

**REPUBLIC OF NAMIBIA**



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

**CASE NO. LC 184/2013**

In the matter between:

**MINISTER OF AGRICULTURE, WATER  
& FORESTRY**

**FIRST APPLICANT**

**PRIME MINISTER**

**SECOND APPLICANT**

**THE PUBLIC SERVICE COMMISSION**

**THIRD APPLICANT**

and

**A.N. HAGEN N.O**

**FIRST RESPONDENT**

**RODERICK LINKS**

**SECOND RESPONDENT**

**LABOUR COMMISSIONER**

**THIRD RESPONDENT**

**Neutral citation:** *Ministry of Agriculture Water and Forestry v Hagen NO (LC 184/2013)[2015] NALCMD 3 (30 January 2015)*

**Coram:** ANGULA, AJ

**Heard:** 10 November 2014.

**Delivered:** 30 January 2015

**Flynote:** Labour Law - Application to review and set aside an award in terms of s 89 (4) and (5) of the Labour Act 11 of 2007 – Grounds for review – Interaction between the arbitrator after the arbitration proceeding but before handing down of the award – Arbitrator receiving a document from one the representative of the parties in the absence of the representative of other party to the proceedings.

**Summary:** Review of an arbitrator's award on the grounds *inter alia* that after arbitration proceedings were concluded but before the handing down of the award an interaction took place between the arbitrator and the second respondent's representative to the exclusion of the representative of the applicants during which a salary slip of the second respondent which the second respondent undertook to make available when he testified, was handed over to the arbitrator.

*Held*, that even though the manner in which the salary slip was delivered to the arbitrator amounts to an irregularity it did not constitute a vitiating irregularity.

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### ORDER

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1. The quantum amount of N\$115, 723.75 as ordered by the arbitrator to be paid to the second respondent, is hereby set aside.
2. The matter is referred back to the arbitrator and the arbitrator is ordered to recalculate the quantum amount to be paid to the second respondent using the figures appearing on the salary slip.

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## JUDGEMENT

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ANGULA, AJ:

### Introduction

[1] I have before me a review application brought by the applicant in terms of s 89 of the Labour Act 2007 (Act No. 11 of 2007) (“the Act”).

[2] The applicant raises two grounds for the review and setting aside of the first respondent’s, the arbitrator, award namely that:

- ‘(a) That the arbitrator at some point after the hearing and before the handing down of the award engaged the second Respondent in the absence of the Applicants and without notifying Applicants of such interaction.
- (b) That the arbitrator made findings with regard to substantive fairness that were mistaken and could not reasonably or rationally be made in the circumstances.’

[3] As will appear from what follows, I will only deal with the first ground of review.

### Background

[4] Following a physical altercation with his co-employee the second respondent was subjected to disciplinary hearing. He was found guilty and dismissed. Thereafter the second respondent filed a complaint of unfair dismissal with the office of the third respondent. At the conclusion of the arbitration proceedings the arbitrator made an award in favour of the second respondent and ordered that the second respondent be paid a sum of N\$115,723.75 representing the second respondent’s eleven month’s salary.

[5] During the arbitration proceedings the second respondent testified that at the time of his dismissal, his monthly basic salary was about N\$7,600. He was asked whether he had a salary slip to prove his salary. He responded in the affirmative and undertook to provide the salary slip at a later stage. Thereafter it transpired, and it is common cause between the parties, that after the conclusion of the arbitration proceedings and prior to handing down the award on an unknown date, a document headed '*calculation of the applicant's loss of income*' was forwarded to the arbitrator by the representative for the second respondent without informing or copying same to the representative for the applicants.

#### The parties' submissions

[6] The applicants take the point that the document containing the calculation of the second respondent's loss of income together with the salary slip should have been tendered in evidence during the arbitration proceedings; that by accepting the document and the salary slip after the arbitration proceedings had been concluded, the arbitrator acted irregular and furthermore the interaction between the arbitrator and the second respondent to the exclusion and without the knowledge of the representative of the applicants amount to gross irregularity on the part of the arbitrator within the meaning of s 89 (4) of the Act.

[7] Counsel for the second respondent concedes that the arbitrator's conducts complained of constitutes an irregularity but not a vitiating irregularity and should thus not result in setting aside of the award. Counsel points out that the salary slip emanates from the office of the first applicant and its authenticity has not been placed in dispute by the applicants. However the applicants are only disputing the accuracy of the calculation of the quantum as done by the arbitrator.

#### Analysis of the evidence and parties' submissions.

[8] I agree that the arbitrator's conducts complained of constitute an irregularity. I agree further that the irregularity committed does not amount to a

vitiating irregularity in view of the fact that evidence was led at the arbitration proceedings with regard to the second respondent's monthly income even though the exact monthly salary amount was not established. Furthermore the amount was not disputed by the applicants when the second respondent testified. Moreover the salary slip emanates or was generated by the first applicant's office. In my view the applicants have not suffered any prejudice, neither is any prejudice being alleged on behalf of the applicants. It would appear to me that this is the type of procedural defect which can be rectified by the court. Nor has it been pinpointed what right(s) of the applicants, if any, has been violated. I think what was said by Smuts J in the matter of *Auto Exec CC*<sup>1</sup> is applicable to the facts of this matter where the learned judge expressed himself as follows:

*'The nature of this "right" is of course purely procedural. It did not constitute a substantive right in any sense as is demonstrated by the facts of this case. It is akin to what was stated by Conradie J (as he then was) in Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another that a procedural right of this nature is no more than a "right" to take a point and to require a court not to turn a good point into a bad one. Mr Dicks would appear to operate from the assumption that a procedural defect of this nature could not be rectified. As was pointed out by Harms JA in Smith v Kwanonqubela Town Council a party to litigation does not have the right to prevent the other from rectifying procedural defects.'*

[9] From reading the record it appears that there was an understanding between the parties that the salary slip would be produced at a later stage after the second respondent had testified and step down from the witness stand. It was however not made clear how, at what stage and to whom the salary slip would be produced. It is however clear from the record that evidence was led which proved the loss of income suffered by the second respondent. The arbitrator ordered that the second respondent be paid N\$115,723.75. The salary slip, which was admittedly irregularly produced, reflects that the second respondent's gross monthly salary was N\$9,611.25 which, when multiplied with

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<sup>1</sup> *Auto Exec CC v Johan van Wyk* (LC 150/2013 [2014] NLCMD 16 (16 April 2014))

11 months, amounts to the total sum of N\$105,723.75. It appears therefore that there is discrepancy in the calculation of the arbitrator by about N\$10,000.

[10] In my view and based on the particular facts of this case, in order to ensure that justice is done between the parties it would be fair and just to refer the matter back to the arbitrator to recalculate the quantum payable to the second respondent using the figures appearing on the salary slip.

[11] In the result I make the following order:

1. The quantum amount of N\$115,723.75 as calculated by the arbitrator is set aside.
2. The matter is referred back to the arbitrator to recalculate the quantum payable to the second respondent using the figures appearing on the salary slip.

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**ANGULA A.J**

APPEARANCE

APPLICANTS  
OF

T.CHIBWANA  
GOVERNMENT ATTORNEY

RESPONDENTS  
INSTRUCTED BY THE

S. RUKORO  
DIRECTORATE OF LEGAL AID