REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00041

In the matter between:

COMMERCIAL INVESTMENTS CORPORATION (PTY) LTD **APPELLANT**

and

TUHAFENI SHALYOLUTE **FIRST RESPONDENT**

CHRISTOPHINA NAMPULA HAMUTELE N.O. **SECOND RESPONDENT**

Neutral citation: *Commercial Investments Corporation v Shalyolute* (HC-MD-LAB-APP-AAA-2018/00041) [2019] NALCMD 5 (7 February 2019)

Coram: PARKER AJ

Heard: **14 November 2018**

Delivered: **7 February 2019**

Flynote: Labour law – Dismissal – Unfair dismissal – Appeal from arbitrator's award – Court held that in appeals under the Labour Act 11 of 2007, it is not the burden of the Labour Court to search the nooks and crannies of the arbitrator's award to

unearth every fault imaginable in the award – Burden of the court is to consider the grounds of appeal to determine whether appellant has satisfied the court that good grounds exist to uphold the appeal – Court held further that the grounds should not be conclusions *simpliciter* drawn by the drafter of the notice of appeal without the reasons therefor having been set out.

Summary: Labour law – Dismissal – Unfair dismissal – Appeal from arbitrator's award – Appellant set out so-called grounds – Court rejected most of the grounds as not being grounds in terms of the applicable rules – Court finding that as to the proper grounds of appeal appellant has not satisfied court that good grounds exist to uphold the appeal – Consequently, court confirming arbitrator's decision that first respondent's dismissal was unfair.

Flynote: Labour law – Dismissal – Unfair dismissal – Appeal from arbitrator's award of severance pay – Court held that in terms of the Labour Act 11 of 2007, s 35 (2), severance pay is in an amount equal to at least one's weeks remuneration for each year of continuous service with the employer for a period falling after the expiration of 12 months of the employee's continuous service with the employer concerned but not for the entire period of such continuous service – Consequently, court held that arbitrator misdirected himself on the law in his calculation of amount of severance pay payable – Consequently, court entitled to interfere with the amount of severance pay arbitrator ordered.

Summary: Labour law – Dismissal – Unfair dismissal – Appeal from arbitrator's award of severance pay – Court finding that first respondent is entitled to severance pay and none of the exceptions in the 'non-applicable' provisions in s 35 (2) of the Act applied to him – Nevertheless, court finding that arbitrator was wrong in his calculation of the amount of payable and so court entitled to interfere

ORDER

1. The appeal is dismissed; but –

   (a) the order in para 76 of the Award is amended to read:
   Appellant must pay to first respondent severance pay, being an amount equal to first respondent's remuneration for 17 weeks before he was dismissed.
   (b) the order in para 77 of the Award is set aside.
   (c) the order in para 78 of the Award is set aside.

2. There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] In this appeal, the appellant employer, represented by Mr Horn, appeals from the award of the arbitrator (second respondent) in case No. CRWK 46-17. In terms of the relevant rules of court, read with the conciliation and arbitration rules (GN No. 262 of 2008), appellant has put forth nine grounds of appeal. The first respondent employee, represented by Mr Bugan, opposes the appeal.

[2] It is to those grounds of appeal that I now direct the enquiry. I shall consider them one by one. Before I do so, I should for good reason rehearse here what I said in the recent case of *Angula v Stuttaford van Lines and Dionysius Louw N.O.* (HC-MD-LAB-APP-AAA-2018/00038) [2018] NALCCMD 31 (27 November 2018). There, I stated at para 3 that it is appellant who must satisfy the court that good grounds exist to uphold the appeal. Thus, the grounds of appeal must be reasons why the court should hold that the decision of the arbitrator is wrong, that is, reasons for the

conclusions drawn by the drafter of the notice of appeal, not just the conclusions *simpliciter* (see also *Germanus v Dundee Precious Metals Tsumeb* (HC-MD-LAB-APP-AAA-2017/00009) [2018] NALCMD 28 (23 October 2018). *Germanus* applied the principle in *S v Gey van Pittius and another* 1990 NR 35 (HC). There, Strydom AJP considering the meaning and content of grounds of appeal, rejected the appellant's so-called grounds of appeal for not being grounds but conclusions drawn by the draftsman of the notice '*without setting out the reasons or grounds therefor*'. (Italicized for emphasis)

[3] In that regard, it must be remembered that in appeals under the Labour Act, it is not the burden of the Labour Court to search the nooks and crannies of the Award to unearth every fault imaginable in the Award. The burden of the court is to consider the grounds of appeal to determine whether the appellant has satisfied the court that good grounds exist to uphold the appeal.

[4] Keeping the foregoing principles and approaches in my mental spectacle, I now proceed to consider what appellant has put forth as its grounds of appeal.

Grounds 2.1, 2.2, 2.3, 2.5, 2.7, 2.8

[5] Appellant gives an encore to the same tune that 'the second respondent erred' in doing one thing or another 'without setting out the reasons or grounds therefor' (see *Grey van Pittius*, *loc. cit.*). They are of the kind, which Strydom AJP rejected in *S v Gey van Pittius and another* as not being grounds of appeal. I also reject these so-called grounds in the instant proceedings: they are not grounds within the meaning of rule 23 (2) (d) of the conciliation and arbitration rules. They are conclusions drawn by the drafter of the notice '*without setting out the reasons or grounds therefor*'.

Ground 2.4

[6] In considering this ground, one must not lose sight of the trite and entrenched principles that –

(a) the function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal; and the Labour 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)); and

(b) 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 *Nathinge v Hamukanda* (A 85/2013) [2014] NAHCMD 348 (24 November 2014)).

[7] The foregoing principles were applied in these recent cases: *Reuter and Another v Namibia Breweries* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NAHCMD 20/2018 (8 August 2018); *Angula v Stuttaford van Lines and Dionysius Louw N.O.* (HC-MD-LAB-APP-AAA-2018/00038) [2018] NALCCMD 31 (27 November 2018)*;* and *Germanus v Dundee Precious Metals Tsumeb* (HC-MD-LAB-APP-AAA-2017/00009) [2018] NALCMD 28 (23 October 2018). In the instant proceeding, appellant does not indicate to the court what irregularities or misdirections were proved; and I do not find any irregularities or misdirections that are apparent on the record. In sum, it has not been shown that there were misdirections on the facts by the arbitrator leading to conclusions that are wrong regarding matters under this ground. It follows inevitably that I am not entitled to interfere. Therefore, I uphold the arbitrator's findings of fact and his conclusions thereon under this heading. Accordingly, I reject ground 2.4 as having no merit. I pass on to consider ground 2.6.

Ground 2.6

[8] It would appear from the question of law raised by appellant (para 1.12) that appellant contends under this ground that the completion and signing of Form LC 21 offend the rules of conciliation and arbitration. Appellant does not say why he makes

this lone and naked averment. Appellant does not give reasons or 'grounds' for his averment. In any case, I do not see on the record that appellant raise the issue during the conciliation meeting and the arbitration proceedings for the arbitrator to consider it. It is too late in the day for appellant to raise the reason here. In that regard, it must be remembered 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 and information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong.'

[*Germanus v Dundee Precious Metals Tsumed* at para 12, relying on *Witvlei Meat (Pty) Ltd and Others v Disciplinary Body for Legal Practitioners and Others* 2013 (1) NR 245 (HC), para 23, per Smuts J]

[9] It follows that ground 2.6 is not valid and good. It is, accordingly, rejected. I now proceed to consider ground 2.9.

Ground 2.9

[10] This ground concerns the arbitrator's order in the award that appellant must make severance payment to first respondent. Section 35 of the Labour Act governs the payment of severance pay; and so, severance pay is a statutory benefit. It has not been shown that first respondent was not entitled to it based on any of the exceptions contained in s 35 (2) of the Labour Act. I agree with the arbitrator that none of the exceptions in the 'non-applicable' provisions in paras (a) to (c) of s 35 (2) applies to first respondent. It follows indubitably that first respondent is entitled to it; and so therefore, the arbitrator was not wrong when he awarded the payment of severance pay to first respondent. Consequently, appellant's ground 2.9, too, is rejected as not valid and good.

[11] The only fly in the ointment is this. The arbitrator misdirected himself on the law in his calculation of the amount of severance pay payable. In terms of the Labour

Act 11 of 2007, s 35 (2), severance pay is in an amount equal to at least one week's remuneration for each year of continuous service with the employer for a period falling after the expiration of 12 months of the employee's continuous service with the employer concerned but not for the entire period of such continuous service. Consequently, this court is entitled to interfere with the arbitrator's decision regarding the amount of severance pay he ordered. In the instant proceeding, it is not clear on the record as to what specific date first respondent's service with appellant commenced. That being the case, it is safe to subtract 12 months, that is, one year, from the undisputed 18 years of first respondent's service with the appellant. Additionally, it must be remembered that the giving of notice or failure to give notice by an employer when he or she dismisses an employee provided in the chapeau of s 33 (1) is irrelevant when considering whether the employer has satisfied the requirements prescribed by s 33 (1) (a) and (b) of the Labour Act. Consequently, I see no good reason why failure to give notice should carry a sanction on its own over and above the sanction for unfair dismissal. Therefore, I should interfere with the arbitrator's order of compensation for failure to give notice when first respondent was dismissed. This part of the award cannot stand.

Conclusion

[12] Based on these reasons and having rejected grounds 2.1, 2.2, 2.3, 2.5, 2.7 and 2.8 as not being grounds in terms of the applicable rules, the appeal fails except that the order of compensation for failure to give notice is not supported; whereupon, I order as follows:

1. The appeal is dismissed; but –

   (a) the order in para 76 of the Award is amended to read:
   Appellant must pay to first respondent severance pay, being an amount equal to first respondent's remuneration for 17 weeks before he was dismissed.
   (b) the order in para 77 of the Award is set aside.
   (c) the order in para 78 of the Award is set aside.

2. There is no order as to costs.

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C Parker

Acting Judge

APPEARANCES:

APPELLANT:	Mr S Horn Of De Klerk Horn and Coetzee Inc., Windhoek
1ST AND 2ND RESPONDENT:	Mr D Bugan Of Harmse Attorneys, Windhoek