

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 66/2015

In the application between:

LUDERITZ TOWN COUNCIL

APPELLANT

and

SHAANIKA N. KORNELIA

RESPONDENT

Neutral citation: *Luderitz Town Council v Shaanika* (LCA 66/2015) [2017]
NALCMD 13 (27 April 2017)

Coram: UNENGU AJ

Heard: 02 February 2017

Delivered: 27 April 2017

Flynote: Labour Appeals – Appellant appealing against the award issued against it in the arbitral proceedings – Appeal unopposed – Respondent’s application for condonation of the late filing of statement of grounds for opposition dismissed – Court found no evidence on record to support the finding made by arbitrator –

Therefore, no reasonable arbitrator could have made such a finding on the evidence presented – Appeal, therefore, upheld and award set aside.

Summary: In this appeal, the appellant appealed against the arbitrator's award and sought the award set aside for relief. The respondent was not part of the appeal proceedings because of the failure to comply with the provisions of *Rule 17(16)(b)*. In her award, the arbitrator found that Council discriminated against the respondent by paying other employees of the Council a housing subsidy, but not the respondent. This finding was made by the arbitrator, despite the evidence from the Chairperson of the management committee of the Council that the resolution which authorised such payments was revoked, because the resolution was contrary to the Personnel Rules promulgated in terms of *Local Authorities Act*.

Held: No evidence on the record of proceedings was found to support the finding that the respondent was discriminated against; therefore, no reasonable arbitrator could have made such a finding. *Held further:* The finding is arbitrary or perverse as discrimination was not proven. Appeal upheld and the award set aside as a result.

ORDER

- (i) The appeal is upheld.
- (ii) The arbitration award issued on 28 October 2015 by arbitrator A.A. Hagen, is hereby set aside.

JUDGMENT

UNENGU AJ:

Introduction

[1] The appellant has noted an appeal against the award issued by arbitrator, Ms Angelina Hagen on 28 October 2015 under case number CRWK 175-14, which was received on 06 November 2015.

[2] In the notice of appeal, the appellant asked the Court to uphold its appeal and set aside the arbitration award for relief. Further, on page 2 of the notice of the appeal, the appellant had listed four questions of law on which the appeal is to be determined. These are:

“(a) Whether the appellant is estopped from revoking a resolution made contrary to gazette (d) Personnel rules issued in terms of the Local Authorities Act 2003?

(b) Whether on the evidence placed before the arbitrator could find that the appellant unfairly discriminated against the respondent?

(c) Whether the appellant committed an unfair labour practice by paying the respondent a housing allowance in the absence of proof of a bond over the property in question as required in terms of the Personnel Rules issued in terms of the Local Authorities Act 2003?

(d) Whether, if the respondent is entitled to being paid housing subsidy, such entitlement being retrospectively payable without being subjected to the prescription provisions of the Labour Act, 2007 Section 86(2)(b)?”

[3] In support of the questions of law mentioned above, the appellant is relying on the grounds that the respondent owns and occupies a house (the property) over which a bond was registered but the bond was settled in 1998; in terms of the appellant's *Personnel Rules (section 10(5))*: for a staff member to apply for a housing subsidy, such a staff member must submit proof of a bond which the respondent did not submit as she did not have such bond). The same was also not produced at the arbitration proceedings; also, the *Ministerial Directive of 14 October 2011* directed that in the absence of proof of a bond, like in the case of the respondent, the staff member will only qualify for a housing allowance – however, and contrary to the said *Ministerial Directive*, the appellant resolved to pay a housing subsidy to employees who did not have a bond registered over the qualifying property, which resolution the appellant revoked later.

[4] Also, in terms of *section 27(i)(c)(ii)(b) of the Local Authority Act of 1992*, the appellant could only determine the remuneration, provide or give pension benefits and housing facilities or benefits to staff members with approval of the Minister, which was not done in the case of the respondent and that if the respondent is entitled to be paid a housing subsidy, the payment thereof has prescribed after 12 months prior to August 2015.

[5] The award appealed against is contained in the amended notice of appeal dated 03 December 2015 and it reads as follows:

- “1. The respondent is ordered to pay the applicant a housing subsidy and not a housing allowance.
2. It is also ordered that the difference between the allowances should be back paid.
3. The respondent is also ordered to pay the difference between subsidy and the allowance from the date that the applicant applied for a subsidy.
4. There is no order of the costs.”

[6] After the hearing of the appeal was delayed so long, it was set down for hearing on 02 December 2016, but again was postponed to 02 February 2017 for hearing of the application for condonation of the late filing of the statement with grounds of opposition as required in terms of *Rule 17(16)(b)*. Needless to point out that the application was refused for reasons contained in the ruling handed down on 24 February 2017. The appeal became unopposed as a result.

Background

[7] The respondent was an employee of the appellant the time she approached the Office of the Labour Commissioner with a grievance of unfair labour practice and unfair discrimination. Both these grievances of unfair labour practice and unfair discrimination came about as result of the fact that the respondent was paid housing allowance, instead of a housing subsidy similar to fellow employees who benefited as such.

[8] On the other hand, the appellant's version is that the respondent did not qualify for a housing subsidy, therefore could not be paid the subsidy. With regard the other employees who did not qualify but was paid a subsidy as opposed to a housing allowance, the appellant conceded that the subsidy was wrongly paid to the employees concerned, which is why a resolution was taken to revoke the previous resolution which allowed the illegal payment of the housing subsidy to the other employees.

Arbitration proceedings

[9] It is the evidence of the respondent that she is the owner of a house and applied for a home loan in terms of an agreement between the appellant and the Local Authorities Pension Fund, which was approved by the Pension fund. She said that her colleagues who applied for home loans to buy houses were paid a subsidy not a housing allowance like her.

[10] In cross-examination, the respondent testified that a mortgage bond is required to qualify for a housing subsidy. She further testified that although her house was already paid off, a second bond was obtained over the house, but was unable to produce proof of such mortgage bond.

[11] Mr Max Tommie Kruger testified on behalf of the respondent. In brief, his evidence corroborated the respondent's version to the effect that a bond was a requirement to qualify for a subsidy.

[12] Before the witness for the respondent was called to testify, it was resolved between the parties that the resolution taken by the Council to revoke the previous resolution which allowed other employees to be paid a subsidy, was not in dispute.

[13] Mr Calein Mwiye, a councillor and member of the management of the Town Council, testified on behalf of the appellant. He said that the Council revoked the resolution taken by it to pay employees a subsidy instead of an allowance, because the resolution was contrary to Personnel Rules and the Minister did not approve the payment of the housing subsidy as provided by law.

Arbitration Award

[14] The arbitrator award was issued on 28 October 2015, the contents thereof are indicated above in the judgment. The appellant received the award on 06 November 2015.

[15] After analyzing and assessing the evidence presented on behalf of the appellant and the respondent, the arbitrator found that the respondent qualified for the subsidy and not for an allowance. That being the case, therefore, the appellant discriminated against the respondent resulting in an unfair labour practice, the arbitrator concluded.

Legal principles

[16] The appeal was brought in terms of *section 89(1)(a) of the Labour Act*¹ which provides:- “on any question of law alone.”

[17] Parker, J in *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo*² dealt with *section 89(1)(a)* and said the following:

‘The predicative adjective ‘alone’ qualifying ‘law’ means ‘without’ others present! (Concise Oxford Dictionary, 10th edition). Accordingly, the interpretation and application of section 89(1)(a) lead indubitably to the conclusion that the Court is entitled to hear an appeal on a question of law alone if the matter, as in the instant case does not fall under section 89(1)(b). A question of law alone means a question of law alone without anything else present, e.g. opinion or fact. 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 to 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] | W.L.R. 1044at 46 per Brandon J.’

¹ Act 11 of 2007.

² Case No. 02/2010.

[18] In the case of the *President of the Republic of Namibia and Others v Vlasiu*,³ O'Linn, J has this to say on a question of law or fact:

'It would appear that we are required to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order. That is a question of law if it did, then the appeal must fail. If it did not then this Court may amend or set aside that decision or order or make any other decision or order according to the requirements of the law and fairness.'

[19] O'Linn, J, further said that it will be convenient therefore to determine the facts which were common cause or not in issue before the Court *a quo*, and then to determine what relevant findings of fact were made by the Court. According to O'Linn, J, it is upon the basis of all those facts that the correctness or otherwise of the decision and order of the Court *a quo* must then be considered.

[20] The lesson we learn from O'Linn J's judgment, is to determine the facts which were common cause or not in dispute in the arbitration proceedings and consider the findings the arbitrator made to determine whether a correct decision was made on the facts presented in the matter (See also *Rumingo & Others v Van Wyk* 1997 NR 102 (H6)).

[21] The Supreme Court of Namibia also dealt with the provisions of *section 89(1)(a)* of the Act extensively in the matter of *Leon Janse Van Rensburg vs Wilderness Air Namibia (Pty) Ltd*.⁴

[22] In paragraph 50 of the judgment O'Regan, AJA stated that in the case of an appeal in terms of *section 89(1)(b)*, appeals that relate to decisions on fact will only be entertained where the arbitrator has made a factual finding on the record that is arbitrary or perverse, in the sense that it could not reasonably have been reached. Which means that not only questions of law "alone" can render a decision of the arbitrator appealable, but also decisions on fact.

³ 1996 NR 36 (LC) at 43.

⁴ Case No. SA33/2013 delivered on 11 April 2016.

[23] In the present appeal, even though not opposed because of the failure by the respondent to file the statement with grounds of opposition as required by the provisions of *Rule 17(16)(b)*, I will consider also the grounds of appeal and questions of law relied on by the appellant.

[24] In my introductory paragraph, I already indicated the questions of law and the grounds of appeal relied on by the appellant. However, it is still necessary to revisit the questions of law and the grounds listed in the notice of appeal to see whether they are questions of law alone or decisions of fact where the arbitrator had made a factual finding on the record that is arbitrary or perverse.

[25] The first ground of appeal to be determined is whether the appellant discriminated against the respondent and thus committed an unfair labour practice.

[26] The ground is supporting questions of law (b) and (c) of the notice of appeal. Questions of law (b) in the notice of appeal reads “whether on the evidence placed before the arbitrator could find that the appellant unfairly discriminated against the respondent.”

[27] In paragraph 5 of the award the arbitrator concluded that in light of her assessment and having considered same, she was of the view that the appellant did discriminate against the respondent and that this indeed constituted an unfair labour practice. The arbitrator did not refer to any specific part of the evidence which, in her view, proved on a balance of probabilities that the appellant discriminated against the respondent, therefore, practiced unfair labour. I could also not find such evidence from the record of proceedings. The only finding made by the arbitrator on the evidence placed before her is the finding that the respondent did qualify for the subsidy, not for an allowance and nothing else.

[28] In his written heads of argument, Mr Philander, counsel for the appellant referred to *section 5(2) of the Labour Act*, which provides for prohibited grounds of discrimination in any employment directly or indirectly and submitted that the respondent failed to make out a case in terms of *section 5(2)*, therefore the arbitrator could not have come to the conclusion that the appellant discriminated against the

respondent. I agree with counsel. The finding is not only against the law (*section 5(2) of the Labour Act*) but also arbitrary or perverse. The finding is not supported by evidence on record, therefore, she could not reasonably have come to such a finding. The appeal can thus on this ground alone succeed.

[29] With regard to question of law (c) whether the appellant committed an unfair labour practice by paying the respondent a housing allowance in the absence of proof of a bond over the property in question as required in terms of the Personnel Rules issued in terms of the Local Authorities Act 2003, it is a duplication of a question of law and ground of appeal (b) discussed above. There is no other evidence on record rebutting this evidence.

[30] In addition to what is said in paragraph 26 above, the respondent could not rely on illegal subsidy payments made to other employees to justify her claim. The evidence from the chairperson of the Regional Council is that the earlier resolution taken by Council to pay housing subsidies in the place of housing allowances without meeting the requirements of Personnel Rules, by submitting a bond or a lease agreement, was outside the power of the Council and was revoked.

[31] To ignore this piece of evidence, in my view, the arbitrator was wrong in law. She ought to have dismissed the claim, because her claim was a nullity. The resolution taken by Council contrary to the provisions of *section 27 read with section 24 of the Local Authorities Act 2003*, as far as benefits of the employees are concerned, was taken outside Council's powers, making such resolution a *nullity ab initio: ex nihilo nihil fit*.

[32] Therefore, the consideration of the question of law (c) above is *mutatis mutandis* applicable to the question of law (d), hence it is unnecessary to repeat what is stated above. That said and applying the above legal principles to the facts of the appeal, I am satisfied that the arbitrator misdirected herself in law when she reached the conclusion she did, resulting in her award to be vacated.

[33] Accordingly, the following order is made:

- (i) The appeal is upheld.
- (ii) The arbitration award issued on 28 October 2015 by arbitrator A.A. Hagen, is hereby set aside.

E P UNENGU
Acting Judge

APPEARANCES

APPELLANT:

SR Philander

of ENSAfrica|Namibia, Windhoek