

REPUBLIC OF NAMIBIA



**IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: HC-MD-LAB-APP-AAA-2022/00004

In the matter between:

NEDBANK NAMIBIA LIMITED

APPELLANT

and

HENDRIK THOMAS MOUTON

RESPONDENT

Neutral citation: *Nedbank Namibia Limited v Mouton* (HC-MD-LAB-APP-AAA-2022/00004) [2022] NALCMD 54 (29 September 2022)

Coram: COLEMAN J

Heard: 5 August 2022

Delivered: 29 September 2022

Flynote: Labour Appeal – Appeal against decision of Arbitrator – Compensation – Compensation in labour matters not be equated with civil or delictual damages – Factors, such as whether the respondent obtained employment in the meantime and period of employment before dismissal, to be taken into account by an arbitrator.

Summary: This is an appeal against an arbitration. Appellant appeals against the findings as well as the compensation awarded while respondent counter appeals against the award.

The respondent was employed by the appellant as branch manager in Rehoboth. After about 12 months of employment, the appellant dismissed the respondent on 28 April 2016 following a disciplinary hearing. The respondent's dismissal was upheld on appeal and he referred a dispute to the Labour Commissioner. This culminated in the arbitrator awarding the respondent N\$313 500 in compensation, being six months' salary, which is now subject to appeal.

Held that compensation in a labour matter should not be equated with civil or delictual damages. There are a number of factors that an arbitrator should take into account, such as, whether the respondent obtained employment in the meantime and the period of employment before his dismissal.

Held that the arbitrator erred in awarding six months' salary as compensation while respondent was employed for only twelve months by appellant. A more appropriate award would be one month's salary, being N\$52 250.

ORDER

1. The arbitration award of N\$313 500 compensation in favour of the respondent is set aside.
2. The appellant is ordered to pay respondent N\$52 250 compensation, being one month's salary, plus interest at the rate of 20 per cent per year calculated from 15 December 2021, the day after the date of the arbitrator's award.
3. No order as to costs.

JUDGMENT

COLEMAN J:

Introduction

[1] This is an appeal against an arbitration award delivered by arbitrator Liwela Sasele on 14 December 2021. Appellant appeals against the findings as well as the compensation awarded while respondent counter appeals against the award.

The pertinent facts

[2] The respondent was employed by the appellant as branch manager in Rehoboth. After about 12 months of employment, the appellant dismissed the respondent on 28 April 2016 following a disciplinary hearing. The respondent's dismissal was upheld on appeal and he referred a dispute to the Labour Commissioner. This culminated in the arbitrator awarding the respondent N\$313 500 in compensation, being six months' salary, which is now subject to appeal.

[3] In essence, respondent was dismissed for authorising the deposit of a non-transferable cheque into the account of an individual who was not the payee of the cheque. He pleaded guilty to 'Failure to Adhere to Laid Down Procedures' at his disciplinary proceeding.

[4] There is some background to this failure by respondent to adhere to procedures of the bank. During October 2015, a person, whom respondent described as '. . . one of the big customers in town . . . and he also has a great influence . . .' showed up at the appellant's Rehoboth branch with a cheque of Rehoboth Town Council made out to Rydox Builders CC. This person is a member of the close corporation and wanted to deposit the cheque in his personal account. A teller took the person to the respondent who at the outset told him that it is not allowed.

[5] They also consulted with another, presumably senior, bank official who is responsible for teller training. She was asked if the deposit could be allowed after the crossing of the cheque was cancelled. Apparently, she responded that it is 'the old way', but respondent could use his discretion. The person bearing the cheque then arranged for the crossing on the cheque to be cancelled. The bank official consulted by the respondent as well as the stand-in for the Rehoboth Branch Controller refused to authorise the deposit of the cheque for various reasons.

[6] Respondent then, knowing full well that a crossing on a cheque cannot be cancelled and that it must be deposited into the account of the payee, instructed the teller to deposit the cheque into the personal account of the person bearing the cheque. There is no evidence that this was a fraudulent deposit.

The Parties' positions

[7] Mr Dicks, who acted for the appellant contended, that the arbitrator erred astonishingly in accepting that respondent could change his guilty plea. He also submitted that respondent did not prove his losses for the purposes of compensation. In conclusion, he submitted that the arbitrator's award should be set aside.

[8] Ms Mondo, who acted for the respondent, essentially submitted that respondent's dismissal was substantively as well as procedurally unfair and that the compensation awarded is inadequate.

Conclusion

[9] I have read all the material and considered each and every submission on behalf of the parties. In my view, respondent's dismissal was substantively unfair, but the arbitrator erred in awarding him N\$313 500 as compensation.

[10] The respondent was employed as branch manager at the Rehoboth branch of appellant. He was about twelve months in the employ of appellant. It is apparent from the record that he was committed to build the business of the branch and wanted to impress an influential client. He consulted a number of senior officials at his branch and was left with the impression that he had a discretion. No money was lost. While it is important that banking procedures are adhered to, this was respondent's first transgression. He clearly realized his mistake and expressed remorse. In my view, dismissal was unfair under the circumstances. Appellant could have given respondent a final warning.

[11] The parties agree reinstatement is not an option. The approach in respect of compensation is well documented in the Namibian context.¹ An important aspect to comprehend is that compensation in a labour matter should not be equated with civil or delictual damages. There are a number of factors that an arbitrator should take into account, such as, for example, whether the respondent obtained employment in the meantime and the period of employment before his dismissal.

[12] In my view the arbitrator erred in awarding six months' salary as compensation while respondent was employed for only twelve months by appellant. A more appropriate award would be one month's salary, being N\$52 250. In my view, the barrier for proving compensation in a labour matter should not be too high. One month's salary is fair under the circumstances of this matter.

[13] In the premises, I make the following order:

1. The arbitration award of N\$313 500 compensation in favour of the respondent is set aside.
2. The appellant is ordered to pay respondent N\$52 250 compensation, being one month's salary, plus interest at the rate of 20 per cent per year calculated from 15 December 2021, the day after the date of the arbitrator's award.
3. No order as to costs.

¹ See for example the discussion and cases cited in C Parker *Labour Law in Namibia* at 193-195 (2012). Windhoek: UNAM Press.

G COLEMAN
Judge

APPEARANCES

APPELLANT: G Dicks
Instructed by Köpplinger Boltman, Windhoek

RESPONDENT: R Mondo
Of Nixon Marcus Public Law Office, Windhoek