



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00047

In the matter between:

DORA !NAWAS CONSERVANCY

APPELLANT

and

CECIL !GANEB

FIRST RESPONDENT

THE LABOUR COMMISSIONER

SECOND RESPONDENT

Neutral citation: *Dora !Nawas Conservancy v !Ganeb* (HC-MD-LAB-APP-AAA-2018/00047) [2019] NALCMD 1 (30 January 2019)

Coram: ANGULA DJP

Heard: 16 November 2018

Delivered: 30 January 2019

Flynote: Labour Law – Unopposed labour appeal – Unfair dismissal – Section 31 of the Labour Act – Payment instead of Notice – Employee compensated in excess – The compensatory award is liable to be set aside and substituted with the correct amount.

Summary: The appellant employed the first respondent as coordinator for its conservancy for a fixed period of three months for a salary of N\$3000 per month – The contract was terminated during the course of the second month with immediate effect – However the appellant offered to compensate the first respondent in full for the unexpired period of the contract – Aggrieved by the appellant's decision, the first respondent filed a dispute with the Office of the Labour Commissioner, alleging that he had been unfairly dismissed – At the end of the arbitration proceedings, the arbitrator made an award in favour of the first respondent by ordering the appellant to compensate the first respondent amounts far in excess of the amount which the first respondent would have earned had the contract not been terminated – The arbitrator further ordered the re-instatement of the first respondent on the same terms and conditions.

The appellant duly complied with the award by paying the amount it was ordered to pay the first respondent. In addition, it offered to re-instate the first respondent, albeit for a shorter period. The first respondent refused to accept the terms of the new contract and filed a second dispute with the Office of the Labour Commissioner again alleging unfair dismissal. The matter was allocated to the same arbitrator who made a second award in favour of the first respondent, awarding monetary compensation 'for generally unfair dismissal' and 'for loss of income and suffering'.

The order for re-instatement was later removed by the arbitrator due to 'continuous damage to the relationship'.

Court held: That, the arbitrator erred in finding that the first respondent was unlawfully dismissed for the reason that the appellant had complied with the provisions of section 31 of the Labour Act 2007 by offering to pay the first respondent his full notice period 'instead of giving the employee notice period'.

Held further: That the appellant lawfully complied with the arbitrator's order by paying the respondent the amount of N\$36 000, which was far in excess of the amount to which the first respondent was entitled to in terms of the law and that to the extent the amount was in excess to what the first respondent was entitled to in

terms of the law, the compensatory award is liable to be set aside and substituted with the correct amount.

Held further: That the arbitrator's second award in favour of the first respondent was so perverse that no reasonable arbitrator faced with the same facts would have made the same award and that the award was liable to be set aside

ORDER

1. The appeal is upheld.
2. The order by the arbitrator on 30 June 2016 is set aside and is substituted with the following order:
 - (a) The appellant is ordered to compensate the first respondent with the sum of N\$6 000.
3. The order made by the arbitrator on 4 October 2016 and varied on 11 October 2017 is set aside.
4. There is no order as to costs.
5. The matter is removed from the roll and considered finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an unopposed labour appeal by an employer against the second respondent's (the arbitrator's), two separate awards made in favour of the employee (first respondent), Mr !Ganeb.

Factual background

[2] Mr !Ganeb was employed by the appellant as a co-ordinator for a fixed term of three months calculated from 8 December 2015, being the date when the letter of appointment was delivered to the first respondent. However on 18 February 2016, appellant terminated the contract with immediate effect and dismissed the first respondent before the expiry of the period of three months.

[3] The first respondent then lodged a dispute with the Office of the Labour Commissioner alleging that he had been unfairly dismissed by the appellant.

[4] At the end of the arbitration proceedings on 30 June 2016, the arbitrator made a finding that the appellant unlawfully terminated the contract without a valid reason and without fair procedure. He therefore made an award (the first award) in favour of first respondent in the following terms:

'The applicant to be paid the loss of income as from 18 February 2016 till 30 June calculated as follows: N\$3 600 x 6 = 36 000;

The applicant to be re-instated, effective 1 August 2016 in the position he occupied prior to the termination of his services;

The respondent is therefore ordered to effect payment of N\$36 000 not later than 1 August 2016; and

The award is final and binding.'

[5] In compliance with the first award, the appellant paid the sum of N\$36 000 to the first respondent and further sought to re-instate first respondent for the period starting from 1 August 2016 until 8 August 2016 with an option to renew the contract. However the first respondent refused to sign the contract.

[6] The first respondent once again filed a dispute with the Office of the Labour Commissioner. He appeared before the same arbitrator who made the first award. The arbitrator made a finding that even though the appellant had complied with the terms of the first award by paying the first respondent, it failed to comply with the condition of the award by creating 'new terms and conditions' with regard to the reinstatement, which caused 'a new dispute hence leading to unfair dismissal'. The arbitrator further found that 'the termination of the applicant's employment contract was not as a result of the fixed contract coming to an end, but instead termination by the respondent within contradiction to the arbitration award re-instating the applicant'. On 4 October 2016 the arbitrator made the following award, (the second award):

'The respondent is hereby ordered to effect the following payment for general unfair dismissal $N\$3\ 000 \times 6 = N\$18\ 000$;

The respondent is further ordered to effect the following payment for loss of income and suffering $N\$3\ 000 \times 8$ months' salary = $N\$24\ 000$;

Therefore the respondent is ordered to effect the payment of $N\$42\ 000$ to the applicant not later than 4 November 2016.'

[7] It is not apparent from the record what caused the arbitrator to amend his award of 4 October 2016. It would appear that it was done *mero moto*. In any event on 11 October 2017, the arbitrator amended his award of '4 October 2016'. The award was purportedly varied in terms of section 88 of the Labour Act on 4 October 2017 by the same arbitrator as follows: (the third award):

1. The award is ambiguous and contains obvious errors and omissions but only to the (existent) of ambiguity of that error.
2. That part of the arbitration award which read the respondent is ordered to effect payment not later than 04 November 2016 was erroneously issued, instead it should read that the respondent is ordered to effect payment of $N\$42\ 000$ not later than 04 November 2017;

3. Also the date on which the award was issued is not 04 October 2016 but instead the 04 October 2017;
4. The variation is also aimed to clarify that the respondent is only ordered to effect the abovementioned payment and that re-instatement was not ordered due to continuous damage to the relationship.'

Grounds of appeal

[8] The appellant advances the following grounds for his appeal:

'The arbitrator erred in finding that the first respondent was dismissed;

The arbitrator erred in not holding that the contract of employment ended by effluxion of time;

The arbitrator erred in ordering the appellant to pay the first respondent a sum of N\$36 000.

The arbitrator erred in not recognising that the first respondent was unjustifiably enriched by the amount of N\$33 000 by his order of 4 October 2016.'

Applicable legal principles

[9] Section 31 of the Labour Act, 2007, provides that an employer may pay the employee the remuneration the employee would have received, as if the employee had worked during the period of notice.

[10] Mr Nakamhela who appeared for the appellant referred the court to Parker AJ¹, where the learned author says the following with regard to compensation of an employee following dismissal.

'Where an arbitrator awards compensation that is equal to the amount of remuneration that would have been paid to the employee had he (or she) not been

¹ Labour Law in Namibia at page 193.

dismissed, it may not be necessary for the employee to lead evidence to establish the amount involved. The amount should be in the employer's domain'.

[11] Furthermore, that 'compensation should not be calculated in a manner aimed at punishing the employer or at enriching the claimant because it is awarded based on the principle of *restitution in intergrum*'².

[12] It has further been held that the claimant should not be better off financially as a result of the dismissal that he or she would have been if there had been no dismissal. In other words, since an award is only compensatory, an aggrieved, dismissed employee should not be made to profit from such dismissal by recovering more than his or her actual losses. What a court should award must be compensation and not gratuity³.

[13] In support of the appellants ground of appeal, Mr Nakamhela submits in his heads of argument that the arbitrator erred in finding that Mr !Ganeb was unfairly dismissed and referred the court to *Overberg Fishing (Pty) Ltd v Docampo*⁴ where the court held that a fixed-term contract terminates by effluxion of time and the only thing that remains is whether the employee was given notice before the expiration of the contract and that the contract would not be renewed.

[14] The first issue for determination is whether the arbitrator was correct in holding the appellant unlawfully terminated the contract without a valid reason and without fair procedure. It appears from the record that the first respondent was employed for a fixed term contract of three months reckoned from 8 December 2015 and would have terminated on 7 March 2016 at salary of N\$3 000 per month. However his contract was terminated on 18 January 2016, before the expiry date. The first respondent was not given a notice of the appellant's intention to terminate the contract: the contract was terminated 'with immediate effect'. The notice of termination stated appellant would 'pay you out to the fullest of the contract'.

² *Ferodo (Pty) Ltd v de Ruiter* (1993) 14 ILJ 974.

³ *Camdons Realty (Pty) Ltd and Another v Hart* (1993) 14 ILJ 1008 (LAC); See also Parker AJ (supra) at page 195.

⁴ 2012 (1) NR 282 (LC).

[15] Taking into account the foregoing undisputed facts it would appear to me that the arbitrator erred in finding that the first respondent was unlawfully dismissed. I say this for the reason that the appellant had complied with the provisions of section 31 by offering to pay the first respondent his full notice period 'instead of giving the employee notice period'.

[16] The next issue for determination is whether, even if it were to be found that the arbitrator was correct in finding that the first respondent had been unlawfully dismissed (which has been found not to be so), was there a basis for the arbitrator to make an award of N\$36 000 in favour of the first respondent given the fact that the first respondent was employed on three months fixed term at monthly salary of N\$3 000? Mr Nakamhela correctly, in my view, submitted that there was absolutely no basis for the arbitrator to have made such an award. The first respondent would have earned N\$9 000 had the contract run its full course. My rough calculation indicates that the first respondent was entitled to a compensation of about N\$6 000.

[17] The appellant lawfully complied with the arbitrator's order, paid the respondent the amount of N\$36 000, which as demonstrated above, was far in excess of the amount to which the first respondent was entitled to in terms of the law. It follows therefore that the compensatory amount, to the extent it was in excess to what the first respondent was entitled to and in terms of the law, is liable to set aside and substituted with the correct amount. Mr Nakamhela initially prayed for an order that this court should order that the first respondent should refund the appellant the amount of N\$33 000, however at the hearing counsel wisely conceded that such an order would be incompetent to be issued by this court. The appellant, if so advised, will have to institute an action for refund of any amount found to have been paid in excess of the amount to which the first respondent was entitled to in terms of the law.

[18] As regards part of the order which ordered re-instatement of the first respondent, as has been noted that part of the order was varied and set aside by the arbitrator in his amended award of 11 October 2017 'due to continuous damaged relationship'. It is therefore unnecessary to deal with that part of the order in this

appeal. I proceed to consider the second award made in favour of the first respondent on 4 October 2017.

[19] It is to be recalled from the detailed factual backgrounds set out earlier in this judgment that on 4 October 2017, the arbitrator made a further award in favour of the first respondent for 'general unfair dismissal in the sum of N\$18 000 calculated at the rate of N\$3 000 for a period of 6 months, plus a further amount of N\$24 000 for loss of income and suffering calculated at the rate of N\$3 000 over a period of 8 months'. The total award amounts to a sum of N\$42 000 payable not later than 4 November 2017.

[20] It appears from the record that in order to comply with the re-instatement order the appellant offered the first respondent a fixed contract valid for a period of 1 August 2016 to 9 August 2016. The arbitrator reasoned that the appellant failed to comply with the terms of the first award which caused a new dispute. He further reasoned instead of the appellant re-instating the first respondent on the same terms and condition he attempted to re-instate the first respondent on new terms and conditions. He therefore found the new terms and conditions contradicting his award with regards to reinstatement. Mr Nakamhela submitted that there was no basis for the arbitrator to have made this award. Furthermore, there was no basis for the arbitrator to make an award based on a fixed contract of three months but calculated the loss of income over a period of 8 months. Furthermore, there was no basis for awarding general unfair dismissal over a period of 6 months for a fixed contract of 3 months. I agree with counsel's submission. Particularly if regard to the fact that the award was amended to remove re-instatement 'due to continuous damaged relationship'.

[21] In my judgment, the arbitrator's finding in this regard is so perverse that no reasonable arbitrator faced with the same facts would have arrived at such a conclusion. Accordingly, the award stands to be set aside.

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

1. The appeal is upheld.

2. The order by the arbitrator on 30 June 2016 is set aside and is substituted with the following order:
 - (a) The appellant is ordered to compensate the first respondent with the sum of N\$6 000.
3. The order made by the arbitrator on 4 October 2016 and varied on 11 October 2017 is set aside.
4. There is no order as to costs.
5. The matter is removed from the roll and considered finalized.

H Angula
Deputy-Judge President

APPEARANCES

APPELLANT: U NAKAMHELA
Of Nakamhela Attorneys, Windhoek

RESPONDENTS: No appearance