



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-APP-AAA-2020/00068

In the matter between:

AFRICA PERSONNEL SERVICES (PTY) LTD

APPELLANT

and

MANFRED NDERO

1ST RESPONDENT

KENNETH KAHITIRE HUMU

2ND RESPONDENT

Neutral citation: *Africa Personnel Services (Pty) Ltd v Ndero and Another* (HC-MD-LAB-APP-AAA-2020/00068) [2021] NAHCMD 49 (11 November 2021)

Coram: PARKER AJ

Heard: 22 October 2021

Delivered: 11 November 2021

Flynote: Labour law – Arbitrator’s award – Award of monetary compensation – Arbitrator making award based on mathematical calculations whereby amount of compensation was reached by multiplying monthly remuneration of employee with the number of months between date of dismissal and date dismissal adjudged to be unfair by arbitrator – Arbitrator’s decision set aside.

Held, arbitrator acted plainly arbitrarily as he applied the wrong principles.

Held further, arbitrator acted perversely on the ground that arbitrator acted without any evidence upon which he could have arrived at a fair and reasonable amount of compensation.

Summary: Labour law – Arbitrator’s award – Award of monetary compensation – Having found employee’s dismissal to be unfair arbitrator ordered payment of compensation to employee – Arbitrator merely took employee’s monthly remuneration and multiplied it with 32 being the number of days between the date of his dismissal and the date on which arbitrator adjudged the dismissal to be unfair – Arbitrator heard no evidence and applied no principles regarding an amount of compensation that is fair and reasonable – Court finding arbitrator acted arbitrarily and perversely entitling the court to intervene – Award of compensation set aside and matter remitted to Labour Commissioner to appoint an arbitrator to reconsider a fair and reasonable amount of compensation after hearing evidence and applying the correct principles.

ORDER

1. The appeal succeeds to the following extent:

The order in the second bullet of para 21 of the Award is set aside and replaced with the following:

The matter is remitted to the Labour Commissioner for the Labour Commissioner to appoint, as soon as practicable, any arbitrator (including second respondent) to hear evidence on monetary compensation in order to arrive at a fair and reasonable amount of compensation; and in that regard, the principles in *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 4 (5 February 2014) must be taken into account.

2. There is no order as to costs.

3. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

[1] In the arbitration award in case no. CRWK 119-19, the arbitrator (second respondent) made the following order:

‘(a) That the respondent should reinstate the applicant in the position held prior to his dismissal or in a comparable position with effect from **23 November 2020**.

(b) That the respondent should pay the applicant an amount of **N\$125 424** which is the salary he would have received from **5 February 2018 to 22 October 2020**.

The said amount must be paid on or before **22 November 2020**, proof of which must be forwarded to the Office of the Labour Commissioner in Windhoek. The appropriate interest will accrue on the said amount if not paid on the date stipulated in this award.’

[2] Aggrieved by the orders, appellant appeals against the order in paras (a) and (b) of the award (see para 1 above) in its notice of appeal, but in its grounds of appeal, appellant appears to attack the monetary compensation part of the orders (ie para (b) thereof) only. That was confirmed by Mr Van Zyl, appellant’s counsel, in his submission to the court. In any case, as Mr Van Zyl submitted, no evidence was led during the arbitration to persuade the arbitrator not to order reinstatement of first respondent (ie the employee). The court is not entitled to adjudicate upon issues that were not placed before the arbitrator for consideration. (*Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC), para 14) The result is that the burden of the court is to consider the appeal in respect of the monetary order (ie para (b) (see para 1 above)) only, as aforesaid.

[3] On the record, I find that the present appeal turns on a very short and narrow compass; and it is this. Was the arbitrator’s order of compensation and the quantum thereof perverse in the sense explained by the Supreme Court, per O’ Reagan AJA,

in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC), para 43? There, relying on authorities, the court held that such appeal 'ought only to succeed where an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached;' that is, where the decision appealed from is perverse. And in *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 724H-I (applied in labour matters in *Edgars Stores (Namibia) Ltd v Olivier* Case No. LCA 67/2009; and recently in *Rossing Uranium Ltd v Goseb and Another* 2019 (2) NR 464), it was held that if the arbitrator exercised her or his discretion on judicial grounds and for sound reasons, that is, 'without caprice or bias or the application of a wrong principle', the appellate court should be slow to interfere and substitute its own decision.

[4] In the instant matter, the arbitrator ordered monetary compensation by merely multiplying first respondent's remuneration by 32, that is, the number of months between the date of his dismissal and the date on which the arbitrator adjudged the dismissal to be unfair. Granted, the arbitrator exercised a *liberum arbitrium* in the making of the award (see *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 33 (7 August 2014)); but such exercise of judicial discretion is not based simply on mathematical calculations without more. In *Shilongo v Vector Logistics (Pty)*, para 18, based on the authorities, I set out the principles which a court or tribunal ought to take into account when considering the amount of monetary compensation that is fair and reasonable in terms of the Labour Act 11 of 2007 ('the *Shilongo* principles').

[5] In the instant matter, as I have found, the arbitrator's decision is based simply on mathematical calculations. No evidence was placed before the arbitrator to enable him to consider a fair and reasonable amount of compensation. The fact that appellant (the employer) ought to know first respondent's remuneration (see *Pep Stores Namibia (Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC)), as Mr Coetzee, counsel for first respondent, submitted, is not enough. No evidence, as Mr Van Zyl submitted, was placed before the arbitrator to enable him to consider a fair and reasonable amount of compensation, based on such principles as the *Shilongo* principles.

[6] The arbitrator acted plainly arbitrarily. The decision he took is based on wrong principles (*Paweni*). The decision is perverse; for, no reasonable arbitrator or tribunal, 'on a proper appreciation of the evidence and the law, would have reached.' (*Janse van Rensburg*)

[7] Based on these reasons, I conclude that a case has been made out for the appeal to succeed. It is one of those cases where, upon request by one of the parties, and on the ground of fairness and reasonableness, the matter ought to be remitted to the Labour Commissioner for him or her to appoint any arbitrator (including the second respondent) to hear evidence on the issue of monetary compensation and to consider, bearing in mind the *Shilongo* principles, a fair and reasonable amount of compensation. In virtue of what I have said in para 2 above, namely that, what is challenged in the present appeal is the order of monetary compensation, the order of reinstatement remains intact.

[8] One last point; and it is directed at the Labour Commissioner (represented by second respondent). Orders that are made in an arbitration award should clearly be delineated with such notations as English letters, eg (a), (b), (c), etc., and not with bullets. Bullets are used in informal writing.

[9] In the result, I make the following order:

1. The appeal succeeds to the following extent:

The order in the second bullet of para 21 of the Award is set aside and replaced with the following:

The matter is remitted to the Labour Commissioner for the Labour Commissioner to appoint, as soon as practicable, any arbitrator (including second respondent) to hear evidence on monetary compensation in order to arrive at a fair and reasonable amount of compensation; and in that regard, the principles in *Shilongo v Vector Logistics (Pty) Ltd* [2014] NALCMD 4 (5 February 2014) must be taken into account.

2. There is no order as to costs.

3. The matter is finalized and is removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

APPELLANT:

C VAN ZYL

Instructed by Francois Erasmus & Partners,
Windhoek

1st RESPONDENT:

E COETZEE

Of Tjitemisa & Associates, Windhoek