

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2019/00013

In the matter between:

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	1ST APPELLANT
CHAIRPERSON OF THE PUBLIC SERVICE	
COMMISSION	2ND APPELLANT
MINISTER OF HEALTH AND SOCIAL SERVICES	3RD APPELLANT
PERMANENT SECRETARY OF HEALTH AND	
SOCIAL SERVICES	4TH APPELLANT

and

ABNER SHOPATI AND 29 OTHERS	1ST RESPONDENT
KYLLIKI SIHLAHLA N.O.	2ND RESPONDENT
THE LABOUR COMMISSIONER	3RD RESPONDENT

Neutral Citation *Prime Minister of the Republic of Namibia v Abner Shopati* (HC-MD-LAB-APP-AAA-2019/00013 [2020] NALCMD 1 (17 January 2020))

CORAM: MASUKU J

Heard: 07 June 2019

Delivered: 17 January 2020

Flynote: Labour Law – collective agreement – whether disputes as to alleged unfair labour practices may be lodged directly with the Office of the Labour Commissioner, notwithstanding the existence of an internal resolution mechanism in the collective agreement signed by and between the parties to the dispute – Canons of interpretation – court to adopt a sensible meaning and not one that results in insensible or unbusinesslike results or undermines the broader purpose and character of the document.

Summary: The appellant, the Prime Minister of the Republic of Namibia, lodged an appeal against the award issued by the Arbitrator, to the effect that she had jurisdiction to deal with a labour dispute between the Government and her employees, despite the existence of a collective agreement prescribing disputes to be submitted to an internal dispute resolution mechanism.

Held: that clause 12 of the collective agreement, properly construed, did not serve to create types of dispute that were amenable internal resolution and those that were not.

Held that: it makes sense for the parties, having signed the collective agreement, to subject all disputes to internal resolution mechanisms, which are cheaper, more efficient, and more readily acceptable to the parties because they play an active role in the entire process.

Held further that: the fact that the agreement uses the words to the effect that the agreement cannot be reached during the negotiation process, does not *per se* mean that only disputes which require prior engagement may only be subject to the internal dispute mechanism and that those that may not require prior engagement may not be the subject of internal dispute resolution.

Held: that the Arbitrator was incorrect in holding that the dispute in question could be lodged directly with the Labour Commissioner, notwithstanding the provisions of the collective agreement.

Held that: the Arbitrator did not have the jurisdiction to determine the dispute in the light of the provisions of the collective agreement.

Held further: that the respondent had not shown that the appellant had filed the matter with the court frivolously or vexatiously and thus it was not entitled to costs, in line with s 118 of the Labour Act, 2007.

The appellant's appeal was upheld and the award by the Arbitrator, was accordingly set aside.

ORDER

1. The arbitral award issued by the Arbitrator, Ms. Kylliki Sihlahla on 19 November 2017, to the effect that she had jurisdiction to determine the dispute, is hereby set aside.
2. It is declared that the Arbitrator did not have the jurisdiction to entertain the dispute lodged before the Office of the Labour Commissioner by the First Respondent.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] At the heart of the dispute between the parties cited above and submitted to this court for determination, is one question that can be formulated as follows: does the Labour Act, 2007, confer an automatic right to employees or a recognised trade union, to refer a dispute to the Labour

Commissioner in a case where the said employees or trade union, are, in terms of a collective agreement, duly entered into with the employer, bound to first submit the dispute in question to a resolution procedure agreed upon and stipulated in the terms of the collective agreement?

[2] The parties, sitting as they do, on different ends of the dispute, have urged the court to return disparate answers to the poser above. The appellants take the view that the parties are and should be bound by the terms of the collective agreement, and to exhaust the procedures set out therein, whereas the respondents contend otherwise, namely, that a party to a dispute is not debarred from referring a dispute directly to the Office Labour Commissioner, the existence of a term of a collective agreement, stipulating a resolution procedure notwithstanding.

Preliminary issue

[3] Before returning an answer to this all-important question, it is necessary to first deal with what is a preliminary procedural issue of law that the respondents had raised. That preliminary issue is whether the appeal noted by the appellants conforms to the provisions of the Rules of this Court. The respondents contend that it does not so conform and that for that reason, there is no appeal proper pending before the court. It is accordingly contended that the failure to file a proper notice of appeal renders the matter *cadit questio* and should mark the end of the enquiry.

[4] In response to this question, the appellants filed an application for condonation of the non-compliance with the relevant parts of the rules of court and this application was not opposed by the respondents. Despite alleging that they do not oppose the application, they seemed to hold the view that the appellants have no prospects of success.

[5] Considering what appears to be a somewhat ambivalent stance by the respondents, and having considered the papers filed by the appellants in support of the application for condonation, I hold the view that the application has merit and I do not agree with the respondents' stance that the applicants

have no prospects of success. A party in the position of the appellants is not required to show that it has bright prospects of success. What is added to prospects of success, is the word 'reasonable', which qualifies the standard to be met by an applicant for condonation.

[6] In the premises, I hold the view that the appellants have, in their explanation for the delay, shown to the satisfaction of the court that they have reasonable prospects of success on the appeal. Whether that will ultimately and actually be the case, is a matter that will be answered at the end of the judgment. I accordingly grant the application for condonation, rendering it unnecessary to deal with the preliminary point, especially in view of the non-opposition thereto by the respondents in any event.

[7] Before dealing with the main question for determination identified in para 1 above, it is however, prudent that a brief chronicle of the facts giving rise to the present dispute be adverted to. This is done to place the reader in a position to comprehend how the main question for determination arose and the various steps that were taken, ripening the matter to ultimately serve before this court.

Background

[8] As indicated above, the facts giving rise to this dispute, are largely common cause and they can be summarised as follows: the parties referred to above, collectively, as the 1st respondent, are employees in the employ of the Government of the Republic of Namibia, ('GRN'). They occupy different positions and they are based at different workstations within the Republic.

[9] The said employees, upon dissatisfaction with a decision taken by the GRN, on 2 November 2017, referred a dispute to the Labour Commissioner, described as a unilateral change of terms and conditions by the former. The dispute ultimately served before the Arbitrator, cited in these proceedings, as the 2nd Respondent. I shall refer to her in the judgment as the Arbitrator, or simply as the 2nd respondent.

[10] At the arbitration proceedings, a preliminary issue was raised on behalf of the GRN, namely, that the 1st respondent does not have an automatic right to lodge their dispute with the Labour Commissioner. This it was said, is so because the GRN and the 1st respondent had, through the instrumentality of the Namibia Public Workers' Union, the sole and exclusive recognised trade union, entered into a collective agreement with the GRN. A provision of the said agreement, it was argued, stipulates the route to be followed in case there is a dispute between the employer and the employees.

[11] After listening to evidence and submissions made on behalf of the protagonists, the Arbitrator, on 19 November 2018, held that the 1st respondent has an automatic right to lodge a dispute with the Office of the Labour Commissioner. The Arbitrator also held that her office does have the jurisdiction to hear and determine the matter so referred by the 1st respondent. She accordingly scheduled the matter to proceed for further hearing on 17 to 21 December 2018.

[12] Dissatisfied with the award by the Arbitrator, the appellants lodged an appeal before this court in terms of which they allege that in making the findings that she did, the Arbitrator fell into error which is of such magnitude that this court is at large to set aside the award in its entirety, which would mean that the matter must be referred to resolution mechanisms provided in the collective agreement referred to above.

[13] It is in the context of the above setting that the question for determination, as couched in the introductory paragraph, arises. It is now opportune for the court to engage the parties' arguments and to decide who among the protagonists, falls on the correct side of the law in respect of the question for determination.

The argument

[14] It would appear that the main issue to be decided is the effect of the relevant clause of the Collective Agreement. There is no dispute about the

existence of the said agreement and the clause in question. The parting of ways, it would seem, is engendered by the interpretation given to the collective agreement, considered in the light of the relevant provisions of the Act.

[15] Ms. Shilongo, for the 1st respondent, argued that the dispute lodged by her clients is tenable before the Labour Commissioner, because it involves a dispute of right. In this regard, she referred the court to the case of *Luckhoff v The Municipality of Gobabis*¹ where the court held, amongst other things, that where there is a dispute concerning a proposal for new or changed conditions of employment, the matter must, in terms of section 1 of the Act, be referred for resolution by adjudication before this court or other court or through arbitration.

[16] Ms. Shilongo also argued that the terms and conditions in issue, and which her clients allege were unilaterally changed, were provided for in terms of the 1st respondents' respective employment contracts and that if there was a unilateral change of these, as the respondents claim, that amounts to a dispute of right, which *per se* entitles the 1st respondent to approach the Office of the Labour Commissioner for appropriate relief, without further ado.

[17] Regarding the collective agreement, as mentioned earlier, Ms. Shilongo admitted the existence of the collective agreement, together with its binding nature on the parties. She argued that properly construed, the provision in question in the said agreement, clause 12, which shall be reproduced in due course, is confined only to those matters that can be negotiated between the parties. This, she specifically submitted, excludes issues of existing rights, of which the terms and conditions allegedly changed unilaterally by the GRN.

[18] Ms. Shilongo further argued that clause 12 of the agreement is designed to resolve disputes of interest but not of rights. As a result, she further submitted, disputes of infringed rights and unfair labour practices,

¹ *Luckhoff v Municipality of Gobabis* (LCA 46/2014 [2016] NAHCMD 6 (02 March 2016)).

cannot be negotiated in terms of the agreement but are open to being submitted to the Office of the Labour Commissioner for adjudication.

[19] Mr. Khama for his part, argued and strenuously too, that the Arbitrator erred in finding as she did, that she had the necessary jurisdiction to entertain the dispute lodged by the 1st respondent. In particular, he criticised the findings of the Arbitrator, in para 21 of the award, to the effect that she could not find any clause in the collective agreement that directed the parties to refer the dispute to private mediation.

[20] He accordingly argued that the existence of the collective agreement, including clause 12, pointed inexorably in the direction that the parties to the collective agreement, faced with a dispute, of whatever nature, I may add, are bound to exhaust the internal dispute mechanism provided for in clause 12 and are not, to that extent, entitled to a direct and automatic right to refer the dispute to the Office of the Labour Commissioner.

Determination

[21] In determining the major question in this case, I find it appropriate to refer to the relevant clause of the collective agreement, namely, clause 12. It reads as follows:

‘Where an agreement between the Employer and the Union cannot be reached during the process of negotiations the following internal dispute settling procedures may be invoked by mutual agreement which shall be concluded within 30 days:

- (a) A fact-finding sub-committee may be appointed from both teams.
- (b) Temporary adjournment of the negotiations to-:
 - (i) to obtain additional information;
 - (ii) consult with experts; and/or
 - (iii) informally consulting each other if there are disputes between individual members of the two teams.
- (c) Mediation/arbitration by an independent person.’

[22] It is important to note that when one has regard to the clause in question, a few words seem loom large and leap at the reader. These are the words 'in the process of negotiations'. Ms. Shilongo urged that this provision comes into play only in matters where the issues in question are subject to negotiation between the parties. If they are not, she further argued, then the parties are not required to submit the dispute arising to clause 12.

[23] She submitted that the nature of the dispute *inter partes* must be the determinant whether the matter must be referred to the internal mechanism or should be referred directly to the Office of the Labour Commissioner. In the present case, as stated earlier, the issue in question, that of unilateral change of terms and conditions is a matter of rights and not interests. For that reason, she further submitted, it is not open to negotiations at all and must, perforce, be submitted to the jurisdiction of the Office of the Labour Commissioner. Is such an argument tenable?

[24] Mr. Khama, for his part, referred to s 86 of the Act, which reads as follows:

'Unless the collective agreement provides referral of disputes to private mediation, any party to a dispute may refer the dispute in writing to –

- (a) the Labour Commissioner; or
- (b) any labour office.'

It was accordingly argued that the Arbitrator incorrectly interpreted the word 'unless' occurring in the above provision. Is this criticism justified?

[25] I am of the considered view that in dealing with such matters, one should not lose sight of the rules of interpretation that have been developed by the courts, especially those which deal with interpreting contracts. I mentioned contracts for the reason that it is clear that to a large extent, the document that has to be interpreted, in deciding whether the Arbitrator had jurisdiction or not, is the collective agreement, which is a binding contract, in this case, between the employer and the employee organisation.

[26] The proper approach to this exercise was undertaken by the Supreme Court in *Total Namibia v OBM Engineering*,² where O'Regan AJA, writing for the majority of the court, after traversing the applicable principles in other respected jurisdictions zeroed on the question as follows at para 19:

‘For purposes of this judgment, it is not necessary to explore fully the similarities and differences that characterise the approaches adopted in the United Kingdom and South Africa. What is clear is that in both the United Kingdom and South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.’

[27] At para 24, the learned Judge of the Supreme Court proceeded to state that, ‘The approach adopted here requires the court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself.’

[28] The court further quoted with approval the judgment of Wallis JA in the celebrated *Endumeni* judgment,³ where the court stressed that ‘a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used’.

[29] Properly construed, it would appear to me that the purpose and character of the document signed *inter partes*, was to try and resolve disputes arising between them in *fora* that were internal in character and in which the

² 2015 (2) NR 733 (SC).

³ *Natal Municipal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 19.

parties could actively participate, engage and to some extent, hold sway. The latter, for instance, is depicted by the power of the parties to adjourn the proceedings with the possibility of informally consulting.

[30] I am of the considered view, having regard to the relationship between the parties and their willingness to sign an agreement that governs the resolution of disputes, that it was their intention to submit all disputes that may arise between or among them, to the internal processes chosen in the first instance. There is nothing in the language employed by the parties that would suggest that the parties were of the intention that certain disputes would be dealt with in terms of the internal processes and others, of a different kind, were liable to external processes for resolution. Had this been their intention, I am of the view that they would have expressly stated so in clear and unambiguous language, in the collective agreement.

[31] Furthermore, there is nothing in the language used, or in the context, that would suggest any reasonable justification for treating different types of disputes differently, in terms of their resolution. To my mind, there is nothing that renders disputes of right inherently unsuitable to be resolved in an internal mechanism, as opposed to disputes of interest.

[32] And as stated above, the parties stand to benefit more from internal processes in which they participate as these are readily accessible, possibly cheaper and more efficient, as the parties are able to make the ground rules therefor. This, in my view, seems compatible with a businesslike approach to the resolution of disputes. Another consideration that cannot be overlooked, is the fact that where the parties participate fully in the setting up of the resolution mechanism in question, they are naturally inclined to accept the result, even if it be adverse at the end. This is the benefit they stand to derive from the internal mechanism chosen.

[33] Section 91(13) of the Act provides the following:

'If any party to an arbitration agreement refers a dispute to the Labour Commissioner that should be referred to private arbitration, the Labour

Commissioner must refer the dispute to arbitration in terms of the agreement.' This provision, when properly considered, appears to respect the exclusivity of the jurisdiction of private arbitrators to settle disputes falling within their jurisdiction.

[34] At the same time, the provision, appears to discourage the Labour Commissioner's Office from assuming jurisdiction in matters that should properly resort to private arbitration in terms of a collective agreement. It seems to me, having regard to the foregoing, that the Arbitrator should have refused to entertain the dispute in view of the provisions of the collective agreement for settlement of disputes *inter partes*.

[35] Her conclusion that she did not find a basis for referring the matter to private arbitration in the face of the clause cited above, as interpreted in this judgment, cannot, in good conscience, be allowed to stand. No reasonable arbitrator, would, faced with a similar case, reach the same conclusion as the arbitrator in the instant case.

[36] It is also pertinent to refer to the provisions of s 73(1), of the Act, on the other hand. The section provides that, 'Every collective agreement must provide for a dispute resolution procedure including an arbitration procedure to resolve any dispute about the interpretation, application or enforcement of the agreement in accordance with Chapter 8 Part C or D, unless provision is made in another collective agreement for the resolution of that dispute.'

[37] Properly and closely construed, it would appear that the intention of the legislature in promulgating this provision, was to avoid this court, including the Labour Commissioner's Office, from dealing with disputes that arise, such as the one under consideration, namely, the interpretation of the collective agreement in so far as whether it applies to any type of dispute.

[38] The reason for such a stance, is to me quite plain, namely, that the parties to the collective agreement, would have, in exercise of their powers and freedom of choice, have chosen a private process to resolve disputes by signing the collective agreement. In that regard, if the scope of the powers of

the said forum to resolve a particular dispute is disputed, it only makes sense that the parties would have to find a private body to resolve that issue, consistent with the manifest intention of the parties by submitting the issue or issues to private mediation. Consistency, in this regard, must be considered.

[39] This finding, accordingly suggests that the Arbitrator should have found that she did not have jurisdiction to entertain the present dispute, unless of course the parties, in exercise of their powers in terms of s 73(2) of the Act, jointly decided to submit the dispute in question to the Labour Commissioner.

[40] Having come to the conclusion arrived at above, it remains for the court to mention that the Arbitrator should have taken into account the fact that the scheme of the Act and its objectives, set out in the preamble, include the creation of a legal framework that would serve to create and conduce to the creation of sustainable labour relations in the country. This, would in turn, promote and give birth to an orderly system of collective bargaining, whose objective is to allow the parties to a collective agreement, to have an internal dispute resolution mechanism in place, and to respect as far as the law allows, the parties' freedom to do so.

Conclusion

[41] Having regard to the argument discussed above, together with the conclusions reached by the court, it would appear that the Arbitrator erred in finding as she did, that she had the jurisdiction to deal with the dispute in question, particularly in the face of the collective agreement. Her misdirection in that regard is grave and should result in the appeal by the appellants being upheld.

Costs

[42] It is now settled law that s 118 of the Act does not lightly admit of this court granting an order as to costs. It is only in very limited circumstances and

upon certain jurisdictional requirements being met that this court may do so. Accordingly, the court may only exercise its legislative jurisdiction, which is discretionary in any event, to grant costs, in matters where the institution of the proceedings or the defence thereof, or continuation with either of the two, is clearly vexatious or frivolous.

[43] The principle that informs this very high standard is laudable. It is to arrest a situation where parties who may have genuine grievances that require determination by this court, are not induced with fright and become frigid or shy of approaching the courts by the possibility of the issuance of adverse costs orders should they be unsuccessful in their cases lodged or defended.

[44] There are no allegations made by the appellants, to the effect that the threshold of the mandatory requirements of s 118 has been met in the instant case, such as to warrant the issuance of a costs order. The defence of this case by the respondents is in my view, perfectly justified, and has contributed to clarifying some grey areas regarding the question in issue. I will accordingly decline to issue an order for costs in this matter.

Order

[45] In view of the conclusion reached in the immediately preceding paragraph, the court is of the considered view that the following order is condign and should accordingly be issued:

1. The decision issued by the Arbitrator, Ms. Kylliki Sihlahla on 19 November 2017, to the effect that she had jurisdiction to determine the dispute, is hereby set aside.
2. It is declared that the Arbitrator did not have the jurisdiction to entertain the dispute lodged before the Office of the Labour Commissioner by the First Respondent.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku

Judge

APPEARANCES:

APPELLANTS: D. Khama
Instructed by: Government Attorney

RESPONDENT: N. Shilongo
Of Sisa Namandje & Co. Inc.