the first respondent issued an arbitration award on 20 October 2010. The award reads as follows:

"I would order as follows:

-that the respondent reinstates all the affected employees on or before 3 January 2010.

-that each employee be paid an amount equal to his/her 12 months' salary; and

-that the respondents meets with the Mine Workers Union (MUN) to sought (sic) out the organizational matters, as soon as applicable on the initiation of the company, but not later than 3 January 2010.”

[6] I assume that the reference to 3 January 2010 was meant to be a reference to 3 January 2011.

[7] Not satisfied with the award issued by the first respondent, the application instituted proceedings in this Court on 22 November 2010. It seeks the following relief.

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1. Reviewing and setting aside of the First Respondent's arbitration award dated the 21<sup>st</sup> October 2010, under arbitration case number CRWK 812/09.
2. Substituting it's finding for that of the first Respondent by holding that the first respondent and 155 Others dismissals were fair.
3. In the alternative to the immediately preceding paragraph, directing that the dispute be referred back to the second Respondent for consideration *de novo* before an arbitrator other than the first respondent.
4. Directing that any party who opposes this application be ordered to pay the costs thereof.
5. Granting such further and/or further relief as the above Honourable Court deems appropriate.”

[8] The application was opposed by the third and further respondents.

[9] Sections 89(4) and 89(5) of the Labour Act, 2007 makes provision for the review and setting aside of an arbitration award upon the grounds set out in that sub-section. Section 89(4) reads as follows:

“89(4) A party to a dispute who alleges a defect in arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside of the award.

- (a) Within 30 days after the award was served on the party, unless the defect involves corruption; or
- (b) If the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption;
- (c) a defect in subsection (4) means
  - (a) that the arbitrator
    - (i) committed misconduct in relation to the duties of an arbitrator.
    - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
    - exceeded the arbitrator’s powers; or
  - (b) that the award have been improperly obtained.”

[10] The mainstay of the argument advanced by Mr. Hinda who appeared for the respondents who opposed the application, was that the applicant failed to bring itself within the ambit of those subsections with the result that it is not entitled to the relief it claims.

[11] To my mind this approach is too narrow. Sections 89(4) and 89(5) of the Labour Act, must be read in conjunction with the provisions contained in the Constitution of Namibia. Article 12 and 18 of the Constitution provides for fairness and reasonableness in the determination of disputes. In ***Eilo v Permanent Secretary of Education 2008 (2) NR 532*** Parker P. said the following at page 539:

“I will take matters further and say that since, in my view, the first respondent is an administrative official and the fifth respondent’s commission is an administrative body, the provisions of art 18 of the Namibian Constitution apply to them in the exercise of their statutory powers and the performance of their statutory functions. In ***Kahuure and 10 Others v Mbanderu Traditional Authority and Others Case No. (P) A 114/2006 at 20-22 (unreported)***, I discussed in some detail the content and principles underlying the provisions of art 18; and relying on Levy AJ’s dictum in ***Frank and Another (HC)*** supra at 265E, I said in ***Kahuure*** that ‘art 18 does not repeal the common law; it embraces it’.”

These principles apply equally to arbitration tribunals constituted in terms of the Labour Act.

[12] Mr. Ram, who appeared for the applicants submitted in summary that some of the factual findings arrived at by the arbitrator were such that no reasonable trier of fact would have come to these findings. He submitted in bolstering his argument, that the constitutional imperative of reasonableness infuses and influences the attack on the factual findings made by the arbitrator. 1.1 He relied

inter alia on *Sidumo & Another v Rustenburg Platinum Mines Ltd & 10 others 2007 12 BLLR 1097 CCC*.

[13] It must be borne in mind that the Labour Act does not permit appeals against findings of facts *per se*, arrived at by an arbitrator in arbitration proceedings.

[14] The question then remains under what circumstances an aggrieved party may resort to review proceedings, instead of the limited and circumscribed right to appeal against findings of fact. Ostensibly the line drawn between the two options appeared to be thin. There is, however, in the basic approach to the issue a fundamental difference. As a matter of course trier of fact sitting as a court or tribunal of first instance will find certain facts proved and others not.

[15] An applicant seeking to review and set aside those findings faces a stiffer and higher hurdle than it would in an appeal. The applicant on review must establish, not only that the finding of fact is arguably wrong. The error in the factual finding must be of such a nature that no reasonable trier of fact would have come to a similar finding.

[16] Against that backdrop, I proceed to deal with the factual findings arrived at by the first respondent which are relevant.

[17] The principal finding of fact by the first respondent was that there was not an illegal strike. The findings was recorded by the first respondent as follows:

“Considerations as to whether there was a strike or whether it was only a demonstration.

Having had the opportunity to listen to both sides of the story, I have come to a conclusion that the aim of the employees was to demonstrate in order to indicate their de-satisfaction (sic) about the respondents’ move to suspend only one of the employees who physically were involved in a fight.”

[18] I will accept that the employees showed their dissatisfaction with the applicants decision. That is not the point however. What matters is how they went about showing their dissatisfactions. The evidence is overwhelming that there was a complete stoppage of work. The machinery and plant at the mine were switched off. The entrance to the mines was blockaded by heavy machinery such as front end loaders.

[19] Following a temporary stoppage in order to ascertain whether any of the plant and machinery had been damaged, the applicant advised its employees by letter, dated 25 July 2009 which was read to them, that they had to resume work at 17h00 on that day, which the employees did not heed.

[20] The first respondent in my view plainly misread the letter, and afforded it a meaning it could not on any score have had. Moreover the first respondents’ finding that the entrance was not blocked is plainly wrong, inasmuch as the first respondent relied for that finding on a photograph which does not depict any

heavy vehicles at the gate. The first respondent failed to take account of the fact that the photograph was taken some time after the events.

[21] I have read the evidence adduced at the hearing before the first respondent. As I indicated the evidence plainly and overwhelmingly discloses that there had been an unlawful strike.

[22] The first respondents' finding to the contrary is so at odds with the evidence, that it constitutes a finding to which no reasonable trier of fact would have come to, and one which must for reason be reviewed and set aside.

[23] In the result I grant Prayer 1 and 2 of the Notice of Application.

[24] There shall be no order as to costs.

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MILLER AJ



**ON BEHALF OF THE APPLICANT:**

Mr. Ram

**Instructed by:**

Pieter J. de Beer Legal Practitioners

**ON BEHALF OF THE 3<sup>RD</sup> AND**

**FURTHER RESPONDENTS:**

Mr. Hinda SC, assisted by Mr. Tjitemisa

**Instructed by:**

Tjitemisa & Associates