

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-LAB-APP-AAA-2020/00023

In the matter between:

**MICHELLE JIMMY-NARUSES**

**APPELLANT**

and

**DUIKER INVESTMENT 142 (PTY) LTD**

**1<sup>st</sup> RESPONDENT**

**t/a ALMOND DIAMONDS NAMIBIA**

**LIWELA SASELE**

**2<sup>nd</sup> RESPONDENT**

**Neutral citation** *Jimmy-Naruses v Duiker Investment 142 (Pty) Ltd* (HC-MD-LAB-APP-AAA-2020/00023) [2021] NALCMD 8 (15 March 2021)

**Coram** Schimming-Chase, AJ

**Heard** 23 October 2020

**Delivered** 15 March 2021

**Flynote** Labour law – Appeal – Against arbitrator’s compensation award – Right of appeal restricted to questions of law only – Court to determine as a question of law whether on the evidence presented *a quo*, that no reasonable arbitrator could make such finding – Labour Act, 11 of 2007 section 89(1)

Labour law – Dismissal – Unfair dismissal – Compensation – Arbitrator to award amount of compensation as he in his discretion considers reasonable, fair and

equitable.

Labour Law – Compensation - In calculating the amount of compensation payable to an employee who has been dismissed unfairly, regard should be had to the actual loss suffered, or the amount that the dismissed employee would have been paid had he not been dismissed.

**Summary** The respondent who did not appear at the arbitration hearing was correctly found by the arbitrator to have unfairly dismissed the appellant. The appellant did not want reinstatement, The appellant's compensation claim was 20 years payment of salary. The arbitrator awarded 4 months' salary on the basis that he was not prepared to award future loss. The arbitrator's discretion was not unreasonably exercised given the evidence, and therefore the labour court declined to upset the arbitrator's findings.

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### ORDER

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1. The appeal is dismissed.
2. There shall be no order as to costs.

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### JUDGMENT

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#### **SCHIMMING-CHASE, AJ**

[1] This is an appeal against an award of compensation made by the first respondent<sup>1</sup> in terms of section 86(15) of the Labour Act, 11 of 2007. The appellant's appeal is based on the contention that the arbitrator misdirected himself in only awarding 4 months' salary as compensation for the appellant's

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<sup>1</sup> Herein referred to as "the arbitrator"

unfair dismissal, and that same was not reasonable, fair and equitable, and thus not sufficient as compensation in the circumstances.

[2] The appellant claimed 20 years' salary at the arbitration proceedings, however Mr Bugan, appearing for the appellant, submitted in argument that a period of 2 years' salary was just and reasonable in the circumstances.

[3] The appellant contended further that the arbitrator did not properly take into consideration evidence relating to mitigation presented at the arbitration hearing, and also did not guide her (given that she was unrepresented in those proceedings) to provide him the necessary information about her employment benefits for purposes of calculating her compensation.

[4] The respondent represented by Ms Shipindo, submitted that the arbitrator acted reasonable and within the confines of his judicial discretion in awarding a period of 4 months' salary as compensation. This amount was calculated from date of dismissal to date of hearing (1 February 2019 to 31 May 2019). Ms Shipindo further argued that the record revealed that there was no of evidence on mitigation, or on the appellant's benefits. This, she argued, was through no fault of the respondent. The respondent was not present, and the appellant had opportunity to provide a payslip at the hearing.

[5] By way of background facts, the appellant was employed by the respondent as an HR Administrator in 2013 and was later transferred to the Stock Department. She was suspended from work on 1 June 2017 for allegedly threatening a supervisor and not performing her work. She was fully paid during her suspension period. After failure to reach an agreement on mutual termination, the respondent dismissed the appellant on 4 February 2019.

[6] The appellant lodged a dispute of unfair dismissal on 25 March 2019 and the arbitration proceedings took place on 31 May 2019.

[7] Due to non-appearance of the respondent at the arbitration hearing,<sup>2</sup> the

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<sup>2</sup> As well as an earlier hearing scheduled for April 2019

arbitrator correctly found, given the absence of any response or opposition from the respondent, together with the evidence represented by the appellant, that her dismissal was substantively and procedurally unfair, contrary to the provisions of section 33 of the Labour Act.

[8] The appellant testified that she worked for the respondent for a period of 6 years. She was employed at HR Administration but after a few months, she was sent to the Stock Department, which deals with the import and export of diamonds.

[9] On 26 May 2017 (a Friday) she felt sick. She called the receptionist to tell her managers that she was not feeling well, that she was going to the doctor and that she would not be reporting for work on that Friday.

[10] After seeing the doctor and doing some tests she was booked off. Thereafter she texted her direct manager and also told her that she was booked off until 30 May 2017.

[11] On or about 31 May 2017 or 1 June 2017 (she could not remember) the appellant returned from sick leave and her superiors chastised her for staying away from work without informing anybody. She denied that she had not informed anybody and indicated that she had told the receptionist to inform the manager that she was feeling sick. She mentioned that she also texted her immediate manager and informed her that she was feeling sick after attending at the doctor and receiving a sick certificate.

[12] She showed the sick leave letter and was informed that “the big boss don’t (sic) want you here anymore”.

[13] After back and forth exchanges between the superior and the appellant, she was eventually suspended on full pay on 16 March 2018. However, the respondent failed to commence disciplinary proceedings against the appellant, and she continued to press on for a disciplinary hearing, indicating that she wanted the issue behind her so that she could return to work.

[14] Despite all the attempts by the appellant to ensure a proper disciplinary process and a fair hearing, as well as an explanation for why she was initially suspended, the respondent did nothing.

[15] The appellant specifically testified that she informed her managers that "... it is very hard and impossible for me to look for another job now. I have kids to take care of ...". After further attempts by the appellant to obtain a proper disciplinary hearing, the respondent instead engaged in settlement negotiations with her, offering her 3 months' employment to accept termination of employment, which she did not agree to.

[16] In the result and on 2 February 2019, the appellant was given a letter of termination, after which the dispute was referred to arbitration in accordance with the provisions of the Labour Act.

[17] The arbitrator correctly held that the appellant's dismissal was procedurally and substantially unfair.

[18] The appellant made it clear that she did not want reinstatement. As regards the compensation claim, the following evidence was led at the hearing:

“CHAIRPERSON: Okay, now what do you want?

THE APPLICANT: According to me, I was supposed to work until my retirement years, because I have kids to take care and it's very difficult to get a job in Namibia, it is not easy. So, I will prefer at least maybe 20 years, (34:10) years payment of salary.

CHAIRPERSON: For 20 years? How much per month?

THE APPLICANT: My basic salary.

CHAIRPERSON: Yes.

THE APPLICANT: Was 5400.

CHAIRPERSON: Okay, anything else? If there is anything that you want to add?

THE APPLICANT: Yes, because Mr Sasele I really go through a lot.

CHAIRPERSON: I am just asking on the (34:37) indicated that you wanted to

be paid 20 years what you were earning per month, you have put it on record, is there still any other claims?

THE APPLICANT: Like, hmm, social, like like can you explain to me, like benefits that I was getting?

CHAIRPERSON: No, no, are you still claiming anything else? What you have indicated to me is that you want

THE APPLICANT: Okay, I also ...

CHAIRPERSON: You want ...

THE APPLICANT: I also want them to pay me out my leave days.

CHAIRPERSON: How many?

THE APPLICANT: I was having 47, but I don't know how many I am having.

CHAIRPERSON: Can you put the figure? Otherwise I am just going to order them to give you 1 day.

THE APPLICANT: The figure of days?

CHAIRPERSON: Ja, the days that you are claiming.

THE APPLICANT: It was 47.

CHAIRPERSON: You are claiming 47 days.<sup>3</sup>

THE APPLICANT: Yes.

CHAIRPERSON: And how many days in the week do you used to work?

THE APPLICANT: 5 days.

CHAIRPERSON: Any other claim if you still have?

THE APPLICANT: No sir.

CHAIRPERSON: Thank you very much, we came to the end of the hearing. Have a good day.

THE APPLICANT: Thank you sir."

(emphasis supplied)

## Legal principles

[19] In terms of section 89(1)(a) of the Labour Act a party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 on any question of law alone. The general principle to be applied to determine whether an appeal is on a question of law is whether on the material placed before the arbitrator during the proceedings, there was no evidence which could have reasonably supported the findings made. Thus, the test is whether, on a

<sup>3</sup> The claim for leave days was not proceeded with at the hearing.

proper evaluation of the evidence placed before the arbitrator, that evidence leads inexorably to the conclusion that no reasonable arbitrator could have made such findings. Simply, the appellant must show that the arbitrator's conclusion could not reasonably have been reached.<sup>4</sup>

[20] Section 86(15) of the Labour Act empowers the arbitrator to make an appropriate arbitration award, including an award of compensation.

[21] In *M Pupkewitz & Sons v Kankara*,<sup>5</sup> Mtambanengwe J (as he then was) held that in calculating the amount of compensation that was payable to an employee who had been dismissed unfairly, regard should be had to the actual loss suffered, or the amount that the dismissed employee would have been paid had he not been dismissed.

[22] The compensation is thus payment of the value, estimated in money, of something lost<sup>6</sup> which consists of (1) an amount equal to the remuneration that the employer ought to have paid the employee had he not been dismissed or suffered other unfair disciplinary measure or some other labour injustice and (2) an amount equal to any loss suffered by the employee because of the dismissal or other disciplinary action or other labour injustice.<sup>7</sup>

[23] In determining the amount of compensation, the courts have taken into account the extent to which the claimant's own conduct amounted to the dismissal. The courts have also taken into account, the view that compensation must not be calculated in a manner to punish an employer, or at enriching a claimant because it is awarded on the principle of *restitutio in integrum*. In *Novanam supra*<sup>8</sup> Ueitele J held that in general, compensation calculated on a period between the dismissal of the respondent and the hearing of the complaint

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<sup>4</sup> *Domingo and Others v Van Wyk* 1997 NR 102 (HC) at 105D-E; *House & Home (a trading division of Shoprite (Pty) Ltd) v Majiedt and Others* 2013 (2) NR 333 at par [4]-[6] and the authorities collected there; *Novanam Ltd v Rinquest* 2015 (2) NR 447 (LC) at par [10]

<sup>5</sup> *M Pupkewitz & Sons v Kankara* 1997 NR 70 (LC) (1998) 1 NLLP 185 (NLC)

<sup>6</sup> Per Justice Collins Parker *Labour Law in Namibia* UNAM Press 2012 at 193

<sup>7</sup> See *Novanam Ltd supra* at par [17]

<sup>8</sup> At 457B-C par [23]

was reasonable and fair.

[24] In *Pep Stores Namibia Ltd v Iyambo and Others*<sup>9</sup> it was held that where an arbitrator awards compensation that is equal to the amount of remuneration that would have been paid to the employee had she not been dismissed, it may not be necessary for the employee to lead evidence to establish the amount involved. The amount should be within the employer's domain, but if the amount includes compensation for loss of certain benefits e.g. medical benefits then the employee must establish by evidence what the losses entail.

[25] After consideration of the legal principles referred to above, the arbitrator made the following findings:

[34] The applicant claimed payment for twenty (20) years as compensation for unfair dismissal. Claiming 20 years of compensation for loss of income, means she also claim for future loss of income. I cannot order further loss of income because even if she was not employed at the time of the arbitration hearing. She can get another job at any time.'

and:

'Compensation is not about self-enrichment or punishing the employer. Further, the applicant failed to show that she suffered any losses. At arbitration hearing, the applicant did not even indicate that she was employed without an income. Thus I will only order payment for four (4) months' salary for loss of income because I am of the view that it's a just and fair compensation. The four months is from the month she was dismissed until the month the hearing was conducted.'

[26] Mr Bugan for the appellant submitted that the arbitrator misdirected himself when he found that the appellant could get another job at any time, when this evidence was not placed before him. Mr Bugan also argued that the delay of 10 months<sup>10</sup> in delivering the award, should have resulted in calculation of the loss of income to date of delivery of the ruling. Further, he argued that the failure to

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<sup>9</sup> *Pep Stores Namibia Ltd v Iyambo and Others* 2001 NR 211 (LC) at 195

<sup>10</sup> 31 May 2019 to 18 March 2020



guide the appellant, who was unrepresented, in how to claim the benefits, was a misdirection on the part of the arbitrator.

[27] Ms Shipindo for the respondent argued that it was incumbent on the appellant to provide sufficient evidence substantiating the exact amount of damages claimed, and that the appellant failed to lead the necessary evidence to support the amount of damages claimed. Reliance was placed on the judgment of *Fisheries Observer Agency v Namibia Public Workers Union and Another*.<sup>11</sup>

[28] M Shipindo argued further that although the appellant remarked that it was hard to find a job in Namibia, there was no indication on the record as to whether the appellant has taken steps to mitigate her loss and that the delay in the award had nothing to do with and should not be held against the employer, for purposes of calculating loss of income.

[29] In addition, the appellant had the opportunity to pray for reinstatement, which would have been more financially beneficial to her.

[30] On the totality of the evidence presented at the arbitration hearing, the arguments made on behalf of the respondent find favour with the court. The appellant was in a very favourable position to apply for reinstatement when on her own version, it was hard to find a job in Namibia. This, she did not do. Instead, she applied for 20 years basic salary on the basis that she would have worked until her “retirement years”. This is also to be considered in the light of her own evidence that before her employment was unlawfully terminated, she had presented herself as willing to work.

[31] The argument put forward by Mr Bagan, to the effect that the arbitrator had a responsibility to explain to the appellant that additional benefits could be claimed (as part of remuneration), especially in light of the principle that this aspect was for the employee to show, loses sight of the fact that the employer

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<sup>11</sup> NLLP 2004 (3) 53 (NLC) at 57; See also *Springbok Patrols (Pty) Ltd v Jacobs and Others* [2013] NALCMD 17 (dealing with the repealed Labour Act, with the legal principles enunciated therein remaining the same)

was not at the proceedings, and that all the appellant had to do was provide a payslip.

[32] Also the appellant specifically claimed her basic salary.

[33] It is so that there was no evidence on record for the arbitrator to make the finding that the appellant could "... get another job at any time". However, the appellant did not give any evidence of the steps she took to mitigate her loss. She gave no evidence of any additional benefits she was entitled to, and it was incumbent on her to do so. Thus the appellant suffered no prejudice.

[34] In light of the foregoing, the court finds that the arbitrator's discretion in the award of compensation to the appellant was not capriciously exercised. The arbitrator had the benefit of receiving the evidence and assessing the demeanour of the appellant, at the hearing, in the absence of the respondent.

[35] Thus the appeal must fail, and the following award is made:

1. The appeal is dismissed.
2. There shall be no order as to costs.

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EM SCHIMMING-CHASE  
Acting Judge

APPEARANCES

APPELLANT

Deon Bagan

Instructed by Harmse Attorneys

RESPONDENT

Rauha Shipindo

Instructed by Metcalfe Beukes Attorneys