



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2017/00009

In the matter between:

EVELINE GERMANUS

APPELLANT

and

DUNDEE PRECIOUS METALS TSUMEB

FIRST RESPONDENT

THE LABOUR COMMISSIONER

SECOND RESPONDENT

ALEXINA MAZINZA MATENGU, NO

THIRD RESPONDENT

Neutral citation: *Germanus v Dundee Precious Metals Tsumeb* (HC-MD-LAB-APP-AAA-2017/00009) [2018] NALCMD 28 (23 October 2018)

Coram: PARKER AJ

Heard: 5 October 2018

Delivered: 23 October 2018

Flynote: Labour law – Arbitrator’s award – Appeal against – Appeal under Labour Act 11 of 2017, s 89 is an appeal in the ordinary sense entailing rehearing but limited to evidence or information on which the decision under appeal was given

and in which the only determination is whether the decision was right or wrong – The notice of appeal must contain grounds within the meaning of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, rule 23 – They must not be conclusions drawn by the drafter of the notice of appeal – Such grounds must apprise the respondents as interested parties as fully as possible what is in issue – The Labour Court will not interfere with the arbitration tribunal's findings where no irregularity or misdirection is proved or apparent on the record – Where the arbitrator has exercised discretion on judicial grounds and for sound reasons without bias or caprice or without applying wrong principles the Labour Court will not interfere with the arbitrator's decision and substitute its decision for the arbitrator's – It is not within the power of the arbitrator or the court to prescribe to employers the composition of their internal disciplinary hearing bodies – In the absence of disqualifying bias in relation to a charged employee the court or arbitrator cannot interfere – Court found that appellant has not established why the sanction of dismissal is not an appropriate sanction and why the arbitrator's decision in upholding the sanction of dismissal was wrong – Not having any good reason to interfere court confirmed the sanction of dismissal.

Summary: Labour law – Arbitrator's award – Appeal against – Appeal under Labour Act 11 of 2017, s 89 is an appeal in the ordinary sense entailing rehearing but limited to evidence or information on which the decision under appeal was given and in which the only determination is whether the decision was right or wrong – The notice of appeal must contain grounds within the meaning of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, rule 23 – They must not be conclusions drawn by the drafter of the notice of appeal – Such grounds must apprise the respondents as interested parties as fully as possible what is in issue – Appellant in the notice of appeal filed 21 grounds of appeal – Court found 11 of the supposed grounds to be no grounds within the meaning of rule 23 of the Conciliation and Arbitration Rules and rejected them – As respects the remaining 10 grounds court found that appellant failed to establish that arbitrator committed misdirection or irregularity or that the decision of the arbitrator on matters referred to in those 10 grounds was perverse and wrong – Consequently court rejected the 10 grounds as having no merit – Accordingly court dismissed the appeal.

ORDER

1. The appeal by appellant is dismissed.
 2. There is no order as to costs.
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JUDGMENT

PARKER AJ:

[1] Before us is an appeal by the appellant from the whole award of the arbitrator (third respondent), being award under Case No. NRTS 37:17, dated 28 August 2017. Ms Nambinga represents the appellant. First respondent opposes the appeal, and it is represented by Mr Dicks. I am grateful to both counsel for their written submissions and their oral submissions.

[2] First respondent employed appellant in the position of Metallurgical Accountant from 7 March 2012 to 28 September 2016 when first respondent dismissed her after an internal first-instance disciplinary hearing body had found her guilty of misconduct on two of the three charges and recommended a dismissal. Appellant's internal appeal hearing body confirmed both the finding of guilt and the sanction. Appellant was charged as follows:

- (a) charge 1 – conflict of interest;
- (b) charge 2 – breach of contract of employment; and
- (c) charge 3 – non-compliance with Company Policy (Corporate Information System Security Policies and Email Policy).

[3] An internal appeal disciplinary hearing body rejected appellant's appeal and confirmed the finding of guilt and the sentence of dismissal recommended by the first-instance disciplinary hearing body. Appellant lodged with the Labour Commissioner a dispute of unfair dismissal with first respondent's employer. In the end, the arbitrator (third respondent) concluded that appellant's dismissal was procedurally and substantively fair and accordingly, dismissed appellant's dispute. It is from the entire award of the arbitrator that appellant now appeals.

[4] Appellant relies on the grounds of appeal put forth in her further amended notice of appeal. Before considering those grounds one by one, I set out, hereunder; some principles that are relevant in these proceedings and that should inform the manner in which I approach consideration of the appeal:

- (a) 'The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall...

'The notice also serves to inform the respondent of the case it is required to meet Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (*S v Kakololo* 2004 NR 7 (HC), per Maritz J).'

- (b) The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal being an inferior tribunal. The Labour Court as an appeal court will not interfere with the arbitrator's findings of credibility and factual findings where no irregularity or misdirection is proved or apparent on the record. (See *S v Slinger* 1994 NR 9 (HC).)
- (c) It is trite, that where there is no misdirection on fact by the arbitrator, the presumption is that his or her conclusion is correct and that the Labour Court will only reverse a conclusion on fact if convinced that it is wrong. If the appellate court is merely in doubt as to the correctness of the conclusion, it must uphold the trier of fact. (See *Nathing v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014).)

- (d) Principles justifying interference by an appellate court with the exercise of an original jurisdiction are firmly entrenched. If the discretion has been exercised by the arbitrator on judicial grounds and for sound reasons, that is, without bias or caprice or the application of a wrong principle, the Labour Court will be very slow to interfere and substitute its own decision (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-1.) It follows that in an appeal the onus is on the appellant to satisfy the Labour Court that the decision of the arbitration tribunal is wrong and that that decision ought to have gone the other way (*Powell v Stretham Manor Nursing Home* [1935] AC 234 (HL) at 555). See *Edgars Stores (Namibia) Ltd v Laurika Olivier and Others* (LCA 67/2009) [2010] NAHCMD 39 (18 June 2010) where the Labour Court applied *Paweni and Another* and *Powell*.
- (e) Respondent bears no onus of proving that the decision of the arbitrator is right. To succeed, the appellant must satisfy the court that the decision of the arbitrator is wrong. See *Powell v Stretham Manor Nursing Home*. If the appellant fails to discharge this critical burden, he or she must fail.

[5] I now proceed to consider the grounds of appeal. They are 21 in number, that is, 3.1 – 3.17 plus 4.1 to 4.4. I observe in parentheses that in my experience this is the largest number of grounds I have seen in any labour appeal.

Ground 3.1, 3.9 (second part), 3.10, 3.13, 3.15, 3.16, 3.17, 4.1, 4.2, 4.3 and 4.4

[6] All these so-called ‘grounds’ stand in the same boat. They are not grounds in terms of rule 23 of Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (‘Conciliation and Arbitration Rules’): they are conclusions drawn by the drafter of the notice of appeal. See *S v Gey van Pittius and Another* 1990 NR 35 (HC). Accordingly, I reject them.

Ground 3.2

[7] This supposed ground is with respect neither clear nor precise. Appellant does not inform the respondents what case they are required to meet. The court is at a loss as to the parameters within which it has to decide the case as respects this ground (see *S v Kakololo*). Appellant does not apprise the respondents, as interested parties, as fully as possible of what is in issue (see *S v Gey van Pittius*). It is not a ground of appeal. One could not expect the arbitrator –

‘to consider ... what constituted a ground for conflict of interest between the parties, what was contemplated to mitigate against the aforestated conflict of interest, what appropriate processes were envisaged to address and manage(d) conflict of interest, and what appropriate sanctions would follow if appellant acted in conflict in his or her employment relationship with the first respondent. The arbitrator completely failed to apply herself to these pertinent crucial considerations in arriving at a proper decision in law on the facts presented, and in doing so, came to a completely wrong decision in law. Appellant does not tell the court in what manner the arbitrator was expected – in doing justice to parties – to apply herself to the so-called ‘pertinent crucial considerations’.

[8] To the greatest deference to the appellant, she does not present any ground of appeal, assuming the statements were clear. A charge of conflict of interest at the workplace is not a conflict between the employer and the employee, as appellant appears to aver.

[9] There is nothing in this supposed ground for the court to consider. It is, with respect, simply meaningless and without substance. Indeed, it is never the burden of the court to search in the nooks and crannies of Form LC41 to find appellant’s grounds of appeal. It is the burden of appellant to set out clearly, concisely and fully the grounds in Form LC41 as the rule requires. ‘The purpose of grounds of appeal’, stated Strydom AJP, ‘is to apprise all interested parties as fully as possible what is in issue and to bind the parties to those issues’ (*S v Gey van Pittius* at 36). It follows that ground 3.2 must be rejected; and, it is rejected.

Ground 3.3

[10] This ground concerns allegations, articulated in Ms Nambinga's submission, that the chairperson of the first-instance disciplinary hearing body solicited crucial and material information outside the disciplinary hearing. After he postponed the matter on 23 September 2016, Ms Nambinga submits, the chairperson solicited information from Mr Sam January, Manager: Human Resources, Health, and Safety of first respondent, to establish whether appellant had in fact sought to address her position of conflict with January. January was not called as a witness at the disciplinary hearing to testify concerning the information that he provided to the chairperson and on which the chairperson relied for his finding against the appellant. Furthermore, according to Ms Nambinga, the information was also not disclosed to the appellant at the time, and appellant was also not given an opportunity to test the correctness of the statements made against her by January at the hearing. Moreover, Ms Nambinga continued, there is the allegation that the chairperson solicited professional advice from the first respondent's DPM IT Manager after reaching his findings on the third charge, in order to obtain clarity both in respect of the breach of the DPM e-mail policy and the charge of breach of the DPM Corporate Information Systems. According to Ms Nambinga the information sought and on which the chairperson relied was not disclosed to the appellant, and the IT manager was not called as a witness at the disciplinary hearing to testify concerning the information that he or she had provided to the chairperson. Appellant's counsel submitted further, appellant was also not given an opportunity to test the correctness of the statements made by the IT Manager.

[11] There is more. Ms Nambinga submitted further that after the disciplinary hearing was conducted (but before the chairperson made his decision), the chairperson of the disciplinary hearing sought to solicit assistance from first respondent's IT Manager's office in Toronto, Canada; as it appears, first respondent is a company of Canadian origins. The chairperson required the information to assist him with the correct interpretation of the policy on conflict of interest. The reason was that the chairperson was unsure whether he had interpreted the policy correctly. Ms Nambinga submits, no employees from the Toronto office were called as witnesses at the disciplinary hearing to testify concerning the information they might have

provided to the chairperson and on which the chairperson relied in finding against the appellant on the charge of conflict of interest. Furthermore, appellant was also not given an opportunity to test the correctness of the statements made by the Toronto office.

[12] I find that appellant did not place these allegations in evidence before the arbitrator; and so, they did not form part of the closing argument of appellant at the arbitration. One must not lose sight of the fact that an appeal under s 89 of the Labour Act 11 of 2007 is an appeal in the ordinary sense. It entails a rehearing on the merits but limited to evidence or information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong. (*Witvlei Meat (Pty) Ltd and Others v Disciplinary Body for Legal Practitioners and Others* 2013 (1) NR 245 (HC), para 23, per Smuts J) Accordingly, I cannot fault the arbitrator for not considering this issue. I, therefore, do not find that the arbitrator acted against the requirement of procedural fairness. Ground 3.3 is accordingly, rejected.

Ground 3.4, 3.5, 3.6, 3.7 and 3.14

[13] As respects these grounds, Ms Nambinga misses the point, as appellant did. It is not first respondent's case that appellant did not make a declaration about the existence of her business organization, being a close corporation ('CC'). The critical point that both appellant and her legal representative miss is the dichotomy between declaration of a business concern and failure to seek and obtain permission to carry out an employment with a business concern that does business with first respondent. In my view, the arbitrator summed up appellant's evidence properly. The evidence is clear that on appellant's own version, she did not inform her supervisor that she entered into a contract of employment with Somses Cleaning Services, a business entity which did business with appellant's employer (first respondent), much against the policy of the employer. On appellant's own version, appellant did not see any point in telling her supervisor when she had already declared her business to HR.

[14] As Mr Dicks submitted, it is one thing appellant declaring the existence of her CC, but it is quite another informing the employer of her simultaneous employment

with a contractor doing business with the employer and getting approval for that. The fact that appellant did not receive feedback from first respondent after declaration of her business 'does not mean the applicant (appellant) can go ahead and do business with the respondent's (first respondent's) client', the arbitrator concluded she is right in her conclusion.

[15] Therefore, I cannot fault the arbitrator's finding that appellant was aware of first respondent's company policies and that there was a possible conflict of interest in her doing business with her employer's client, and yet she went ahead, regardless. The arbitrator rightly rejected appellant's feeble argument that the remuneration she had received from Somses Cleaning Services did not go to her but to the CC.

[16] I do not find that the arbitrator misdirected herself on the law on the point under consideration. The evidence accounts for the conclusion the arbitrator reached on the issue. It is a decision that an arbitrator acting reasonably would not make, considering the facts placed before him or her. The arbitrator's decision was, therefore, not perverse. (See *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC), paras 42-49, *passim*.)

[17] Appellant avers that the arbitrator erred in law in finding that the appellant's position/responsibility in the Company presented the appellant with an opportunity for personal gain apart from the normal rewards of employment to the detriment of the company (first respondent) (ground 3.6). Ms Nambinga took up the refrain in her submission that it was not established that by entering into a contract of employment with an entity which also did business with first respondent and receiving remuneration for her services occasioned detriment to first respondent. I am surprised Ms Nambinga urged such submission. As Mr Dicks submitted, at common law, an employee has the fiduciary duty not to do that, which did not further the interests of his or her employer. An employee must not act in a manner that was detrimental to the interests of his or her employer. It is not furthering the interests of the employer – it is detrimental to the interests of the employer – for its employee to have simultaneous contract of employment with an entity external to the employer without the employer's permission.

[18] To bring the discussion home, it was in the interest of first respondent that its employees did not have business dealings with entities external to it, particularly, where such external entities have business dealings with first respondent. Somses Cleaning Services was one such entity. The arbitrator found that appellant received remuneration from her other employer, Somses Cleaning Services. The detriment occasioned to first respondent is inherent in appellant's breach of her fiduciary duty to her employer (first respondent) and her violation of first respondent's company policies and rules, of which, as the arbitrator found, appellant was aware.

[19] I accept Mr Dicks' submission that the arbitrator was right in rejecting appellant's contention that there was no conflict of interest in her rendering services to Somses Cleaning Services, and that she did not need to inform her supervisor of her services to an entity external to first respondent, because she had informed Human Resources (HR) department about the services. It follows inevitably that all these grounds are rejected. They have no merit.

Grounds 3.8, 3.11

[20] There is not one iota of merit in these grounds. On the record, the only reference to the use of email facilities was in para [4] of the award under the evidence of Mr Simasiku Kamwi and in the closing argument by appellant. There is nothing in the weighing of the evidence by the arbitrator that she took cognizance of appellant's private use of first respondent's email facilities. I find, accordingly, that it is not established that this played any role in the decision of arbitrator. I, therefore, reject these grounds as having no merit.

Ground 12

[21] This ground is in the further amended notice of appeal, but I did not hear Ms Nambinga pursue it in her oral and written submissions. In any case, it cannot be within the power of the court or, indeed, an arbitration tribunal, to prescribe to employers the composition of their internal disciplinary hearing bodies. In the absence of proved disqualifying bias in relation to a charged employee, the court or

tribunal cannot interfere. (*Reuter and Another v Namibia Breweries* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NALCMD 20 (8 August 2018) This ground has no merit, and I reject it.

Ground 3.9 (the first part)

[22] I have already rejected the second part of this ground on the basis that it is not a ground within the meaning of the Conciliation and Arbitration Rules. See para 6, above. As respects the first part, I find that the ground is not well taken. Appellant has not established in what manner the evidence of Mr Simasiku Kamwi qualifies as hearsay evidence and why the arbitrator was wrong in admitting it. This ground was also not ventilated by Ms Nambinga in her submissions. In any case, the power of the arbitrator 'to deal with the substantial merits of the dispute with minimum of legal formalities' in terms of s 86(7)(b) of the Labour Act 11 of 2007, includes the power to deal with the substantial merits of the dispute without being bound by the strict rules of law of evidence. On that point, I accept Mr Dicks's submission. It follows that ground 3.9 is rejected. It is not a good ground.

Ground 3.5, 3.14

[23] Appellant did not set out clearly and fully any separate ground dealing specifically with the sanction of dismissal that the arbitrator ordered in her award. The issue of the sanction of dismissal is conflated with these two grounds, which also deal with the issue of 'conviction'. Thus, appellant does not deal specifically with the question as to why the sanction of dismissal is not an appropriate sanction, albeit the arbitrator considered the issue of appropriate sanction and why in her view the internal disciplinary hearing bodies' sanction of dismissal was appropriate. I find that the arbitrator exercised her discretion on judicial grounds and for sound reasons, which, as I have said, she properly articulated, that is, without bias or caprice or the application of a wrong principle. (See *Reuter*, para 7). As I have said previously, appellant has not satisfied the court that the decision of the arbitrator in upholding the sanction of dismissal was wrong and that that decision ought to have gone the

other way (*Reuter*, para 7). That being the case, I have no good reason to interfere with the decision of the arbitrator on the sanction imposed.

[24] Based on these reasons and having rejected all the grounds of appeal as either being no grounds of appeal or as having no merit, and having found no reason to fault the arbitrator's decision to uphold the sanction of dismissal imposed by the internal disciplinary hearing bodies of first respondent, the appeal by appellant fails; whereupon, I order as follows:

1. The appeal by appellant is dismissed.
2. There is no order as to costs.

C Parker
Acting Judge

APPEARANCES:

APPELLANT: S NAMBINGA
Of AngulaCo. Inc., Windhoek

FIRST RESPONDENT: G DICKS
Instructed by Köpplinger Boltman Legal Practitioners,
Windhoek