REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 52/2011

In the matter between:

PETER MOKWENA **APPLICANT**

and

SHINGUADJA B M **FIRST RESPONDENT**
ENGEN NAMIBIA (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Mokwena vs Shinguadja* (LC 52/2011) [2013] NALCMD 10 (28 March 2013)

Coram: PARKER AJ
Heard: **1 March 2013**
Delivered: **28 March 2013**

Flynote: Labour Law – Arbitral award – Application to review and set aside of award in terms of the Labour Act 11 of 2007, s 89(4) and (5) and (10) – The Labour Act sets out exhaustively the grounds, any one of which, the applicant should prove exists in order to succeed.

Flynote: Labour Law – Arbitral award – Application to review and set aside award in terms of the Labour Act 11 of 2007, s 89(4) and (5) and (10), read with rule 6(1) of the Rules of the Labour Court – Facts (or grounds) not set out in the notice of motion not available to applicant during the hearing.

Summary: Labour Law – Arbitral award – Application to review and set aside award in terms of the Labour Act 11 of 2007, s 89(4) and (5) – Court setting out the four categories of judicial review in our law and concluding that review under s 89 of the Labour Act is a category of judicial review governed by the Labour Act as the applicable legislation – Consequently, court holding that for the applicant to succeed the applicant must prove the existence of one or more of the grounds set out in subsection (4), read with subsection (5) of s 89 of the Labour Act – Court holding further that an arbitration is a tribunal within the meaning of Article 12(1)(a) of the Namibian Constitution.

Summary: Labour Law – Arbitral award – Application to review and set aside award in terms of the Labour Act 11 of 2007, s 89(4) and (5), read, with rule 6(1) of the Rules of the Labour Court – Court holding that facts (or grounds) not set out in the notice of motion not available to applicant during hearing – Accordingly, submissions by counsel (oral or written) during the hearing of application are not facts within the meaning of rule 6(1) of the Rules of the Labour Court and therefore should not be considered by the court as such.

ORDER

(a) The application to review and set aside arbitration award no. CRWK#857-10 (dated 25 March 2011) is dismissed.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] In this proceeding the applicant (who was an employee of the second respondent) has launched an application and prayed for relief in the following terms:

(a) the setting aside of the award made by the arbitrator (the first respondent) (in arbitration no. CRWK#857-10, dated 25 March 2011) ('the arbitration award');

(b) referring the matter back for (fresh) conciliation and (fresh) arbitration;

(c) costs of this application;

(d) further and/or alternative relief.

The second respondent has moved to reject the application. The first respondent has not filed any papers; he should, therefore, abide by the decision in this proceeding.

[2] Review of arbitral awards is governed by subsection (4), read with subsections (5) and (10), of s 89 of the Labour Act 11 of 2007. Broadly speaking there are four distinct categories of judicial review. The first type of review relates to irregularities and illegalities in the proceedings before a lower court ('category 1 reviews'). Section 20 of the High Court Act 16 of 1990 contemplates precisely this type of review. The second category is meant to control proceedings before tribunals ('category 2 reviews'). The third category is meant to control acts of administrative bodies and administrative officials ('category 3 reviews'). The fourth (and last) category comprises reviews provided by other legislation ('categories 4 reviews').

[3] Article 18 of the Namibian Constitution does not apply to category 1 reviews; it does not also apply to category 2 reviews. Furthermore, that Article does not also apply to category 4 reviews unless the act sought to be reviewed and set aside under the applicable legislation is the act of an administrative body or administrative official within the meaning of that Article.

[4] Review of arbitral awards under the Labour Act falls under category 4 reviews; and since an arbitration is a tribunal within the meaning of Article 12(1)(a) of the Namibian Constitution, Article 18 of the Namibian Constitution does not apply to such arbitration. The proposition of law about judicial review and the conclusions reached thereanent in paras (2) and (3) impel me to the following overall conclusion that is germane to the present proceeding; that is to say, there are only four grounds under the Labour Act (the applicable legislation) for reviewing and setting aside an arbitration award, and they are those expressly delineated in s 89(5)*(a)* and *(b)* of the Act, namely, that –

(a) the arbitrator has committed misconduct in relation to the duties of an arbitrator ('statutory ground 1');

(b) the arbitrator has committed a gross irregularity in the conduct of the arbitration ('statutory ground 2');

(c) the arbitrator has exceeded his power ('statutory ground 3');

(d) the award has been obtained improperly ('statutory ground 4').

I, accept submission by Mr Van Zyl, counsel for the second respondent, on the point. I conclude, therefore, that in order to succeed in this application the applicant must prove the existence of one or more of those four statutory grounds, and the respondents bear no burden to prove anything. Furthermore, it must be remembered that this proceeding concerns judicial review of the arbitration award, and so I shall not concern myself with what the chairperson of the second respondent's internal disciplinary hearing did or did not do. Indeed, the chairperson is not a party to these proceedings. Keeping this conclusion and considerations in my mind's eye, I now proceed to consider what the applicant puts forth as grounds for reviewing and setting aside of the arbitration award, as set out in his notice of motion.

[5] Under ground 3.1 in the notice of motion it would seem the applicant contends the existence of the statutory grounds 1, 2 and 3. And what is the basis of the applicant's contention? It is that the first respondent denied the applicant representation 'by a Labour consultant'. And as respects this ground 3.1 in the notice of motion; Mr Phatela, counsel for the applicant, submits that 'there is no indication whatsoever in the record that the arbitrator adhered to the strict and peremptory requirements of s 89 …' Counsel submits further, 'section 89(13)*(b)* is very different from section 89(14). Regrettably it is evident that the arbitrator paid more attention to the requirements of section 89(13) in deciding to unlawfully deny the applicant necessary and appropriate representation.' I think counsel is referring rather to s 86(13) and 86(14); for, the context so indicates, because at times he refers to 86(14). This is a mistake anybody can make. But, as I have said, the context indicates clearly that counsel is making reference to s 86 of the Act. By a parity of reasoning, the context in the record of the arbitration proceedings indicates clearly that the arbitrator was making reference to subsection (13)*(b)*, read with subsection (14), of s 86, the person, because the person the applicant had lined up to represent him (a Poshigo) is a labour consultant, and not a legal practitioner.

[6] In any case, I do not accept Mr Phatela's submission that s 86(13)*(b)* is very different from s 86(14). The two provisions are intertwined: the application of s 86(13)*(b)* is the exercise of guided discretion, that is, guided by the provisions of s 86(14). As Mr Van Zyl submitted, the Minister has not issued any such guidelines in terms of s 86(14) of the Labour Act. I did not hear Mr Phatela to contradict Mr Van Zyl. Thus, in the absence of any such guidelines, what remains is, therefore, the exercise of the unguided discretion of the arbitrator under s 86(13)*(b)* of the Act. In this regard, I should say that it can clearly be seen from the record of the arbitration proceedings that the arbitrator was alive to the requirements of s 86(13)*(b)* of the Labour Act and he did bring his mind to bear on the interpretation and application of that provision before he decided; that is, he did exercise discretion under that provision before he decided. Mr Phatela's contention is, therefore, incorrect. The arbitrator gave a real hearing to 'the other individual', Poshigo, who had been selected by the applicant to represent him and also to the second respondent before he decided not to permit Poshigo to represent the applicant. On that score I conclude that the arbitrator

exercised discretion under 86(13)*(b)*. And it has not been established by the applicant that the arbitrator exercised the discretion wrongly. That being the case, I have no good reason to fault the arbitrator's exercise of discretion under s 86 of the Labour Act when he decided not to permit 'the other individual' (Poshigo) to represent the applicant at the arbitration proceedings. It is also my view that the arbitrator exercised the discretion properly.

[7] It follows that the applicant's reliance on statutory grounds 1, 2 and 3 to establish his ground 3.1 in the notice of motion fails: the applicant has failed to prove the existence of statutory grounds 1, 2 or 3 in relation to ground 3.1 in the notice of motion.

[8] I pass to consider the applicant's other grounds. The applicant relies again on ground 1; but this time based on the arbitrator's alleged failure to keep a proper record. And why does the applicant contend that the first respondent failed to 'keep a proper record'? The applicant avers that 'the purported record of the arbitration proceedings (is) in only partially English language. The rest of it is in one of the local languages which do not form an official language of the Republic of Namibia'.

[9] The statutory ground based on the record cannot take the applicant's case any further. To start with – and this is important – this ground is not raised in the applicant's notice of motion. This observation goes also for Mr Phatela's submission that the arbitrator placed the duty on the applicant to prove that he was unfairly dismissed. It must be borne in mind that submissions by counsel – oral or written – are not facts within the meaning of rule 6(1) of the Labour Court Rules, and so they should not be considered as such. A ground which does not exist in the notice of motion cannot be created by counsel during submissions from the Bar or in writing.

[10] In any event, as respects the record; as far back as 15 June 2011 the applicant issued a 'Certificate' in which he did certify that to the best of his knowledge 'the copies of the original record herein are correct'. And as respects proof of unfair dismissal; it would seem Mr Phatela has misread the record. As Mr Van Zyl submitted, the arbitrator was clearly aware as to the burden which the

applicant should discharge in terms of s 33(1), read with s 33(4), of the Labour Act, that is, ‘once you prove that there was a dismissal, that’s all’, so said the arbitrator. ‘The whole thing shifts to the respondent, that’s the employer, to prove that the dismissal was effected within a fair procedure. Yours is just to establish that there was a dismissal; that’s all’, so the arbitrator said further.

[11] The applicant’s other ground in the notice of motion (ground 3.2) is the ‘admission of the CCTV footage into evidence, which the first respondent refused and/or failed to discover to the applicant, prior to the disciplinary hearing and the arbitration hearing’. As respects this ground 3.2, Mr Phatela submitted that the first respondent admitted unlawful evidence which, according to him, is clearly prohibited by the Computer Evidence 32 of 1985.

[12] Mr Van Zyl’s response is that in the first place the applicant did not request the arbitrator to make an order as to the disclosure of documents in terms of rule 26 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner. Thus, counsel submitted, the applicant never raised the issue of the CCTV footage, including the authenticity of the footage, during the arbitration proceedings and that if the applicant had raised the issue the second respondent would have had the opportunity to address the issue. For counsel, it is, therefore, too late in the day for the issue of the CCTV footage to be raised in the present proceeding. I accept submissions by Mr Van Zyl. Besides, s 86(7)*(b)* of the Labour Act enjoins an arbitrator to deal with the substantial merits of the dispute before him or her with the minimum of legal formalities. Furthermore, rule 18 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner provides peremptorily that the ‘arbitrator must conduct the arbitration in a manner contemplated in section 86(7) of the Act and may determine the dispute without applying strictly the rules of evidence’. In my opinion, the arbitrator can do all that so long as the proceedings are conducted fairly.

[13] In this regard, I consider the Computer Evidence Act 32 of 1985 to be a legal formality and a strict rule of evidence; and so the arbitrator was entitled not to apply that Act strictly or at all; and more important, on the facts and in the circumstances of

the case, it is my view that the acceptance of the CCTV footage by the arbitrator is fair and it is in accordance with justice. Consequently, I conclude that the arbitrator did not commit misconduct in relation to the duties of an arbitrator (statutory ground 1) and did not commit gross irregularity in the conduct of the arbitration proceedings (statutory ground 2). The applicant's reliance on these statutory grounds based on the CCTV footage (ground 3.2), therefore, also fails. Accordingly, I conclude that the applicant has not established the existence of those two statutory grounds in relation to ground 3.2 in his notice of motion.

[14] I proceed to deal with the applicant's reliance on yet again statutory grounds 1 and 2; this time based on the alleged failure of the arbitrator to consider the documentary evidence and the testimony of the applicant's witness adduced during the arbitration proceedings (Ground 3.3 in the notice of motion).

[15] It is clear to me from the award that the arbitrator duly considered Exhibit 2. He also considered the evidence surrounding the 'inspection in loco' in respect of the disciplinary hearing and other relevant evidence. The applicant has failed to point it out to the court any particular evidence the arbitrator unjustifiably excluded. It is trite that the fact that a court or tribunal does not in its judgment or award itemize point by point all the series of evidence placed before it does not ipso facto lead to the inference that the court or tribunal did not consider all the pieces of evidence placed before it. It is within the power of the court or tribunal to consider such evidence that has probative value and assists it and so make reference to only such evidence in its award or judgment. Accordingly, I find that the applicant has failed to establish the existence of statutory grounds 1 or 2 in relation to ground 3.3 in his notice of motion.

[16] The last ground raised by the applicant in his notice of motion (ground 3.4) is this: 'The manner, in which the arbitration hearing was conducted, was bias and prejudice towards the applicant'. On the need and necessity to specify grounds of appeal I had the following to say in *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo and Another* LCA 02/2010 (judgment delivered on 7 March 2011) (Unreported) para 3:

'It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is "not a matter of form but a matter of substance … necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon J). The *locus classicus* of a similar proposition of law by the Court is found in *S v Gey Van Pittius and Another* 1990 NR 35 at 36H where Strydom AJP (as he then was) stated, "The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues". That case concerned a criminal appeal, but I see no good reason why the principle enunciated by the Court should not apply with equal force to appeals in terms of the Labour Act.'

[17] I see no good reason why this proposition regarding appeals under the Labour Act should not apply to review under that Act. In the instant proceedings the applicant has not placed before the court anything of substance and precise that is capable of sustaining his averment. The bare averment does not enable the review to be disposed of as far as ground 3.4 is concerned. And in my opinion there is nothing in the record of proceedings and the arbitrator's award that establishes the appearance of judicial bias as explained in *Sikunda v Government of the Republic of Namibia (1)* 2001 NR 67 (HC) at 83I-84A. I, therefore, find that the applicant has failed to prove that statutory grounds 1, 2 or 3 exists in relation to ground 3.4 in the notice of motion. Accordingly, I conclude that ground 3.4 also fails.

[18] As respects costs; in the interpretation and application of s 118 of the Labour Act, I do not find any good reason to order costs in these proceedings.

[19] For all the aforegoing, I hold that the applicant has failed to prove the existence of any of the statutory grounds he relies on in his notice of motion. Whereupon; I make the following order:

(a) The application to review and set aside arbitration award no. CRWK#857-10 (dated 25 March 2011) is dismissed.

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(b) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	T C Phatela Instructed by Diedericks Inc., Windhoek
FIRST RESPONDENT:	No appearance
SECOND RESPONDENT:	C J Van Zyl Instructed by GF Köpplinger Legal Practitioners, Windhoek