REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: *BASIL READ MINING NAMIBIA (PTY) LTD* *and* *DIAS KAVU*	Case No.: HC-MD-LAB-APP-AAA-2020/00049 **Division of Court:** Main Division **Heard on:** 16 April 2021
Heard before: Honourable Mr. Justice Masuku	**Delivered on:** 26 April 2021

Neutral citation: *Basil Read Mining Namibia (Pty) Ltd v Kavu* (LC-MD-LAB-APP-AAA-2020/00049) [2021] NALCMD 18 (26 April 2021)

The order:

Having heard **Mr. R. Philander**, on behalf of the Appellant, there being no appearance for the Respondent, and having read the pleadings and other documents filed of record:

IT IS HEREBY OREDERED THAT:

(i) The appeal is upheld and the arbitration award dated 26 June 2020 be and is hereby set aside.

(ii) The matter is removed from the roll and is regarded as finalised.

Reasons for order:

MASUKU, J:

[1] Serving before court for consideration is a labour appeal. The appeal is against an arbitration award issued by the arbitrator, Mr. Joseph Windstaan (the 'arbitrator') on 26 June

2020, under case number SRRO 01/2020.

Background

[2] From the onset, it is worthy of note that the respondent initially referred a dispute to the Office of the Labour Commissioner, under case number SRRO 01/2020. It became settled on 28 May 2020 and on that date, the parties agreed the to following terms:

'[1] That the respondent, without an admission of any fault or liability shall pay the applicant N$ 90 000 on which the tax directive resort at the respondent, as full and final settlement of the matter.

[2] The payment to be made on/or before 25 June 2020 to the applicant or at the Ministry of Labour, Industrial Relations and Employment Creation Located in Rosh Pinah.

[3] This agreement is private and confidential.

This agreement constitutes a final, binding and enforceable agreement which resolves all issues between the parties herein.'

[3] The appellant obtained a tax directive from the Ministry of Finance, Inland Revenue Department, which amounted to N$ 27 000. The respondent subsequently complied with the agreement and it accordingly deducted the tax as directed and paid the balance to the respondent.

[4] Properly ensconced in the view that the agreement and subsequent compliance therewith marked the end of the matter, the appellant was stricken by shock when it received a notice sent via email on 26 June 2020 from the arbitrator. The long and short of the notice was that the appellant was ordered to pay the N$ 27 000 which it had deducted as a result of the tax directive issued by the Ministry of Finance. In this regard, the arbitrator issued what appears to be an amended arbitration award, which reflected the same case number as the initial award issued on 28 May 2020, calling upon the appellant to pay to the respondent the amount deducted in the tax directive with which the appellant dutifully complied.

[5] The appellant, dissatisfied with the new development, launched an appeal against the new award. The appellant argued that no new dispute was referred by the respondent, and that the arbitrator consequently did not have any authority in law, nor the jurisdiction to adjudicate a dispute that was never referred to him in terms of the provisions of the Labour Act, 2007.

[6] The respondent opposed the appeal. There was, however, no heads of argument filed by the respondent, nor was there any appearance for and on behalf of the respondent at the

hearing of the appeal and for reasons unknown to this court. The respondent adopted the attitude that it would abide by the decision of the court.

[7] The court is of the considered view that the appeal has a lot of merit. This is for the reason that the dispute was settled finally by the parties. Once a dispute becomes settled, it cannot be resurrected by any of the parties, nor by the adjudicating authority. The settlement agreement brings the dispute to an end.[1] It can thus not unilaterally be amended by issuing a new award. In this case, the arbitrator's jurisdiction ceased upon the settlement and finalisation of the dispute. He thus became *functus officio*, having fully and finally exercised his jurisdiction in terms of the law.

[8] The only reason that appears to be on record for the issuance of the new award by the arbitrator is that the appellant misunderstood the initial award.[2] From this response one can reasonably gauge that the respondent appears to have been at one with the arbitrator and was therefor aware of the 'amendment', which constitutes a new award in fact and in law.

[9] It is unclear from the record of proceedings as to how the arbitrator came to the decision to 'amend' the award as the appellant does not appear to have been consulted on the new developments. The only reasonable conclusion one can come to is that the arbitrator acted unilaterally, possibly on the prodding of the respondent. To that extent, the said prodding, unilateral, as it seems to have been, was *ultra vires* the provisions of the Act and was thus invalid.

[10] The law recognises that there are certain circumstances in which the court or adjudicating authority, may commit an error, which can be corrected without further ado. In that case, the error sought to be corrected, must be clerical or mathematical in nature. Furthermore, the correction effected must not serve to change the nature, character and substance of the order that had been previously granted.[3]

[11] In the instant case, it is clear that the subsequent award had the opposite effect. Not only was the appellant not contacted before the issuance of the new order, but there was no new dispute lodged in terms of the law to deal with the new facts that had allegedly arisen. Furthermore, as indicated above, once the settlement agreement was signed, it put an end to the dispute between the parties, resulting in the arbitrator fully and finally exercising his

[1] Sakaria v Nampost Ltd (HC-LAB-MOT-GEN-2018/00071 [2020] 5 NALCMD (23 March 2020).
[2] Founding Affidavit, Para 4.8
[3] Firestone SA (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A).

jurisdiction. He thus was rendered *functus officio* in relation to that particular dispute.

[12] I must comment on one matter however. The respondent is represented by counsel in this matter. I am of the view that this is a matter which from what has been described above, is one that should not have been opposed. This is so because the procedure and course adopted by the arbitrator has no basis in law and was fundamentally flawed. It is odious that the appellant has been put to the vexation of having to institute these proceedings in order to set aright what was an obvious and screaming injustice by committed the arbitrator. The respondent, represented as he is, should not have made common cause with the arbitrator in supporting the perverse ruling and procedure followed.

[13] I need to appeal to officers of this court to shake off their client's gowns or apparel when they appear in court. They should disabuse their minds of only what is in their client's interests. As officers of the court, their eyes must extend to the wider interests of propriety and justice. They should not support what, as is the case in this matter, a naked and unpretentious wrong committed by the arbitrator. They should, like Pontius Pilate of Biblical times, wash their hands and distance themselves and their clients from the wrong perpetrated by an arbitrator. In doing so, they save their clients from being possibly held to have acted vexatiously or frivolously in opposing the appeal and defending the steps taken by the arbitrator.

[14] As an aside, I am acutely aware that this matter marks the valedictory appearance by Mr. Philander before our courts. That being the case, though unusual, it is in order to wish him well in the new direction his calling as a lawyer takes him henceforth.

[15] Finally, and reverting to the matter at hand, it appears that the proper order to issue in the circumstances, is the following:

(i) The appeal is upheld and the arbitration award dated 26 June 2020 be and is hereby set aside.

(ii) The matter is removed from the roll and is regarded as finalised.

	Note to the parties:
T. S. Masuku Judge	Not applicable
Counsel	
Appellant	**Respondent**
R Philander ENSAfrica Namibia	No appearance

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