



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: LCA 38/2012

In the matter between:

NAMIBIA ESTATE AGENTS BOARD

APPELLANT

and

PHELEM MANYANDO LIKE

RESPONDENT

Neutral citation: *Namibia Estate Agents Board v Like* (LCA 38/2012) [2013] NALCMD 26 (21 June 2013)

Coram: GEIER J

Heard: 21 June 2013

Delivered: 21 June 2013

Flynote: Labour Court — Appeal from arbitrator's award — at the arbitration respondent had failed to prove his losses – after the completion of the arbitration hearing the arbitrator however requested the respondent to provide her with proof of his losses - such proof was then submitted subsequent to the hearing and without providing the appellant the opportunity of dealing with such documentation – such conduct then constituted one of the grounds of appeal –

Court holding that failure of arbitrator to afford appellant the opportunity to deal with such evidence breaching *audi alterem partem* rule - thus constituting a material irregularity in the arbitration proceedings –

The aforementioned conduct of the arbitrator also disclosing possibility of bias – such possibility corroborated by letter filed of record by respondent's legal practitioner alleging highly irregular conduct on part of arbitrator – respondent's legal practitioner requesting that arbitration be reconvened in order to deal with recusal of arbitrator – arbitrator refusing to reconvene arbitration proceedings – instead of hearing the requested recusal application the arbitrator continued to abuse her position by favouring the respondent by allowing him to bolster a deficient facet of his case and by subsequently delivering the arbitration award in favour of respondent.

Conduct of arbitrator constituting material irregularities in the proceedings

Court holding that an arbitrator, who should have recused him/herself, committing an irregularity every minute that he/she continues to preside over a matter.

Appeal accordingly upheld and arbitration award set aside.

Conduct of arbitrator referred for investigation.

ORDER

1. The appeal is upheld.

2. Arbitration award made by *Ms Tuulike Mwafufya-Shikongo*, on 9 July 2012, is hereby set aside.

3. The conduct of *Ms Tuulike Mwafufya-Shikongo* in this matter is referred to the Honourable Minister of Labour and Social Services and the Labour Commissioner for investigation and further action, if necessary.

JUDGMENT

GEIER J:

- [1] Following disciplinary proceedings, the appellant dismissed the respondent from his position as manager.

- [2] The respondent had been charged and was found guilty of theft and fraud.

- [3] The matter was then referred to conciliation and arbitration.

- [4] The outcome of the arbitration proved positive for the respondent who was reinstated. The appellant was also ordered to pay back the respondent's salary and any increases and benefits together with all losses, as proved, due to any delayed payments, inclusive of bank charges.

- [5] This award forms the subject matter of this appeal, which is unopposed, due to the respondent having been barred, from opposing it, as a result of the non-

condonation of his failure to comply with the court's case management order of 22 January 2013.

THE APPELLANT'S AUTHORITY

[6] Mr Dicks, who appeared on behalf of the appellant at the hearing, firstly addressed the court on the issue of the appellant's authority at the time of disciplining the respondent. It was conceded in this regard that the appellant's board had been improperly constituted at the time. However the board was subsequently properly re-constituted. It was this properly constituted body that then ratified all the preceding actions inclusive of the actions and steps taken against the respondent.

[7] Mr Dicks submits that such ratification is valid and cures this initial defect, I agree.¹

THE APPEAL

[8] From the Notice of Appeal it appears that essentially three points potentially require determination in this appeal.

[9] I do however believe that the first ground of appeal is so fundamental to the determination of this matter that the need, to deal with the remaining grounds of appeal, therefore falls away.

[10] The issue is this: At the arbitration it had always been incumbent on the respondent to prove his losses. This he failed to do. After the completion of the arbitration hearing the arbitrator, *Ms Tuulike Mwafufya-Shikongo*, however requested the respondent to provide her with proof of his losses, such proof was then submitted subsequent to the hearing and without providing the appellant the opportunity of dealing with such documentation.

¹See for instance : *Pinkster Gemeente van Namibia (previously SWA) v Navolgers van Christus Kerk van SA and Another* 1998 NR 50 (HC) at 55A

[11] This *modus operandi* obviously constitutes a fundamental irregularity in the proceedings as it breaches the underlying *audi alterem partem* rule.

[12] This conduct of the arbitrator also reveals the possibility of bias on her part. Bias was however not a ground raised in the Notice of Appeal. Such conduct was however exposed in the course of considering the present ground of Appeal.

[13] In this regard it did not go unnoticed - and which aspect corroborates the inference of bias to be made from the arbitrators aforesaid conduct – and which aspect appears from a letter - dated 18 May 2012 - written by Mr Marcus - to the arbitrator - in which he placed conduct, of a most serious nature, on to the record.

[14] By way of the following letter the respondent's legal; practitioner informed the Office of the Labour Commissioner - for attention *Ms Tuulikki Mwafufya-Shikongo* – as follows:

'Dear madam

Phelem Manyando Like // Namibia Estate Agents Board

We refer to the above matter. We acknowledge receipt of your letter dated 18 May 2012 in which you state you are unable to re-convene the arbitration proceedings. The purpose of the request to convene the arbitration proceedings is to formally place the following information on record: After the conclusion of the arbitration proceedings on 15 May 2012 our candidate legal practitioner, Ms Mondo, informed me that during the short adjournment of the proceedings on 15 May 2012, you asked her to tell me that I should address the allegations that the respondent had raised, as I had not dealt with them. You also requested her not to tell me that you had spoken to her and that she should pretend that she was making this suggestion.

Please note that your conduct which was clearly aimed at assisting us in the conduct of our case is highly improper and effectively disqualifies you from further presiding over this matter. In light of this incident we do not believe that you will be able to fairly adjudicate this

matter Please note that that we will not be able to file our written submissions in circumstances where we feel that the fairness of the process is not guaranteed. Please note that we have informed our client that your conduct leaves us with no other option but ask for your recusal from the case.

We therefore again request you to reconvene the arbitration proceedings as a matter of urgency.

Yours Faithfully
Nixon Marcus
(Public Law Office)

Copy to GF Köpplinger Legal Practitioners for attention Ms Mia Swart.’

[15] In my view this letter does not only disclose a valid basis for an application for the recusal of the arbitrator in this matter but it also affords corroboration of the motive with which the subsequent material irregularity was committed by the arbitrator when she afforded the respondent a further opportunity to remedy the insufficiency of having proved his quantum without first affording the appellant the opportunity to be heard.

[16] At the same time it becomes clear that the arbitrator had no business to continue to preside at the arbitration or to deliver her award subsequent to the letter of the 18th of May 2012 in view of the serious allegations contained therein which provided a more than valid basis for an application for her recusal.

[17] Instead of hearing the requested recusal application the arbitrator continued to abuse her position by favouring the respondent by allowing him to bolster a deficient facet of his case.

[18] It has been held that a judicial officer, who continues to preside over a matter in which he or she should have recused him or herself, commits an irregularity every minute he continues to sit on the bench.²

²*Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at p 9 B – C,

[19] The same principle applies to arbitrators who should be impeccably unbiased and objective in the execution of the important role assigned to them by the Labour Act 2007.

[20] The conduct of *Ms Tuulikki Mwafufyai Shikongo* constitutes such a material irregularity which conduct should be investigated and the suitability of her executing any further role, as arbitrator, should thus urgently be re-assessed.

[21] In the premises it becomes clear that the arbitration award made by Ms Shikongo, on 9 July 2012, in favour of the respondent, is vitiated not only by the material irregularity exposed by the first ground of appeal raised in this matter, but also from the inferences to be drawn from the facts and her subsequent conduct which all corroborate her biased role in this matter.

[22] In the result:

- a) The appeal is upheld;
- b) The arbitration award made on 9 July 2012 is set aside *in toto*;
- c) The conduct of *Ms Tuuliki Mwafufya-Shikongo* is to be referred to the Labour Commissioner and the Minister of Labour for further investigation and for the taking of appropriate action if necessary.

H GEIER

Judge

APPEARANCES

APPELLANT:

G Dicks

Instructed by GF Köpplinger Legal Practitioners,
Windhoek.