

REPUBLIC OF NAMIBIA



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

In the matter between:

Case no: LC 41/2016
LCA 16/2016

QKR NAMIBIA NAVACHAB GOLD MINE (PTY) LTD

APPLICANT

and

FILLEMONT XOAGUB

1ST RESPONDENT

GETRUDE USIKU N.O.

2ND RESPONDENT

THE LABOUR COMMISSIONER N.O.

3RD RESPONDENT

Neutral citation: *QKR Namibia Navachab Gold Mine Pty Ltd v Fillemon Xoagub & 2 Others (LC 41/2016: LCA 16 2016) [2017] NALCMD 16 (28 April 2017)*

Coram: PRINSLOO AJ

Heard: 28 February 2017, 31 March 2017

Delivered: 28 April 2017

Flynote: Labour Law – Dual Proceedings – Appeal and Review of an arbitration award – In dealing with dual proceedings of this nature, the outcome of the review application will be deciding if the Court is required to further consider the appeal – The applicant on review must establish, not only that the finding of fact is arguably wrong, but 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 – It is clear that the arbitrator did not follow any of the guidelines as set out by the learned Judge and the manner in which she conducted the proceeding gave rise not only to irregularities but gross irregularities – It follows for all the reasons set out above and based on the authorities referred herein I have come to the conclusion that the arbitrator's conducts complained of by the applicant constituted gross irregularity within the meaning of the Act – The application for review succeeds – The appeal is removed from the roll.

Summary: This is an application for review and an appeal lodged by the applicant/appallent seeking the Court to review and set aside the second respondent's decision made on 12 February 2016 and that the Court direct and order that the matter be referred back to the Office of the Labour Commissioner to be heard *de novo* before a newly designated arbitrator. The applicant also seeks a cost order against the arbitrator to pay the costs of the review application in terms of section 118 of the Labour Act (the Act)

ORDER

1. The application for review succeeds;
2. The award in arbitration No CRSW 136/2014 is set aside;
3. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to conduct the arbitration *de novo* and to deal with the matter according to law.

4. No order as to costs is made.

5. The appeal is removed from the roll.

JUDGMENT

Prinsloo AJ:

Introduction

[1] The matter came before me on 28 February 2017 as dual proceedings as the applicant in case number LC 41/2016 is also the appellant in case LCA 16/2016. Both counsel submitted written heads of argument in advance and amplified their submissions orally when the review and the appeal was heard. Mr Jones represented the applicant/appellant and Ms Nambinga represented the first and second respondents.

Relevant background

[2] The first respondent, Mr Fillemon Xoagub (hereinafter referred to as 'Xoagub'), was employed by the Applicant, QKR Namibia Navachab Gold Mine (hereinafter referred to as 'QKR') as a Grade Control Assistant.

[3] Xoagub was charged with fraud. The charge was in essence based on the fact that Xoagub submitted a sick leave certificate through a colleague which was suspected to be fraudulent.

[4] On 07 April 2014 a recommendation was made that Xoagub should be dismissed, following the disciplinary proceedings on the above charge. Xoagub was afforded the opportunity of an internal appeal but this was not successful, and on 29 April 2017 the Managing Director of QKR confirmed the recommendation of the chairperson of the Disciplinary hearing.

[5] Subsequent to his dismissal, Xoagub referred an unfair dismissal dispute to the second respondent (hereinafter referred to as the 'arbitrator') in which Xoagub contended that his dismissal was both substantively and procedurally unfair.

[6] An arbitration was conducted on 12 February 2016, the arbitrator handed down an arbitration award under case number CRSW 136/2014 and in the said arbitration, the second respondent determined that Mr Xoagub's dismissal was procedurally unfair¹ and proceeded to make an arbitration award that has given rise to these proceedings now before me, in the following terms²:

*“ **Award***

I therefor order the following:

- 1. That the respondent Navachab Anglo Gold Ashanti (Pty) Ltd remunerates the applicant Mr. Fillimon Xoagub remuneration of one year and six months (April 2014 to September 2015) loss of income in the amount of N\$ 163,800.00 calculated on his basic salary of N\$9,100.00. The relationship between the parties is irreparable as could be observed during the arbitration proceedings therefore re-instatement is not appropriated in this regard.*
- 2. The amount ordered must be paid on or before 29th February 2016 to the applicant by contacting the applicant through his representative Mr Alberturs ! Noariseb the fulltime shops ward(sic) at the respondent.*

¹ Page 66 of the Court Bundle at par 13.

² Page 68 – 69 of the Court bundle.

The Arbitration award is binding upon the parties hereto and become an order of the Labour Court upon filing the Award in accordance with S.87(1) of the Labour Act (Act 11 of 2007).

The amount ordered earns interest from the date of the Arbitration Award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates Of Interest Act, 1975 (Act No 55 of 1975)”

[7] The applicant, QKR, has brought an application on notice of motion setting out its prayer in summary, for this Court to review and set aside the second respondent’s decision made on 12 February 2016 and that the Court direct and order that the matter be referred back to the Office of the Labour Commissioner to be heard *de novo* before a newly designated arbitrator. The applicant also seeks a cost order against the arbitrator to pay the costs of the review application in terms of section 118 of the Labour Act (the Act).³

[8] As indicated, the applicant also noted an appeal against the award under s 89 of the Act and in dealing with dual proceedings of this nature, the outcome of the review application will be deciding if the Court is required to further consider the appeal⁴.

Review application:

³ No. 11 of 2007.

⁴ *Hangana Seafoods v Swartz* [2014] NAHCMD 32 (30 July 2014) at par [4].

[9] The grounds of review are fourfold⁵, i.e.:

- (i) the arbitrator committed misconduct in relation to her duties as an arbitrator;
- (ii) the arbitrator committed gross irregularities in the conduct of the arbitration proceedings;
- (iii) the arbitrator exceeded her powers; and
- (iv) the award has been improperly obtained.

[10] In support of the notice of motion for review, the applicant filed the founding affidavit of Ms Maryke Kröhne. Ms Kröhne further amplified the grounds of review with specific reference to alleged bias on the part of the arbitrator, failure to act fairly and reasonably in terms of the common law and/or Article 18 of the Constitution and abuse of power. These defects or irregularities in the proceedings are in summary, as the applicant listed 12 issues⁶ that I will not replicate.

[11] The first respondent has moved to reject the application arguing that the review and appeal against the arbitrator's award is unsubstantiated and without merit.

[12] Review, it must be noted, does not concern itself with the decision arrived at but rather, how that decision was reached.⁷

⁵Supporting affidavit of Me Khröhne, p 17

⁶ Supporting affidavit of Me Khröhne, p 17-19 paragraphs 57.1-57.12

⁷*Atlantic Chicken Company (Pty) Ltd v Mwandingi and Another* (SA 45/2012) [2014] NASC 10 (15 July 2014).

'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')... Review of arbitral awards under the Labour Act falls under category 4 reviews...'⁸

[13] Accordingly, "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, but 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".⁹

[14] As the grounds of review are set out in the notice of motion it is clear that the review was brought in terms of *section 89(4) and (5)* of the Act which provides:

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

(5) A defect referred to 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*

⁸*Mokwena vs Shinguadja*(LC 52/2011) [2013] NALCMD 10 (28 March 2013), para 2.

⁹*Purity Manganese (Pty) Ltd v The Commissioner Tuulikki Mwafufya-Shikongo N.O. and Two Others* (LC 5/2010), para 15.

(iii) *exceeded the arbitrator's power; or...*

The Parties Submissions

[15] Mr Jones submitted that, throughout the arbitration, the conduct of the arbitrator can be regarded as a misconduct in respect of her duties and that she consequently committed a gross irregularity. He referred the Court to several extracts from the record which he submitted in which the arbitrator mishandled the arbitration proceedings by descending into the arena and repeatedly intervened or taking over the cross-examination of witnesses under the guise of asking questions for clarity sake, effectively assisting the first respondent and curbing the applicant's representative's cross-examination.

[16] Ms Nambinga in turn submitted that the arbitrator conducted the proceedings judicially and fairly and sought to assist the parties throughout the proceedings and referred the Court to extracts of the record illustrating the instances where the arbitrator facilitated the proceedings by guiding the inexperienced parties where necessary. It is denied that the arbitrator either committed misconduct or a gross irregularity.

Arbitration proceedings:

[17] The arbitration proceedings commenced on 16 September 2015. During the said proceedings, the applicant and the first respondent were represented.

[18] From the record it is evident that the arbitrator is well acquainted with her role as an arbitrator. At the commencement of the arbitration proceedings, the arbitrator explained to the parties that she was independent and impartial where after she went

to great lengths to explain the procedure to the parties step by step. The arbitrator covered issues from opening statements to cross-examination, re-examination, closing arguments, objections and also the right of the arbitrator to ask questions in clarification of issues¹⁰.

[19] The proceedings started off well enough but went fast downhill as the arbitrator continuously intervened during the evidence-in-chief of the witnesses. During cross-examination of the witnesses of QKR, the arbitrator under the pretext of clarifying issues launched into cross-examination of the said witnesses, effectively taking over the cross-examination on behalf of Mr Xoagub's representative.

[20] As illustration, this Court will refer to a few incidences where the arbitrator asked questions for 'clarification':

- 20.1 On pages 65 to page 75 of the transcribed record in respect of Mr Liebenberg;
- 20.2 On pages 104 to page 129 of the transcribed record in respect of Mr Bell;
- 20.3 On pages 172 to page 202 of the transcribed record in respect of Mr Frank. The issue with Mr Frank did however not stop there as is clear from my discussion of the evidence of Mr Frank hereunder.
- 20.4 On pages 519 to 594 of the transcribed record in respect of Mr Coetzee.

[21] These questions in clarification were over and above the questions posed by the arbitrator during the evidence-in-chief of the respective witnesses.

¹⁰ Page 5 to 9 of the Transcription.

[22] Whilst Mr Frank was still under oath and being questioned by the arbitrator, an issue arose regarding the disclosure of the disciplinary proceedings to Mr Xoagub. The arbitrator then decided that the person who had knowledge of the disclosure of the 'docket' should be subpoenaed and be brought to testify. One Mr Willem Cloete was brought to the proceedings and was summarily sworn in and the arbitrator proceeded to lead his evidence¹¹. Hereafter, a substantial question and answer session between the arbitrator and Mr Frank¹² followed. Mr Frank, still under oath, was then given the opportunity to cross-examine Mr Cloete. During the cross-examination by Mr Frank of the said witness, the arbitrator again launched into questioning Mr Frank 'just for clarity'.¹³

[23] At this point of the proceedings it was 17:00 and the matter had to be postponed and the arbitrator released the witness, Mr Frank, as follows:

CHAIRPERSON: Ja, but I was hoping that we could at least finish here, but it seems that we would not be able to, because with you as well as we are not going to finish, meaning that there will still be re-examination part and questions for me to ask. And once again the cross-examination part for the Applicant. But I will brief in what I am asking. So I will ask that maybe we set a date, on the following date that we get you also here. I will write out a subpoena letter so that you can come, because we are not done with you.

MR FRANK: No problem.

CHAIRPERSON: Yes. All I am asking is that since you are the witness, we are not done with you, you are not to discuss any of this with your management or any other person that do not have any, who have any interest in this matter as you are still a witness. So, I think you are under oath, for this matter, and I do the same with Mr Cloete.....' (My underlining).

¹¹ Page 205 to 211 of the transcription.

¹² Page 211 to 216 of the transcription.

¹³ Page 222 to 227 of the transcription.

[24] On resumption of the proceedings on 5 January 2016, the arbitrator cautioned both Mr Frank and Mr Cloete that they are still under oath and then allowed Mr Frank, whilst under oath, to cross-examine Mr Cloete (who was also under oath). This 'cross-examination' continued for close to 130 pages of the transcription when Mr Cloete was excused and an earlier witness, Mr Liebenberg was recalled to testify, while Mr Frank was still under oath.

[25] The matter was hereafter adjourned to the following day. Upon resumption of the proceedings the representative of QKR was given the opportunity to re-examine Mr Frank. Upon completion of the re-examination the arbitrator addressed an objection by the representative of Mr Xoagub stating the following:

CHAIRPERSON: ...Let me ask my questions for the clarification that I am seeking and then whatever I'm going to ask you that you did not have the opportunity to ask questions on, you are liberty to ask that questions. You can cross-examine him based on that and Mrs Khröne can also re-examine the witness on what I asked. (My underlining).

[26] Hereafter the arbitrator questioned Mr Frank for a further 49 pages of the transcribed record. Once the arbitrator finished her questions, the representative of Mr Xoagub was given opportunity to cross-examine Mr Frank.

[27] The aforementioned are just a few examples of the arbitrator's conduct of the proceedings and will suffice.

Applicable legal principles

[28] In the matter of *Atlantic Chicken Company (Pty) Ltd v Mwandingi*¹⁴ Damaseb AJA discussed the role of an arbitrator as follows:

'[33] Given that the law reposes so much authority in an arbitrator as the trier of fact, that imposes a special duty on the arbitrator to allow the ventilation by the parties of all the material and relevant facts. Conduct by an arbitrator which frustrates a party in ventilating all material and relevant evidence, especially where the party bears the risk of non-persuasion, will amount to a gross irregularity, unless it is patently obvious that the irregularity did not have a material effect on the outcome of the proceedings.

*[34] The proper approach to be taken when the conduct of an arbitrator is impugned on the basis that it constitutes 'a gross irregularity', is that set out by Muller J in *Roads Contractor Company v Nambahu and Others*¹⁵. In that case, the following conduct by the arbitrator was found to constitute a gross irregularity within the meaning of ss 89(4) and 98(5)(a)(i) and (ii) of the Act:*

- '(a) exhibiting pre-conceived ideas and pre-judging issues;*
- (b) incessantly intervening while witnesses testified and asking questions which went beyond seeking identifications: As the learned judge observed, the arbitrator became 'the most active questioner'.*

*[35] The arbitrator's conduct with which the court was concerned in the *Roads Contractor Company* case is on all fours with the conduct of the arbitrator in the case before us. The ratio for the court's conclusion that the arbitrator in the *Roads Contractor* matter failed to be neutral and independent, was succinctly set out by Muller J in the following terms:*

'The arbitrator clearly revealed his attitude and anybody reading the record would have the perception that the arbitrator had pre-conceived ideas and pre-judged the

¹⁴ (SA 45-2012) [2014] NASC (15 July 2014)

¹⁵ 2011 (2) NR 707 (LC).

issue. . . . Furthermore, the whole procedure and the way that the hearing was conducted, made it impossible for any witness to testify, because the arbitrator constantly and nearly after each and every sentence in the evidence of a witness, intervened and asked questions which were not only based on assistance or clarification. The arbitrator not only interfered in the evidence and cross-examination of witnesses, but he seemed the most active questioner.¹⁶

[36] *The learned judge then goes on to give very useful guidelines to arbitrators in para 31 of the judgment. In particular, he states:*

'The arbitrator should always remain independent and impartial and he/she cannot allow that any party gain the perception that he/she is not a neutral and impartial adjudicator. In this regard the arbitrator:

- (a) *does not descend into the arena;*
- (b) *does not cross-examine any witness;*
- (c) *only ask questions for clarification or to provide guidance;*
- (d) *does not interrupt or stop cross-examination, unless it is clear that the questions being asked in cross-examination are repetitive, have already been answered, or do not have any relevance;*
- (e) *never give any indication how he or she feels about the evidence or give any indication how he or she may decide¹⁷*

[29] In applying the legal principles as set out in the *Road Contractor Company* case to the facts *in casu*, it is clear that the arbitrator did not follow any of the guidelines as set out by the learned Judge and the manner in which she conducted the proceeding gave rise not only to irregularities but gross irregularities. The arbitrator used her right to clarify issues as a ticket to go off on a frolic of her own. To ask some questions in clarification is acceptable but the arbitrator was almost the sole cross-examiner in this matter. Her conduct was to the point where the role of the representatives of the applicant and the first respondent became obsolete.

¹⁶ Ibid at 711G-I.

¹⁷ Ibid at 724H-J and 725A.

[30] This Court accepts that it is recognised that the manner in which labour proceedings should be conducted may rest in the hands of the presiding officer or the arbitrator, and that the proceedings should be more flexible than that in a Court of law, also in regard to the rules of evidence.¹⁸ However, the arbitration proceedings were riddled with procedural irregularities, for example, letting two witnesses under oath cross-examine one another. This is unheard of, that the witness who is under oath would be allowed to take on the role of the witness and the leading representative. At some stages there appeared to be a free for all discussion between witnesses, representatives and the arbitrator.

[31] It follows for all the reasons set out above and based on the authorities referred herein I have come to the conclusion that the arbitrator's conducts complained of by the applicant constituted gross irregularity within the meaning of the Act. The proceedings stand to be set aside.

Issue of Cost

[32] The prayers to cost in the notice of motion is set out in paragraph 3 and 4 thereof. In summary the applicant prayed for an order directing and ordering the second defendant (the arbitrator) to pay the cost of this application, such cost to include the cost of one instructing and one instructed counsel¹⁹ and in the event that this application is opposed by any party, directing and ordering that party that opposes the application to pay the cost of the application.

[33] Adv. Jones argued that the opposition to the review was frivolous and vexatious as the irregularities in the arbitration proceedings were glaring. Although the notice of intention to oppose the review was filed on behalf the second respondent together with that of the first respondent no opposing affidavit was filed in that regard and the second

¹⁸ Roads Contractor Company v Nambahu and Others 2011 (2) NR p713 par [16]

¹⁹ Paragraph 3 of the prayer to Notice of Motion for Review.

respondent thus did not oppose the relief claimed.

[34] In terms of Section 118 of the Act²⁰, a Court is precluded from making a cost order against a party unless that party has acted in a frivolous and vexatious manner by instituting, proceeding with or defending those proceedings.

[35] Given these pre-conditions, it would not be competent for the Court to make any costs order against the second respondent if she did not defend these proceedings.

[36] Adv. Jones argued under those circumstances the issue of cost should fall back on the first respondent.

[37] I can do no better than to concur with the findings of the learned Judge in the matter of *National Housing Enterprise vs. Beukes and Others*²¹ on the issue of costs:

[21] It seems to me that the intention in enacting s20²² was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'. (My underlining).

²⁰ No. 11 of 2007.

²¹ 2009(1) NR 82 (LC) at par [21]

²² With reference to the repealed Labour Act, 6 of 1992: 'The Labour Court or any district labour court shall not make any order as to any costs incurred by any party in relation to any proceedings instituted in the Labour Court or any such district labour court, except against a party which in the opinion of the Labour Court or district labour court has, in instituting, opposing or continuing any such proceedings, acted frivolously or vexatiously.'

[38] This Court therefore declines to make an order of costs in respect of the first respondent.

[39] In the result I order as follows:

1. The application for review succeeds;
2. The award in arbitration No CRSW 136/2014 is set aside;
3. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to conduct the arbitration *de novo* and to deal with the matter according to law.
4. No order as to costs is made.
5. The appeal is removed from the roll.

J.S. Prinsloo AJ

APPEARANCES:

FOR APPLICANT/ APPELLANT: Advocate J.P Jones

INSTRUCTED BY: Köpplinger Boltman, Windhoek

FOR RESPONDENT:

Ms S Nambinga

OF:

Angula Co. Inc, Windhoek