



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

**JUDGMENT**

Case no: HC-MD-LAB-APP-AAA-2018/00013

In the matter between:

**DREAMLAND INVESTMENT CC**

**APPELLANT**

and

**EDMUND FRITZ DICHTL**

**FIRST RESPONDENT**

**THE LABOUR COMMISSIONER**

**SECOND RESPONDENT**

**Neutral citation:** *Dreamland Investment CC v Dichtl* (HC-MD-LAB-APP-AAA-2018/00013) [2018] NALCMD 35 (12 December 2018)

**Coram:** ANGULA DJP

**Heard:** 13 July 2018

**Delivered:** 12 December 2018

**Flynote:** Labour Practice – Appeal against an arbitration award – Failure for a party to attend arbitration proceedings – Section 83(2)(b) of the Labour Act, 2007 and Rule 27 of the rules relating to the conduct of conciliation and arbitration (the rules) – Failure for a party to follow procedure to request for a postponement; Rule 29 of the rules – Respondent aggrieved that arbitrator failed to conciliate the dispute and proceeded with the proceedings in the respondent's absence.

**Summary:** The first respondent was employed as a branch manager by the appellant from September 2012 until 15 March 2017 when he was dismissed. The respondent then filed dispute with the Office of the Labour Commissioner alleging that he had been unfairly dismissed. The matter was set down for hearing on 21 November 2017. Shortly before the commencement of the proceedings a representative for the appellant telephoned the arbitrator requesting for a postponement of the proceedings for the reason that the parties were busy with settlement negotiations. The arbitrator rejected the pointing out the appellant had been aware of the date of the when the proceedings would commence but failed to follow the correct procedure to apply for a postponement. The arbitrator proceeded with the arbitration proceedings in the absence of the appellant. At the end of the hearing the arbitrator made an award in favour of the respondent.

The appellant unhappy with the arbitrator's award then filed this appeal. As a ground of appeal the appellant contended that the arbitrator erred in law when he failed to conciliate before proceeding to arbitration; that the arbitrator erred in concluding that the appellant had waived its right to attend his right to attend the proceedings; and that, that the arbitrator should have not allowed evidence of the settlement negotiations between the parties. The appeal was opposed by the respondent who also filed a cross-appeal.

*Court held:* The appellant was served with the notice and was fully aware of the date of hearing. Furthermore the appellant failed to give an explanation why no one from its office could attend the proceedings. The legal rules stipulate the procedure to be followed if a party wishes a postponements, which the respondent failed to follow. Thus arbitrator was correct in refusing postponement.

*Held further:* Conciliation is a two-way stream. This process requires that the parties to the dispute to be present, in the presence of each other and in the presence of the arbitrator to engage each other in an effort to resolve the dispute. With one party being absent, it is not legally possible nor practical for the arbitrator to have conducted a conciliation process in the absence of the appellant's representative.

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## ORDER

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1. The arbitration award dated 18 January 2018 is confirmed and the matter is referred back to the same arbitrator to consider whether the respondent is entitled to further compensation as claimed in the cross-appeal, in addition to the compensation already granted.
2. There is no order as to costs.
3. The matter is removed from the roll and considered finalized.

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## JUDGMENT

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ANGULA DJP:

Introduction:

[1] This appeal concerns the dismissal of first respondent, Mr Edmund Fritz Ditchl by the appellant, Dreamland Investment CC. The respondent was employed as a branch manager by the appellant from September 2012 until 15 March 2017 when he was dismissed. Thereafter, the respondent launched a dispute with the Office of the Labour Commissioner. The arbitrator found in favour of the respondent culminating in this present appeal. The second respondent, the arbitrator, did not oppose the appeal. Only the first respondent opposed the appeal. Accordingly, in this judgment, I will only refer the first respondent as 'the respondent'.

[2] It appears that during March 2017, the appellant called upon the respondent to attend a disciplinary hearing scheduled for 13 March 2017. The charges on the notice of a disciplinary hearing were as follows: failure to comply with a reasonable

and lawful request; gross insubordination, and failure to comply with the provisions contained in the contract of employment or policy of the company.

[3] On 13 March 2017, being the date on which the disciplinary hearing was due to take place, the respondent received a telephone call from the appellant's representative informing him that the hearing would not take place and that it has been moved to 16 March 2017. On 15 March 2017, the respondent received a letter from the appellant, informing him that his services as an independent contractor had been terminated. The reason for the termination was that the appellant's clients were unhappy with the respondent's services as they had been experiencing problems with his services.

[4] The respondent then wrote a letter to the appellant in which he, amongst other things pointed out that he was not an independent contractor for the reasons that: he had been employed since 2012, with his business card showing that he was an employee of the appellant; and that he received a monthly salary from the appellant.

[5] The appellant replied to the respondent's letter pointing out *inter alia* that he did not have an office at their premises nor was there an employment agreement, neither did the appellant deduct PAYE or social security from his salary. He was thus merely an independent contractor.

[6] The respondent felt aggrieved by the appellant's decision and therefore launched an unfair dismissal claim with the Office of the Labour Commissioner. The matter was set down for conciliation and arbitration for hearing on 21 November 2017.

#### Arbitration proceedings

[7] On 21 November 2017 the arbitration proceedings were presided over by a Mr Liwela Sasele as arbitrator. It appears from the record that on the day of the hearing at 10h00, the arbitrator started with the proceedings and informed the respondent who was present that the appellant had not appeared for the hearing,

although the matter was set down for 09h00 and the appellant was notified in accordance with their rules. The arbitrator went on to state that he had not called the appellant to ask, why they did not attend the hearing. The record further shows that ten minutes before 09h00, a certain Mr Lukas Sisamba called the arbitrator over the telephone and asked him to postpone the hearing. He informed the arbitrator that the legal representative for the appellant was busy with negotiations with the respondent. The arbitrator thereafter informed the respondent that he was not prepared to postpone the hearing because there is a procedure that should have been followed by the appellant if it wanted a postponement of the proceedings.

[8] Thereafter the arbitrator requested the respondent to put on record what negotiations were taking place between himself and the appellant. The respondent informed the arbitrator that earlier in the year before he was dismissed, he was informed by Mr Lukas Sisamba that they should go on holiday to Mauritius and after they return, the respondent would get a salary of N\$26 000.

[9] According to the respondent this suggestion was after the notice of termination. Furthermore, on the morning of the arbitration hearing Mr de Beer, the legal practitioner for the appellant, telephoned him at around 08h45, and informed him that they should settle the dispute without going through with the arbitration process.

[10] According to the respondent, he explained to Mr de Beer why he was calling and why he did not attend the proceedings. Furthermore, that he informed Mr de Beer that he was not interested in negotiations because that is something he and the appellant should have done earlier before the arbitration proceedings. Thereupon, Mr de Beer informed the respondent that he would speak to Mr Lukas Sisamba.

[11] The arbitrator proceeded with the arbitration hearings. The respondent testified that he was employed as a branch manager of the appellant at Walvis Bay branch as from 12 September 2013; that he was paid a basic salary of N\$21 500; that he was given a company vehicle to perform his duties however the vehicle was later taken away; and that he was provided with a cellphone allowance and paid a thirteenth cheque annually.

[12] The respondent further testified that he was claiming N\$200 000 which includes: interest, bonus, income tax, severance payment of 5 months and 6 to 7 months of loss of income.

[13] In conclusion, the respondent testified that he was unfairly dismissed because he had not received any reasons why his services were terminated.

[14] Thereafter and on 18 January 2018, the arbitrator delivered his award in favour of the respondent. He made the following order:

- '(a) the respondent must pay the applicant the sum of N\$17,862.91 (N\$992.38 x 18 days) as payment in lieu of accrued leave days;
- (b) the respondent must pay to the applicant the sum of N\$24,809.60 (N\$4 961.92 x 5 years as severance payment;
- (c) the respondent must pay the applicant the sum of N\$64,500.00 (N\$21,500.00) 8 months as compensation; and
- (d) the total amount of money the respondent must pay is: N\$107,172.51.'

[15] The appellant then noted an appeal against the arbitrator's award, and raised the following grounds of appeal:

- '1. The arbitrator erred in law by not first attempting to resolve the dispute through conciliation in terms of section 86(5) of the Labour Act, 2007 in that the arbitrator immediately continued with arbitration after arbitrator declined to grant postponement.
- 2. The arbitrator erred in law in that he concluded appellant waived its right to be heard and to be present during the arbitration proceedings. And then the arbitrator continued with arbitration without conducting conciliation. On the facts before the arbitrator no reasonable arbitrator could have come to a conclusion that appellant waived its rights, which is an error in law.

3. The arbitrator erred in law to conclude that he may continue with the arbitration process in the absence of the appellant.
4. The arbitrator requested first respondent to provide information pertaining to settlement discussions between a representative or an employee of appellant before the relationship was terminated and later before the arbitration proceedings commenced.'

[16] The appeal is opposed by the respondent who has simultaneously filed a cross-appeal. The cross-appeal was filed late, and there is a condonation application before court, which is unopposed. The respondent's reasons for his filing of his cross-appeal late have been fully and satisfactorily explained and it is not necessary to traverse them in this judgment. The court thus accepted the explanation by the respondent and the application for condonation is accordingly granted as prayed.

[17] The cross-appeal seeks an order that the arbitration award be amended in the following terms:

- '1. That the arbitrator was entitled to proceed with the arbitration hearing in the absence of the appellant, given the provisions of section 86(5) and 86(6) of the Labour Act, 2007 read with rule 27(2)(b) of the rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
2. That the respondent suffered losses as a consequence of his unfair dismissal, in addition to the amounts already awarded, and which amounts the appellant is ordered to pay, namely:
  - 2.1 the amount of N\$193,500.00; and
  - 2.2 the amount of N\$42,499.75.'

[18] I will proceed to consider the grounds of appeal.

#### Grounds of appeal

[19] As regards the first ground of appeal, namely that the arbitrator erred in law in conducting arbitration without first attempting to resolve the dispute through

conciliation in terms of section 86(5), Mr de Beer for the appellant, submitted in his heads of argument that the arbitrator should have first attempted to resolve the dispute through conciliation, before proceeding to arbitration, and only if conciliation was unsuccessful, could the arbitrator have proceeded to arbitration.

[20] Section 83(2)(b) provides that the conciliator of the dispute may determine the matter if the other party to the dispute fails to attend conciliation meeting. Rule 27 relating to the conduct of conciliation and arbitration provides for the consequences of failure of a party to attend conciliation or arbitration. It provides that if a party fails to attend a hearing, the arbitrator may postpone the hearing; proceed with the hearing in the absence of the other party; and or dismiss the matter. The rule further provides that the arbitrator must be satisfied that the party has been properly notified of the date, time and venue of the proceedings and should attempt to contact the absent party telephonically.

[21] In this matter, the record shows that the notice of the proceedings was hand delivered by the respondent to one Xuefung Haung. It was also sent by fax to the appellant's fax number as well as the fax number of appellant's legal representative at the appellant's office on 13 September 2017. There is no doubt that the appellant was aware of the date of the hearing.

[22] It appears further from the record that Mr Lukas Sisamba from the appellant's office, telephoned the arbitrator and asked him to postpone the proceedings because the legal representative for the appellant was busy with settlement negotiation with the respondent. According to the arbitrator he refused the request for the postponement because it was not done in terms of the rules. Rule 29 deals with the procedure for postponement of arbitration proceedings. It provides that arbitration proceedings may be postponed by agreement between the parties or on application and on notice to the other party by delivering an application to the other party to the dispute and filing a copy with the arbitrator before the date scheduled for the arbitration.

[23] In the present matter, there is no explanation why no one from the appellant's office or its legal representative did not attend the proceedings. There was no

application made before the date of the hearing. Instead, the application was made telephonically on the date of the hearing, a few minutes before the time scheduled for the hearing. That was contrary to the clear provisions of the rules. In my view, the arbitrator was correct and was entitled to refuse the postponement and to proceed with the hearing.

[24] During the hearing, the court enquired from Mr de Beer, whether in view of the fact that nobody appeared on behalf of the appellant at the hearing, how was it possible for the arbitrator to conduct a conciliation. Mr de Beer wisely conceded that it was not possible under those circumstances for the arbitrator to be expected to hold conciliation proceedings. The court is of the view that the concession was well-made for the reason that the conciliation process by its very nature, is a two-way stream. The process requires, as a matter of logic and practicality, that the parties to dispute be present, in the presence of each other and in the presence of the arbitrator to engage each other in an effort to resolve the dispute. In the present matter the appellant was not present at the hearing. It was therefore not legally possible nor practical for the arbitrator to have conducted a conciliation process in the absence of the appellant's representative.

[25] It follows therefore that this ground of appeal stands to fail. I proceed to consider the second ground of appeal.

[26] The second ground of appeal is that the arbitrator erred in law when he concluded that the appellant had waived its right to be heard and to be present at the arbitration hearing. I have read the arbitrator's award but was unable to trace a finding by the arbitrator that the appellant had waived his right to be present. The arbitrator simply proceeded with the hearing in the absence of the appellant and in the absence of a formal application for postponement.

[27] In any event, the general principle of our law is that waiver is not easily inferred. Waiver of right must be demonstrated in that the party imputed to abandon his or her right, does so with a full appreciation of his or her right sought to be abandoned.

[28] In *Fedics Food Services Namibia (Pty) Ltd v Amutenya & 2 Others*<sup>1</sup>, van Wyk AJ, outlined the principle as follows -

‘When considering whether or not the appellant has waived his right to be heard the arbitrator should have considered the presumption that no party is likely to waive their rights to an arbitration hearing lightly. Clear evidence is required that such a waiver did in fact take place. I found support for this view in the matter of *Grobbelaar and Another v Council of the Municipality of Walvis Bay and Another* 1997 NR 259, where Maritz AJ, as he then was, held

<sup>2</sup>:

“It is trite law that, given the factual presumption that a person is not likely deemed to have waived his or her rights, the *onus* to prove the applicant’s alleged waiver on a balance of probabilities rests on the respondent. (See: *Hepner v Roodepoort-Maraisburg Town Council*, 1962 (4) SA 772 (A); *Borstlap v Spangenberg en Andere*, 1974 (3) SA 695 (A)).” ’

[29] As pointed earlier in this judgment, both the appellant and its legal representative were served with copies of the proceedings. They knew that the proceedings were taking place on that date. Mr Lukas Sisamba telephoned the arbitrator requesting a postponement of the matter. The request was declined. The appellant’s legal representative telephoned the respondent on the day of the proceedings and prior to the commencement of the proceedings and tried to negotiate a settlement. The settlement offer was rejected. In my view, it is unnecessary to invoke the principle of waiver based on the facts of this matter. As I mentioned earlier, I could not find any finding by the arbitrator that the appellant had waived his right to be present at the hearing. This ground is equally rejected.

[30] The appellant’s third ground of appeal is closely connected to the first ground of appeal in so far as the appellant contends that the arbitrator erred in law in concluding that he may continue with the arbitration proceedings in the absence of the appellant. I have already dismissed the ground with regard to the criticism that the arbitrator proceeded with the arbitration proceedings in the absence of the appellant representative. In my view, the appellant took a deliberate decision not to attend the proceedings. The appellant’s legal representative it would appear, was

<sup>1</sup> (LCA 20/2015) [2016] NAHCMD 18 (20 May 2016).

<sup>2</sup>*Grobbelaar and Another v Council of the Municipality of Walvis Bay and Another* 1997 NR 259.

aware of the date and time of the proceedings. No explanation has been put forward why either Mr Lukas Sisamba from the appellant's office or the legal representative for the appellant did not attend the proceedings. They refuse to take the court into confidence and instead put the blame on the arbitrator. I have already found that the arbitrator acted correctly in terms of the statute and the rules governing conciliation and arbitration proceedings.

[31] The fourth ground of appeal sought to criticise the arbitrator's request to the respondent for the latter to provide information with regard to the settlement negotiations which took place between the parties shortly after the relationship between the parties was terminated and also before the arbitration proceedings commenced. In respect of the negotiations between the parties shortly before the commencement of the arbitration proceedings, that the legal practitioner for the appellant telephoned and tried to negotiate a settlement. The details of the negotiations were revealed by the respondent at the arbitrator's request. The appellant alleges that the arbitrator erred in law to have allowed or invited the particulars of the negotiation between the parties to be revealed as they were privileged and constituted inadmissible evidence. In my view, this ground would constitute a question of law for review not a question of fact. This ground was wisely abandoned at the hearing. This leaves me to consider the cross-appeal.

[32] It is submitted on behalf of the respondent that the arbitrator erred in not finding that the respondent was entitled to further compensation than that awarded by the arbitrator.

[33] Mr de Beer, for the appellant submitted that the calculation of loss by the respondent is a question of fact and not law. I agree. This court can only determine questions of law. I therefore refrain from making any finding whether the arbitrator was correct or not in calculating the compensation. It follows therefore that the calculation of the respondent's alleged loss, if any, had to be made by the arbitrator.

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

1. The arbitration award dated 18 January 2018 is confirmed and the matter is referred back to the same arbitrator to consider whether the respondent is entitled to further compensation as claimed in the cross-appeal, in addition to the compensation already granted.
2. There is no order as to costs.
3. The matter is removed from the roll and considered finalized.

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H Angula  
Deputy-Judge President

## APPEARANCES

APPELLANT:

P J DE BEER

Of De Beer Law Chambers, Windhoek

FIRST RESPONDENT:

P J BURGER

Instructed by Kinghorn Associates, Swakopmund  
*c/o Engling, Stritter & Partners, Windhoek*