

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

HC-MD-LAB-APP-AAA-2020/00042

In the matter between:

DALENE MEYER

APPELLANT

and

LENA SWARTZ

1st RESPONDENT

DONYSIUS LOUW N.O.

2nd RESPONDENT

Neutral Citation: *Meyer v Swartz* (HC-MD-LAB-APP-AAA-2020/00042) [2021]
NALCMD 11 (29 March 2021)

CORAM: OOSTHUIZEN J

Heard: 5 February 2021

Delivered: 29 March 2021

Flynote: Labour Law – Labour Appeal – Appeal Against Arbitrator’s Award – finding of constructive dismissal by the arbitrator – arbitrator going beyond the scope of future loss of income – awarded 10 years of future loss of income – employer appealed – appeal succeeds.

Labour Law – Relief sought – future loss of income not meant to be a punishment for the employer – arbitrator erred in his finding – arbitrator acted arbitrarily by awarding future loss of income – no reinstatement was sought – ground of appeal succeeds.

Summary: Paragraphs [1], [3], [5] to [33] in the Judgment.

ORDER

IT IS ORDERED THAT:

1. The appeal is upheld.
 2. The arbitrator's award delivered on 25 June 2020 is hereby set aside.
 3. There is no order as to costs.
 4. The matter is finalised and removed from the roll.
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JUDGMENT

OOSTHUIZEN J:***Introduction***

[1] The First Respondent was a former employee of the Appellant who referred a dispute to the Labour Commissioner's Office for unfair dismissal.¹ The Appellant noted an appeal against this arbitration award delivered on 25 June 2020.

[2] The appellant set out the following questions of law in her Amended Notice to Appeal:

'The questions of law appealed against in the arbitrator's award are as follows:

1. Whether or not the arbitrator misconstrued the powers and duties conferred on him in terms of section 86 of the Labour Act 11 of 2007 ("the Act") and in doing so, erred in law insofar as he failed to conduct the arbitration proceedings in a fair and just manner committed a gross irregularity in the conduct of the arbitration proceedings.
2. Whether or not the arbitrator erred in law in failing to find and conclude that the Appellant did not contributed to the alleged intolerable and unsafe working environment of

¹ Appeal Record p.1-4.

the First Respondent (“the Respondent”), that the Respondent resigned voluntarily and therefor that the Respondent’s resignation did not amount to a constructive dismissal, but instead finding that the Respondent’s resignation was involuntarily, that the Appellant contributed to the intolerable and unsafe working environment of the Respondent and concluding that the Respondent was constructively dismissed, and therefore unfairly dismissed by the Appellant, in contravention of Section 33 of the Act.

3. Whether or not, following from the first and second question of law and first and second ground of appeal, the Arbitrator erred in awarding the Respondent future loss of income for a period of ten years.

Ad First Ground of Appeal

4. Whether or not the arbitrator misconstrued the powers and duties conferred on him in terms of Section 86 the Act, and in so doing erred in law insofar as he failed to conduct the arbitration proceedings in a fair and just manner and committed a gross irregularity in the conduct of the arbitration proceedings.

5. The arbitrator erred in law in failing to conduct the arbitration proceedings in a fair and just manner insofar as the arbitrator: -

5.1. failed to comply with the rules of natural justice, in particulars, by ensuring that the arbitration proceedings are conducted in a manner that is fair to both parties. The arbitrator erred:-

5.1.1. in failing to properly explain the process to be followed in the arbitration proceeding;

5.1.2. to have the Appellant state its version, under oath, to the Respondent.

5.2. misconstrued the powers and duties conferred on him in terms of section 86 (8)(c) of the Act in that he failed to ensure that the proceedings were conducted in a manner that was fair to both parties. It is evident from the record of proceedings that the arbitrator assumed an inquisitorial role in conducting the arbitration proceedings. During the Respondents evidence in chief, and the subsequent testimony by the Respondent’s witnesses, the arbitrator asked suggestive and leading questions, exhibiting a lack of impartiality by the arbitrator. The arbitrator in so doing has committed misconduct in relation to the duties of an arbitrator.

5.3. relied on his personal experience and knowledge in finding that “In the medical fraternity not even a registered nurse may administer an injection to a patient without a prescription.” The finding and conclusion by the arbitrator constitute a gross irregularity insofar as no medical expert or any other witness testify hereto. The conduct by the arbitrator constitutes a gross irregularity.

Ad Second Ground of Appeal

6. Whether or not the arbitrator erred in law in failing to find and conclude that the Appellant did not contribute to the intolerable working environment of the Respondent, that the Respondent voluntarily resigned and that her resignation did not amount to a constructive dismissal, but instead finding that the Appellant contributed to the intolerable and unsafe working environment of the Respondent, that the Respondent's resignation was made involuntary and concluding that the respondent was constructively dismissed, and therefore unfairly dismissed by the Appellant, in contravention of section 33 of the Act.

7. Generally, it is contended on behalf of the Appellant that the arbitrator failed to properly understand and/or properly apply the common law test for constructive dismissal, namely:

7.1 Whether, in resigning, the employee did not intend to terminate the employment relationship. In other words, that the resignation was involuntary;

7.2. Whether the employer had without reasonable and proper cause conducted itself in manner calculated or likely to destroy or damage the relationship or confidence and trust with the employee; and

7.3. Even if the requirements under paragraphs 4.1 and 4.2 are met this does not necessarily mean that the employee was constructively dismissed. The circumstances that prompted the employee to resign should also be unfair. In other words, it must be asked whether the employer lacked reasonable and proper cause for its conduct.

8. The arbitrator erred in his application of the common law test in finding that the Respondent's conditions of employment were intolerable, that the intolerability was caused by the Appellant, and that the Appellant did not fairly deal with the Respondent (insofar as the arbitrator even considered fairness as part of the requirements to sustain a claim for constructive dismissal) and that, according to the arbitrator and as part of his reasoning, the Respondent resigned involuntarily.

9. In cases where an employee claims to have been constructively dismissed, the onus rests on the employee to prove that the resignation constitutes a constructive dismissal. In this regard the arbitrator made a finding of fact which no reasonable arbitrator would have made based on the facts before him in concluding that the Respondent's termination of employment was prompted or caused by the conduct of the Appellant...

13. The correct conclusion and award should have been that the Respondent resigned voluntarily, that her resignation did not constitute a constructive dismissal, and that the Appellant in no way may (sic)(made) the Respondent's working environment unsafe or intolerable resulting in the Respondent's referral being dismissed.

Ad Third Ground of Appeal

14. Whether or not, following from the first and second question of law and the first and second ground of appeal, the arbitrator erred in awarding the Respondent future loss of income for a period of (10) years.

15. The arbitrator erred in finding and concluding that the Respondent could have worked up until retirement age until she could have been dismissed for poor work-performance, misconduct or incapacity.

16. The Respondent failed to tender any evidence at the arbitration proceedings that she attempted to mitigating her losses or damages. In such circumstances it would be unreasonable to award the Respondent future loss of income for a period of ten (10) years.'

Parties

[3] The appellant is Dalene Meyer, and the first respondent is Lena Swart, a former employee of the appellant (hereinafter referred to as the respondent).

[4] The second respondent is the Arbitrator cited in his official capacity (hereinafter referred to as the arbitrator).

Background

[5] The respondent referred a dispute for unfair dismissal to the Labour Commissioner's Office on the ground of constructive dismissal.

[6] Conciliation proceedings were conducted and was not successful and the matter proceeded to arbitration.

[7] The arbitrator made a determination in favour of the respondent and ordered the appellant to pay the respondent her salary x 12 months x 10 years for future loss of income.

[8] The appellant dissatisfied with the outcome instituted this appeal.

[9] The respondent never opposed the appeal even though being fully aware of the appeal. This is evident by the service affidavits and email correspondence between the appellant's legal practitioners.

Issues for determination in the appeal

[10] So regardless of whether or not the respondent opposed the said appeal. The court was still tasked with determining the issues which arose in this appeal being:

[10.1] Should the Appellant have instituted review proceedings as oppose to appeal proceedings?

[10.2] Was there irregularities conducted by the Arbitrator during the Arbitration proceedings?

[10.3] Were there circumstances created by the employer (the appellant) which rendered the working environment of the respondent unbearable?

[10.4] Was there evidence tendered during the arbitration to validate the Arbitrator's finding in granting the relief of 10 years for future loss of income?

Determination

Should the Appellant have instituted review proceedings as oppose to appeal proceedings?

[11] Ms Williams for the Appellant argued that the arbitrator failed to comply with the rules of natural justice by ensuring that the arbitration proceedings were conducted in a manner that is fair to both parties.

[12] The argument advanced by Ms Williams was that at first glance the proper proceeding to have been instituted based on the Arbitrator's irregularities would have been to institute review proceedings. However, the irregularities committed by the Arbitrator raised questions of law, specifically whether or not the Appellant received a fair and just hearing.

[13] The Appellant is correct when she quoted *Shaama v Roux*² where Van Niekerk J stated "It seems to me that where a defect in the proceedings raises a question of law and such a defect is apparent from the record, a party would be able to bring the matter before the Labour Court either by way of appeal or by way of review."

[14] The arbitrator's conduct during the arbitration proceedings is the focal point of the Appellant's complaint and this raises the question of law whether or not the Appellant received a fair and just hearing and therefore it is appealable.

[15] I confirm that the Appellant instituted the correct procedure before this court.

Was there irregularities conducted by the Arbitrator during the Arbitration proceedings?

[16] The arbitrator commenced the arbitration proceedings by referring to Section 86(6)(c) of the Labour Act, Act 11 of 2007 which states that an arbitrator may question any individual on any matter relevant to the dispute. From the onset this infers that the arbitration proceedings would be inquisitorial in nature.

² *Shaama v Roux* 2014 NALCMD 39 (30 September 2014).

[17] It can be seen from the record that the arbitrator places the respondent under oath and proceeds to ask the respondent various questions based on the various aspects related to her summary of dispute. The Appellant is correct when she argued that the arbitrator becomes the main questioner during the respondent's testimony.

[18] Whilst the arbitrator was busy questioning the respondent during the examination-in-chief, he pauses to address the appellant and informs her that she should be taking notes as she would have an opportunity to cross examine the respondent³.

[19] Thereafter, the arbitrator proceeds to call the respondent's only witness, without affording the appellant the opportunity to cross examine the respondent, all whilst the respondent is told to remain under oath.

[20] The appellant argued that this was aggravated by the fact that the respondent was then given an opportunity to question the witness whilst the respondent was still under oath.

[21] The arbitrator proceeded to ask the appellant on the conclusion of the respondent's witness evidence, whether she would cross examine both the respondent and witness or just the respondent.⁴

[22] The appellant argues that despite the fact that all parties present at the arbitration proceedings appeared in person and were both lay persons, at no stage did the arbitrator explain the various stages of the arbitration proceeding and what is expected of them during those stages.

[23] On further study of the record, I found that the argument had a lot of merit and that the arbitrator committed an irregularity.

[24] A further irregularity was that the appellant was not afforded an opportunity to be placed under oath and to state her case. The arbitrator failed to explain to the appellant what the consequence would be if she refused to testify, except the

³ Appeal Record p.22.

⁴ Appeal record p. 44.

arbitrator explained what the consequence would be if she did not call Dr Grevling to testify.⁵

[25] The abovementioned amounted to a gross irregularity.

Were there circumstances created by the employer (the appellant) which rendered the working environment of the respondent unbearable?

[26] When an employee alleges constructive dismissal as a ground for the unfair dismissal, the employee bears the onus of proving this, and the employee must prove that⁶:

[26.1] He/she terminated the employment contract;

[26.2] His/her continued employment became unbearable;

[26.3] The situation that rendered his employment unbearable was created by the employer; and

[26.4] The termination was a direct result of that situation and the employee had no choice but to terminate the employment contract.

[27] Despite the fact that the appellant was never placed under oath to put her version of events on the record, what is apparent from the record is that the respondent's termination of her employment contract does not qualify under the above categories. This is further confirmed by the record where the respondent testified that she is terminating her employment because she wants to divorce her husband⁷. (In Afrikaans).

[28] Therefore, I find that there was no unfair dismissal under the ground of constructive dismissal.

⁵ Appeal record p. 71.

⁶ Parker, C. Labour Law in Namibia, (2012), University of Namibia Press: Windhoek. Page 109

⁷ Appeal record page 69-70

Was there evidence tendered during the arbitration to validate the Arbitrator's finding in granting the relief of 10 years for future loss of income?

[29] Firstly, the arbitrator erred when he found that the respondent was constructively dismissed. But when the arbitrator decided to grant 10 years for future loss of income as oppose to the 12 months that the respondent claimed, he acted beyond his scope and powers. The South African Labour Appeal Court in *Le Monde Luggage CC 2015 (2) NR t/a Pakwells Petje v Dunn NO and Others*⁸ held that:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.' (underlining is my emphasis).

[30] The award granted was clearly to punish the appellant.

[31] I therefore found that the arbitrator acted ultra vires and did not exercise his discretion judicially.

Conclusion

[32] In conclusion, and in light of the discussion above I find that the Arbitrator erred in finding that the respondent was constructively dismissed and to have ordered the award.

[33] I hereby make the following order:

[33.1] The appeal is upheld.

[33.2] The arbitrator's award delivered on 25 June 2020 is hereby set aside.

[33.3] There is no order as to costs.

⁸ (2007) 28 ILJ 2238 (LAC) in paras 30 – 31.

[33.4] The matter is finalised and removed from the roll.

GH OOSTHUIZEN

Judge

APPEARANCES:

APPLICANT: Ms Williams
Of Koep & Partners Legal Practitioners

RESPONDENT: No Appearance