

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2021/00053

In the matter between:

LADY POHAMBIA PRIVATE HOSPITAL (PTY) LTD

APPELLANT

and

BERTITHA N SHOVALEKA

FIRST RESPONDENT

ELIZABETH NKOLE N.O

SECOND RESPONDENT

LABOUR COMMISSIONER

THIRD RESPONDENT

Neutral citation: *Lady Pohamba Private Hospital (Pty) Ltd v Shovaleka* (HC-MD-LAB-APP-AAA-2021/00053) [2022] NALCMD 42 (28 July 2022)

Coram: SCHIMMING-CHASE J

Heard: 21 January 2022

Delivered: 28 July 2022

Flynote: Labour Law – Appeal against an arbitration award – Reinstatement – Compensation.

Summary: This appeal lies against the sanction imposed by the arbitrator in her award in favour of the first respondent employee. The appellant takes issue with the order reinstating the first respondent and the amount awarded as compensation. In essence, the appeal is premised on the ground that insufficient evidence was placed before the arbitrator to justify the sanctions she imposed, and further that her compensation award was manifestly high in the circumstances.

Held that: there was no evidence presented to the effect that the employer-employee relationship had irretrievably broken down, thereby rendering an order for reinstatement impossible.

Held that: no reasons were advanced by the arbitrator for the compensation award, however, given the period of lockdown occasioned by the global Covid 19 pandemic, there was sufficient evidence on record enabling the court to alter the compensation award in terms of s89(10) of the Labour At 11 of 2007.

ORDER

1. The arbitrator's award of reinstatement of the first respondent at the appellant from 15 July 2021 is upheld.
2. The reinstatement of the first respondent must be effected on or before 31 August 2022.

3. The arbitrator's award of compensation is set aside, and the appellant is ordered to pay the first respondent compensation by way of full salary and benefits for a period of 9 months in total. No further compensation is to be awarded to the first respondent.
4. The matter is removed from the roll and regarded finalised.

JUDGMENT

SCHIMMING-CHASE J:

[1] The appellant appeals against the arbitrator's award wherein the appellant was ordered to reinstate and compensate the first respondent. This was after the first respondent was dismissed by the appellant following a disciplinary hearing.

[2] The appellant is Lady Pohamba Private Hospital (Pty) Ltd, a company registered in accordance with the laws of the Republic of Namibia, conducting business as a private hospital.

[3] The first respondent is Bertitha Shovaleka, who was employed by the appellant from 1 June 2016 until 23 January 2020 when she was dismissed for being absent from work from 2 January 2020 - 15 January 2020. For completeness, it is to be noted at the outset, that on 17 January 2020, the first respondent presented the appellant's HR Manager with a doctor's sick leave certificate, in terms whereof she was booked of sick

for the period 2-20 January 2020. The third respondent is the arbitrator whose decision is being challenged.

[4] The first respondent commenced employment at the appellant on 1 June 2016 as ward assistant, which position she held until her dismissal on 23 January 2020.

[5] It appears from the record that the first respondent was charged with misconduct for unauthorised absenteeism. The charge reads as follows: 'on 02 January 2020, you were scheduled to work but did not clock in. You came in at 06:50 to EC claiming you were in a motor vehicle accident. You were admitted in hospital and discharged on 6 January 2020 and neglected to inform your Manager of your whereabouts until 17 January 2020.'

[6] This led to a disciplinary hearing, whereafter the first respondent was dismissed. The first respondent referred a dispute to the Office of the Labour Commissioner and the arbitrator found in favour of the appellant. The arbitrator ordered that the first respondent be reinstated and compensated her salary inclusive of benefits for a period of fourteen months. The appellant, disgruntled by this award, now appeals to this court. Before considering the arguments of the parties on appeal, I summarise below the arbitrator's award and particularly her reasoning. I confine my summary to the issue of reinstatement and compensation, which falls for determination by this court.

[7] The majority of the award was concerned with the issue of determining the fairness of the first respondent's dismissal.

[8] After finding that the first respondent was unfairly dismissed, the arbitrator found, insofar as it relates to the award for reinstatement of the first respondent, that her immediate supervisor, Ms Cilliers of the appellant, was not opposed to the first respondent going back to work for the appellant. It is on this basis, that the reinstatement was ordered. I also note from the arbitration award as well as the rest of the record, that there was no evidence tendered relating to an irretrievable breakdown of the employer-employee relationship between the appellant and the first respondent.

[9] The arbitrator did not provide reasons why compensation (comprising full salary and benefits) was ordered for a period of fourteen months.

[10] It appears that the appellant does not take issue with the finding of unfair dismissal per se. The issues on appeal relate to the reinstatement order and the amount of compensation awarded to the first respondent. According to the appellant, an order for compensation would be sufficient and reinstatement should not have been ordered.

[11] Regarding the question of reinstatement, it was argued by the appellant that the first respondent was employed at a hospital and that the absence of an employee leaves management in 'a dire position'. According to the appellant, the arbitrator did not give reasons 'why re-instatement is justified after reaching the conclusion that the first

respondent was guilty of abscondment, for which she was charged for the period 2 – 15 January 2020'. I take issue with this argument of the appellant. My understanding of the arbitrator's reasoning in this regard, is that the arbitrator was merely drawing a distinction between absconding and absenteeism. In the end, the arbitrator asked, if the appellant was convinced that the first respondent had absconded, why was she not charged with absconding? I therefore understand para 200 of the award as an obiter statement, for lack of a better word, rather than a finding, as submitted by the appellant.

[12] The appellant also took issue with the fact that the arbitration award was dated 7 July 2021, but in terms thereof, the first respondent had to be reinstated on 15 June 2021. In fact, the award in para 203 orders reinstatement date to be as of 15 July 2021. Therefore, the reinstatement date is also not an issue.

[13] According to the appellant, the question that ought to be answered is whether the first respondent may still be trusted by the appellant. For this assertion, appellant relied on *Trio Data Business Risk Consultant (Pty) Ltd v Andima & Others*¹. In this matter, the court was satisfied on the evidence that the employment relationship had broken down irretrievably.²

[14] The appellant also argued that, in taking into account that Ms Cilliers (the direct supervisor of the first respondent) was not opposed to the first respondent going back to work for the appellant, the arbitrator neglected to consider the particular circumstances

¹ *Trio Data Business Risk Consultants Namibia (Pty) Ltd v Andimba and Others* (LCA 161 of 2012) [2013] NALCMD 29 (9 August 2013).

² *Ibid*, para 13 and 33.

of the type of work, as well as the first respondent's nonchalant approach to 'being absent and submitting sick leave certificates, which are part of the rules.' Further, that even if the procedure employed at the disciplinary hearing was unfair, a valid reason existed for the dismissal of the first respondent in the circumstances.

[15] The appellant's argument as regards the amount of the compensatory award, was that the period of delay in the finalisation of the arbitration process should not have been included in the computation of the compensation payable to the first respondent. The arbitrator also did not give reasons for the period of computation in the determination of the compensation. According to the appellant, the arbitrator ought to have given compensation for two to four months which would have been N\$ 16 347.01 x 2 = N\$ 32 694.02 / N\$ 65 388.04.

[16] According to the appellant, the order for compensation is also unclear, confusing and difficult to implement, and that compensation should not be aimed at punishing the employer.

[17] The first respondent submitted that the decision as to whether to make an order for reinstatement or not lay within the discretion of the arbitrator, and further that, had the appellant been convinced that by failing to attend work for the time period in question, the first respondent intended to not return to work, it should have charged her with abscondment and not absenteeism.

[18] The first respondent further argued that due to the global pandemic, the arbitrator cannot be faulted for the delay in the arbitration process. I understand this argument to mean that the period for which the first respondent had been effectively unemployed (14 months), was as a result of the global pandemic. Therefore, the inclusion of that period in the arbitrator's computation of the compensation should not be faulted. According to the first respondent the court should take judicial notice of the global pandemic as well as the restrictions insofar as public gatherings are concerned.³

[19] The first respondent also argued that in the computation of the appropriate compensation, the arbitrator took into account the duration of the first respondent's unemployment - that is from February 2020- March 2021. Submissions were made in April 2021 and closing arguments in May 2021. The award was then released on 5 July 2021. The period from April 2021-July 2021 was not included in the computation of the compensation payable. It is for this reason, so the argument goes, that the arbitrator awarded compensation for 14 months.

[20] In terms of s 89 (1) of the Labour Act, 11 of 2007 ("the Act") –

'(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78-

(a) on any question of law alone;'

³ Civil Proceedings Evidence Act, 65 of 1965, s 5(1).

[21] The two questions of law on which the appellant's appeal is premised are these: a) reinstatement and b) compensation. I will now consider these two issues. I proceed on the basis that it is common cause that the dismissal was unfair. Also from my reading of the grounds of appeal, that the dismissal was unfair is not in issue.

[22] In *Adcon CC v Von Wielligh*⁴, Ueitele, J in discussing the remedies available to an employee dismissed unfairly stated that the starting point for such an employee is s 86 of the Labour Act, 11 of 2007. In terms of s 86(15), the arbitrator may make an appropriate order including but not limited to an order for reinstatement and an award of compensation.

[23] As regards reinstatement, in *Paulo v Shoprite Namibia (Pty) Ltd and Others*⁵, Damaseb JP had the following to say about reinstatement;

'[9] It must now be obvious that Namibia's 2007 Labour Act does not contemplate retrospectivity in reinstatement. This has led Parker to conclude in his book *Labour Law in Namibia* that the word 'reinstatement' in s 86(15)(d) of the 2007 Labour Act ought to bear its 'ordinary, grammatical meaning in the employment context'; interpreted by McNally JA in *Chegutu Municipality v Manyora* as follows:

"I conclude therefore that reinstatement in the employment context means no more than putting a person again into his previous job [underlined for emphasis]. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding backpay and/or compensation. But mere reinstatement does not necessarily imply that backpay and/or compensation automatically follows".⁶ [underlined for emphasis]

⁴ *Adcon CC v Von Wielligh* (LC 80/2016) [2017] NALCMD 24 (07 July 2017) at par 26.

⁵ *Paulo v Shoprite Namibia (Pty) Ltd and Others* unreported, LC40-2011 [2012] NALC 17(1 June 2012).

⁶ See also *Transnamib Holdings v Engelbrecht* 2005 NR 372 (SC) at 381 E-G.

[24] Having regard to the above, the arbitrator has a discretion to make an appropriate award as justified by the circumstances of each case. I also am mindful that an order for reinstatement does not necessarily invite an order for compensation. I understand this to be the gravamen of the appellant's case.

[25] Taking the arguments and cited authorities into consideration, I am of the view that the arbitrator's award clearly stated that re-instatement ought to be from 15 July 2021, therefore there was no retrospectivity in that award when it was made. The appellant was incorrect to argue that the reinstatement date was 15 June 2021. I am further fortified in my view that the arbitrator gave clear reasons for the reinstatement order and her findings on this score cannot be faulted. I say so because, she stated that the direct supervisor of the appellant, Ms Cilliers was not opposed to the first respondent returning to work. If the employer – employee relationship had irretrievably broken down, Ms Cilliers would have indicated as such. In her rather lengthy award, the arbitrator noted the nature of the work done by the first respondent as well as the duration for which she had been dismissed. If it was the case that her position was filled in this time, then that would have been indicated during evidence, which was also not provided.

[26] I am also of the considered view that the employer – employee relationship between the appellant and the first respondent had not broken down irretrievably. That was certainly not the evidence before the arbitrator. It is for this reason that I will not

interfere with the reinstatement order. As regards the evidence by Ms Du Plessis that the first respondent cannot be trusted to obey the rules of the appellant, I am not convinced that this is true. I say so because the first respondent submitting the leave forms after her follow up, is indicative of her obedience to the said rules. She was booked off until 20 January 2020, but went in to office on 17 January 2020, even if it was on the request of the Human Resources Manager, to submit the leave form. If she had the propensity to disobey orders or rules, I am of the considered view that the first respondent would not have attended office on 17 January 2020, whilst booked off. In this regard, it is to be noted that the first respondent was admitted to the hospital where she works.

[27] As regards the award of compensation, I am of the considered view that although the arbitrator did not explain why she calculated compensation for fourteen months instead of the twelve months sought by the first respondent, it is apparent that she took the National Lockdown period into consideration in the computation of her compensatory award. This is accordingly a case where it would be apt to make an appropriate order in terms of s 89(10).

[28] The first respondent was dismissed on 23 January 2020. Her reinstatement was ordered on 5 July 2021 and the reinstatement date was 15 July 2021. The evidence in the arbitration hearing closed in March 2021. The first respondent should be awarded compensation in the circumstances. Unfortunately the unfair dismissal took place during a time the world was experiencing a global pandemic. This had influenced operations in

many if not all areas of life. Hospitals, however, continued to operate, as obvious essential services. Conversely, delays were experienced in the finalisation of the arbitration process for the same reasons. In spite of the absence of the reasons given, the Labour Act gives the court a discretion to consider an appropriate award. Taking all the circumstances into consideration, I am of the view that compensation by way of full salary and benefits for a period of nine months, would adequately compensate the first respondent in the circumstances, and that a period of 14 months is excessive.

[29] In the result, the following order is made

1. The arbitrator's award of reinstatement of the first respondent at the appellant from 15 July 2021 is upheld.
2. The reinstatement of the first respondent must be effected on or before 31 August 2022.
3. The arbitrator's award of compensation is set aside, and the appellant is ordered to pay the first respondent compensation by way of full salary and benefits for a period of 9 months in total. No further compensation is awarded to the first respondent.

E SCHIMMING - CHASE

Judge

APPEARANCES

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