

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 16 & 19 / 2017

In the matter between:

DR. KUIRI F. TJIPANGANDJARA

APPELLANT

and

**NAMIBIA WATER CORPORATION LTD
KYLLIKI SIHLAHLA, N.O.
THE LABOUR COMMISSIONER**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

and

NAMWATER CORPORATION LTD

APPELLANT

and

DR. KUIRI F. TJIPANGANDJARA

RESPONDENT

*Neutral citation: Tjipangandjara v Namibia Water Corporation Limited & Others
(LCA 16 & 19/2017) [2018] NAHCMD 30 (9 November 2018)*

Coram: Masuku, J
Heard: 11 May 2018
Delivered: 9 November 2018

Flynote: Labour law – Labour Court – Arbitration Award not appropriate – Appellant brought an appeal against certain parts of the arbitration award – A party to a dispute may appeal to the Labour Court against an arbitrator’s award made in terms of section 86 on any question of law. The powers that the arbitrator has to grant an award emanates from Section 89(15) of the Labour Act, 2007. Labour Court – Jurisdiction – Appellant brought a cross appeal pursuant to section 89(1)(a) of the Labour Act, 2007 read with Rule 17 (1)(c) against the whole of the decision or order of the Arbitrator – Arbitrator has no jurisdiction to order the appellant to end the lockout of the respondent. **Jurisdiction of arbitrator – power to grant an award emanates from Section 86 (15) of the Labour Act, 2007. Condonation – Non-compliance with the rules of this Honourable Court.**

Summary: Labour Law – Appeal against arbitrator award – Arbitrator erred in law in not granting the declarations sought by the applicant. Application to appeal and set aside an arbitrator’s decision not to grant the applicants the relief sought, which is, to declare that the industrial action of lockout deployed by the respondent against the applicant was unlawful, null and void. Failure by arbitrator to declare that the industrial action of lockout is not available to the respondent when the lockout is intended to be deployed against an individual employee – Failure to declare that, the provisions of section 34 of the Labour Act, 2007 were applicable and the first respondent was bound to comply with those provisions. Failure to grant an award for costs. A cross appeal was filed by the appellant.

ORDER

1. The appellant’s application for condonation is granted as prayed.
2. The appellant’s appeal is upheld.
3. There is no order as to costs.

I make the following order on the cross-appeal:

1. The cross-appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

MASUKU J:

Introduction and background:

[1] In this matter there is an appeal and a cross-appeal. The appeal by the appellant is against certain parts of the arbitration award including orders issued by the Arbitrator, the 2nd respondent herein, delivered on the 8 March 2017. The cross-appeal is lodged by NAMWATER, against the whole award of the Arbitrator.

[2] The parties to these proceedings are Dr. Kuiri Tjipangandjara, the appellant in his capacity as the employee of the first respondent. The first respondent is Namibia Water Corporation Ltd, the appellant's employer. The second respondent is Ms. Kylliki Sihlahla *N.O.*, cited in her nominal capacity as the arbitrator, employed by the Labour Commissioner. The third respondent is the Labour Commissioner. It is the decision of the arbitrator that is sought to be appealed and set aside. For this purpose, I shall refer to the parties as appellant and respondent in the appeal and in the cross-appeal as well. I now commence with the appeal.

[3] I find it appropriate to first mention that three matters involving both parties were referred to the Labour Commissioner regarding a restructuring exercise effected by the respondent. The first matter, under case CRWK 85-15, was referred by the appellant and the disputes were about the unilateral change of terms and conditions; and unfair labour practice allegedly committed by the respondent. This matter was dealt with by arbitrator, Mr. Otto Nangombe. In this case, the parties reached a voluntary agreement entered into on 25 February 2015 and a certificate of resolved dispute was accordingly issued.

[4] The second matter, under case CRWK 86-15, which was referred by the respondent, was a dispute of interest. This matter was dealt with by the arbitrator Mr. Sackey Aipinge. The matter could not be settled at conciliation and a certificate of unresolved dispute was thus issued. This dispute resulted in the first respondent locking out the appellant.

[5] The third matter is the instant one, CRWK 294-15. The appellant submits that it was the respondent's refusal to implement the settlement agreement and his conduct after the conclusion of this agreement that gave rise to the following disputes; refusal to bargain alternatively bargaining in bad faith; the refusal and/or failure to implement the terms of the settlement agreement; and non-compliance with or contravention of section 51(4) for the Act, alternatively, failure to refrain from effecting a unilateral alteration of the terms and condition of employment.

[6] The respondent opposed the appeal and the appellant opposed the cross-appeal, in terms of rule 17(16) of the Labour Court Rules. The respondent, however, argued that the appellant's appeal was not properly opposed as no notice to oppose or grounds of opposition were filed, nor was a condonation application delivered in terms of rule 17(6) of the Labour Court Rules and section 89(2). It is accordingly argued that there is no proper appeal before this court.

[7] The arbitrator, Ms. Sihlahla, in her award ordered the first respondent to implement the terms of the settlement agreement signed on 25 February 2015; and to end the lockout and allow the applicant to return to work so that proper consultations can commence without any delay; and both parties are ordered to engage in the process of consultations and to do so in good faith and in line with the voluntary settlement agreement. There is no order as to costs.

Brief factual background

[8] In 1998, the applicant applied for the position of General Manager: Operations as advertised by the first respondent in the local newspaper. The applicant was interviewed, and after an assessment he was offered the position which he accepted.

[9] In 2006, the applicant, after consultation with the first respondent, was transferred to the position of General Manager: Engineering and Scientific Services, a position he held up to 7 July 2014. On 7 July 2014, the respondent, implemented the revised structure and unilaterally abolished the applicant's position, by handing him an appointment letter to a new position of Chief: Water Supply – Central.¹

Issues for determination in the appeal

[10] The following issues arise for determination in this appeal:

(a) Whether the respondent acted or bargained in good faith with the appellant when the respondent locked out the applicant with the view to compel him to accept the new position;

(b) Whether in fact the respondent offered other alternatives to the appellant after the parties agreed that the respondent was to consult the appellant and give him other alternatives other than the offer for the new position;

(c) Whether the first respondent implemented the terms of the settlement agreement;

Grounds of Opposition

[11] The representative of the respondent, Ms. Mbudje, stated at the arbitration hearing that the onus of proof rested on the appellant to prove that the conduct of the respondent in so far as the lockout was unlawful for one person. In April 2015, the applicant lodged an urgent application with the Labour Court challenging the lawfulness of the lockout of one person.

[12] The Labour Court found that the matter lodged was not urgent and the court did not engage in the merits of the case. Ms. Mbudje further argued that, should the appellant wish to challenge the lawfulness of the lockout which still persists, the onus rests on him to lodge a civil claim. Then, the respondent opted to close its case

¹ Record Volume 1 page 109, para 15.

without presenting any evidence on merits and even on points in *limine* it raised. The arbitrator's award was therefore solely based on the evidence of the applicant.

Application for condonation

[13] The appellant has made an application for condonation in respect of his non-compliance with the rules of this Honourable Court in relation to the following defaults; his late filing of his notice to oppose the respondent's appeal, his late filing of this statement containing the grounds to oppose the respondent's appeal, his late filing of his heads of argument in both appeals, in the event that it is found that his appeal has lapsed, his late prosecution of appeal.

[14] In my view, the reasons for default furnished by the appellant of lack of funds is condoned by this court. I further submit that good cause has been shown in terms of rule 15 of the Labour Court Rules, and no evidence of wilful default on the part of the appellant and his reasons for the default are condoned. The appellant is a layperson in law and he could not on his own comply with the rules without the services of a legal practitioner.

Considering the grounds of appeal

[15] The appellant's first ground of appeal is that the arbitrator erred in law in not granting the declarator sought by him. The powers that the arbitrator has to grant an award emanate from s. 86 (15) of Labour Act, which provides that an arbitrator may make any appropriate arbitration award including;

- '(a) an interdict;
- (b) on order directing the performance of any act that will remedy a wrong;
- (c) a declaratory order;
- (d) an order of reinstatement of an employee;
- (e) an award of compensation; and
- (f) subject to subsection (16), an order of costs;'

[16] I pause here to state that it is common cause that the restructuring exercise took place within the respondent's company and as a result the appellant's position was abolished. The respondent's conduct to unilaterally change or later any term or condition of employment of the appellant is of a serious nature.

[17] In a similar matter that came before the Labour Court on appeal in *Shanjeka v Transnamib Holdings Ltd*² the court found that the respondent did unilaterally change the terms and conditions of employment of the respondent. It follows that respondent contravened s. 50(1)(e) of the Labour Act and consequently made itself guilty of unfair labour practice. S. 50(1) states that: *It is unfair labour practice for an employer or an employers' organisation-*

(e) to unilaterally alter any term or condition of employment.

[18] I am of the view that once a binding employment agreement is in place between an employer and employee, the law prohibits the employer to unilaterally change any terms or conditions that both parties have agreed on. In this instance, to abolish by reason of restructuring, the position of the appellant, without applying the provisions of s 34 of the Act and bargain or negotiate in good faith, with the appellant is a violation.

[19] The new position offered to the appellant as a result of the restructuring in a letter dated 7 July 2014, did not meet the appellant's approval. The appellant contested by writing a letter to the CEO of the respondent which was copied to the chairperson of the first respondent's Board, as well as the Human Resources Committee. The CEO's response was a mere one liner that; 'I would like reiterate here that the decision contained in my letter to you of 7 July 2014 remains.'

[20] Restructuring normally takes place when an organisation decides to review and reorganise its operations in order to optimize its operations. When this takes place, the Act, under s. 34 makes provision for guidelines to be followed in order to ensure that the employees affected as a result of the restructuring are treated fairly.

² LCA 89/2009 delivered on 15 June 2012.

[21] S. 34 of the Act provides as follows:

'If the reason for an intended dismissal is the reduction of the workforce arising from the re-organising or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, an employer must:

(a) at least four weeks before the intended dismissals are to take place, inform the Labour Commissioner and any trade union which the employer has recognised as the exclusive bargaining agent in respect of the employees of –

- (i) the intended dismissals;
- (ii) the reasons for the reduction in the workforce;
- (iii) the number of categories of employees affected; and
- (iv) the date of the dismissals;

(b) if there is no trade union recognised as the exclusive bargaining agent in respect of the employees, give the information contemplated, give the information contemplated in paragraph (a) to the workplace representative elected in terms of section 67 and the employees at least four weeks before the intended dismissals;

(c) subject to subsection (3) disclose all relevant information necessary for the trade union or workplace representative to engage effectively in the negotiations over the intended dismissals;

(d) negotiate in good faith with the trade union or workplace union representative on;

- (i) alternatives to dismissals;
- (ii) the criteria for selecting the employees for dismissal;
- (iii) how to minimise the dismissals;
- (iv) the conditions on which the dismissals are to take place; and
- (v) how to avert the adverse effects to the dismissals.'

[22] In *Matuzee v Sihlahla*³ the court held that dismissal for operational requirements must be substantively and procedurally fair. The court further found that the second respondent failed to furnish the appellant with the necessary documentary information to enable him to understand the business case upon which redundancy was premised and hence the retrenchment, was procedurally unfair and rejected the respondent's claim that the documents requested by the appellant were privileged. The second respondent's failure to consult and engage the appellant in order to meaningfully discuss alternatives to dismissal, constituted procedural unfairness.

[23] In *Namibia Wildlife* the Supreme Court endorsed a decision by the Arbitrator who found that s. 34 of the Labour Court obliged an employer acting in terms of that section to *play open cards*. *Namibia Wildlife* withheld the redeployment information until the two employees accepted to be redeployed as he found that to be inconsistent with the provisions of s. 34. I endorse that, this finding be applied in the present matter and I find that all other issues are as a result disposed of.

Cross-appeal

[24] I now turn to the cross-appeal by the respondent. On 3 February 2015, the respondent referred a dispute of interest regarding the implementation of the revised structure. On 9 March 2015, a meeting was called by the first respondent with the respondent to give effect to the settlement agreement. The appellant demanded that the dispute of interest lodged to his knowledge be withdrawn and that in the absence of compliance with his demand, no further discussion would take place. I will return to the dispute of interest shortly.

Issues for determination

[25] The respondent's central contentions in this cross-appeal are that the arbitrator did not have jurisdiction to end its lockout of the respondent as all statutory requirements for a valid lockout had been complied with and only the Labour Court

³ (LCA 2/2016) [2018] NALCMD 3 (15 March 2018)

could set aside the statutory process or any party thereof and then direct the appellant to end its lockout.

[26] The other issue is whether the arbitrator could, as a matter of law, refuse to deal with the points in *limine* raised before her by the appellant.

[27] The last issue is whether no reasonable arbitrator could have found that the respondent had acted in bad faith and failed to implement the terms of the parties' settlement agreement.

The law and application of facts

Jurisdiction to end lockout

[28] The first question of law which the appellant wants this court to resolve is as follows: '*Whether the arbitrator did not have jurisdiction to end its lockout of the respondent;*' The powers that the arbitrator has to grant an award emanate from s. 86 (15) of Labour Act, which provides that an arbitrator may make any appropriate arbitration award including;

- '(a) an interdict;
- (b) an order directing the performance of any act that will remedy a wrong;
- (c) a declaratory order;
- (d) an order of reinstatement of an employee;
- (e) an award of compensation; and
- (f) subject to subsection (16), an order of costs;'

[29] The representative of the appellant, Mr. Khama stated that in terms of section 86(15)(b) of the Act, the Arbitrator is conferred with the power to direct the *performance of any act that will remedy any wrong*. The Arbitrator directed to end a lock-out that will remedy a wrong, in that, when the settlement agreement of 25 February 2015 was signed, both parties intended to put effect to the terms of the agreement. I agree such powers is bestowed onto the arbitrator to execute and has done so suitably.

[30] Mr. Khama further argued that the respondent is not entitled to deploy the relief of a lock-out against the appellant as the appellant is an individual employee. The legislature did not intend to confer the relief of lock-out on the employer if the lock-out is against an individual employee. The Industrial Court in South Africa held as follows on this point. *Fischer v Clinic Holdings Ltd*,⁴ the court held that; '*For these reasons, I have concluded that a lock-out cannot be imposed against an individual employee.*' This principle was similarly adopted in a number of other cases.⁵

[31] I agree with the appellant's that a lock-out cannot be deployed by an employer against one employee. In terms of section 1 of the Act, lock-out means a total or partial refusal by one or more employers to allow their employees to work, if the refusal is to compel those employees or employees of any other employer to accept, modify or abandon any demand that may form the subject matter of a dispute of interest. This definition by implication excludes a single employee.

Refusal to deal with points in *limine*

[32] On this issue whether the arbitrator could, as a matter of law, refuse to deal with the points in *limine* raised before her by the respondent, the arbitrator in her award stated that she only had evidence of the appellant before her since the respondent opted to close its case without presenting any evidence on merits. The arbitrator's reason for declining to address the points of law as the respondent did not lead evidence on the points and are unsupported in fact and law because the points arise from common cause facts and were expressly raised in arguments at the start and repeated at the end of the arbitration proceedings. WAS SHE CORRECT IN THIS POSITION?

[33] Section 89(1) (a) of the Act restricts a respondent's right to appeal to this court against an arbitrator's award made in terms of section 86, to questions of *law only*. Section 89(1)(a) of the Act, 2007 in material part provides as follows:

⁴ (1994) 15 ILJ 842 at page 845.

⁵ *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* (1997) 10 BLLR 1364; *Adonis v Modtek Security Systems* (1998) 10 BLLR 1008 (LC).

'89 (1) A party to a dispute may appeal to the Labour Court against an Arbitrator's award in terms of Section 86-

(a) on any question of law alone; or

(b) in the case of award in a dispute initially referred to the Labour Commissioner in terms of Section 7 (1) (a) on question of fact, law or mixed fact and law'.

[34] The provisions of s 89 of the Act were considered by this Court in the unreported judgment of *Shoprite Namibia (Pty) Ltd Appellant v Faustino Moises Paulo*: Case No: LCA 02/2010 where Parker, J said:

'The predicative adjective 'alone' qualifying 'law' means 'without others present'. (*Concise Oxford Dictionary*, 10th edn) Accordingly, the interpretation and application of s 89(1)(a) lead indubitably to the conclusion that this 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 s. 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 of 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] 1 W.L.R. 1044 at 1046 *per* Brandon J).'

[35] It thus follows that in so far as the arbitrator's award purports in relation to the points in *limine* raised by the respondent, there was neither oral nor documentary evidence adduced before her and such points were only mentioned in the opening statements as well as the closing arguments.⁶ The respondent could have presented evidence on the points in *limine* and the appellant would have been also afforded an opportunity to rebut such evidence if it so wished and she could have asked questions for clarity purposes. However, the respondent since abandoned its request by deciding to close its case without leading any evidence and in this light, the arbitrator regarded the issue as purely academic.

⁶ Arbitrator's award para 136 to 137.

[36] I am of the view that the arbitrator did not err, as a matter of law, refuse to deal with the points in *limine* but merely acted reasonably to treat this as academic in the sense that whether or not in any event the position was going to be abolished because of restructuring it was proper for the respondent to attend to the appellant's concerns and clarify what it meant in order for the appellant to make an informed decision and to air his concerns before the alteration are affected.

Respondent acted in bad faith and failed to implement the terms of the settlement agreement

[37] The forms of unfair labour practices which may be committed by an employer are limited in s. 50 (1) of the Labour Act. The relevant provision provides as follows;

'(1) Any employer who intends to terminate any or all of the contracts of employment of his or her employees on account of the reorganization or transfer of the business carried on by such employer or to discontinue or reduce such business for economic or technological reasons, such employer shall -

(a) . . .

(b) afford such trade union, workplace union representative or the employees concerned an opportunity to negotiate on behalf of such employees the conditions on which, and the circumstances under which such terminations ought to take place with a view to minimizing or averting any adverse effects on such employees.'

[38] The purpose of s. 50 is to bring the employer and the employees' representative or employees to the negotiating table and the requirement contained in ss. (1)(b) that the employer shall afford an opportunity to negotiate must mean that the employer is under an obligation to enter into genuine negotiations and that he is obliged to negotiate in good faith.⁷ (Underlined for emphasis).

[39] In the present matter, in order to appreciate whether the arbitrator erred or not in her findings, the arbitrator reasoned that when the settlement agreement of 25 February 2015 was signed, both parties were already aware of the existence of the

⁷ *African Granite CO (Pty) Ltd v Mineworkers Union of Namibia and Others* 1993 NR 91 (LC) at page 98 thereof.

dispute of interest lodged by the respondent and they signed with the intent to put effect to the terms of the agreement. The appellant's condition to the settlement agreement in order to negotiate with the respondent was that the respondent had to withdraw the case against the appellant. This evidence remains unchallenged by the respondent.

[40] The arbitrator's further view is that the settlement agreement should have automatically nullified that dispute of interest, since the agreement was that the decision of the CEO will be suspended until the finalisation of the consultations and also owing to the fact that the relief sought by the respondent in that dispute centered around the implementation of the CEO's decision which was already suspended by the settlement agreement.

[41] I agree with this view that the respondent could have then only referred a fresh dispute of interest after the agreed consultations had failed and the date on which the dispute had arisen would have been the date when such consultation failed. That of course, is only if the intention of the respondent was to act in good faith.

[42] As to the action of the first respondent to pursue a dispute of interest before the terms of the settlement agreement were implemented i.e. where it sought the appellant to accept the position of Chief: Water Supply – Central, it was unfair as that order would be against the spirit of the voluntary settlement agreement. There was a settlement agreement in place, which was signed by the parties on the 25 February 2015 and parties were aware of this fact. Furthermore, the parties were aware of the respondent's dispute of interest but nonetheless continued to sign the settlement agreement. The arbitrator did not mix her words when she questioned; '*why the respondent would agree to suspend the implementation of its decision in the settlement agreement but yet proceed with the dispute of interest before exhausting the elements of the settlement agreement.*'⁸

[43] The arbitrator in her award stated further that when the respondent signed the settlement agreement he was *playing double standards* and had *ulterior motives* and

⁸ Arbitrator's Award para 121 to 123.

he merely signed the agreement so that the case of the appellant is closed whilst in actual fact it wanted to ambush him by way of pursuing its dispute of interest. In fact, the settlement agreement should have automatically nullified the dispute of interest since the agreement was that the decision of the CEO be suspended until the finalisation of the consultations. Also, owing to the fact that the relief sought by the respondent in that dispute centered around the settlement agreement.

[44] The arbitrator continues to state that the respondent's conduct to exert pressure on the applicant to accept the new position was unfair as that order would be against the spirit of the voluntary settlement agreement which was entered into and signed by both parties, on 25 February 2015, in which the parties had agreed that the implementation of the CEO's decision is suspended pending consultations.

[45] In my view, the respondent approached this court with '*dirty hands*' as it was not supposed to pursue that dispute before executing the terms of the settlement agreement. I find the legislative purpose behind the section is as clear as noon day. It seeks to ensure that employers negotiate the conditions on which, and the circumstances under which such terminations ought to take place with a view to minimising or averting any adverse effects on such employees.

[46] In *Seebach v Tauber & Corssen Trading (Pty) Ltd And Another*,⁹ it is emphasized that;

'The employer not only has a duty to negotiate, but he also has a duty to do so in good faith. Equally, an employee who avails himself of an opportunity to negotiate needs to do so in good faith. Of course, when an opportunity to negotiate is given but the employee opts not to avail himself of such opportunity that then spells the end of the matter.'

An important element of the obligation to bargain in good faith involves meeting, discussing and negotiating with an honest intention of reaching an agreement, if this is feasible. What is required is a demonstration of a genuine willingness to compromise, to shift ground, to make concessions; this is because willingness to do any of the above-mentioned things is an important feature of bargaining in good faith with a view to resolving the differences that exist between the parties.'

⁹ 2009 (1) NR 339 at paras 8 to 9

[47] The respondent's conduct serves as illustration of bad faith in bargaining. As regards to their argument based on the *onus* and unfair labour practice resting on the employee, who according to them has to prove, not only the existence of the practice, but also that it was unfair. In the present case, the employer merely informed the employee on the change of his new position and there was no room to negotiate despite various attempt by the employee to do so. I find that the arbitrator did not err in law in her findings.

[48] In the result, I make the following order on the appeal:

1. The appellant's application for condonation is granted as prayed.
2. The appellant's appeal is upheld.
3. There is no order as to costs.

[49] I make the following order on the cross-appeal:

1. The cross-appeal is dismissed.
2. There is no order as to costs.

T MASUKU
JUDGE