

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2022/00028

In the matter between:

FILLEMONT HAMBUDA

APPELLANT

and

THE MUNICIPAL COUNCIL OF WINDHOEK

1ST RESPONDENT

KAHITIRE KENNETH HUMU

2ND RESPONDENT

Neutral citation: *Hambuda v The Municipal Council of Windhoek* (HC-MD-LAB-APP-AAA-2022/00028) [2023] NALCMD 15 (4 April 2023)

Coram: RAKOW J

Heard: 17 February 2023

Delivered: 4 April 2023

Flynote: Labour law – Correct interpretation of the employment contract – Court is satisfied that the conclusion reached by the Labour Commissioner is clearly not wrong – Employer seeks a three month notice period before early retirement – No legal point available – Appeal is dismissed.

Summary: This is an appeal against the arbitrator's award of 18 March 2022, under case number CRWK 808-21. The matter turns on the correct interpretation of the employment contract entered into by the appellant and the first respondent. The appellant was a member of the pension fund of the first respondent and was entitled to retire as from the age of 55. He applied for early retirement at the age of 59 and 11 months which retirement was approved by the Chief Executive Officer. He was at that stage, 12 days from reaching retirement age. This coincides with the election of the appellant to the local authority council. The legal question that remained is that in terms of the requirement for the pension fund to become operational, the employer seeks a three month notice period before early retirement although that is not a requirement for resignation.

Held that: in this instance the court is satisfied that the conclusion reached by the Labour Commissioner is clearly not wrong and it is a conclusion she was entitled to reach. I therefore find no legal point available and for that reason the appeal must not succeed.

Appeal is dismissed.

ORDER

1. The appeal is dismissed with no order as to costs.
 2. The matter is removed from the roll and regarded as finalized.
-

JUDGMENT

RAKOW J

Introduction

[1] The appellant filed a notice of appeal from the arbitrator's award, citing himself as the appellant and the Municipal Council of Windhoek as the first respondent and the Honourable Kahitire Kenneth Humu N.O. as the second respondent.

[2] The matter turns on the correct interpretation of the employment contract entered into by the appellant and the first respondent. The appellant was a member of the pension fund of the first respondent and was entitled to retire as from the age of 55. He applied for early retirement at the age of 59 and 11 months which retirement was approved by the Chief Executive Officer. He was at that stage, 12 days from reaching retirement age. This coincides with the election of the appellant to the local authority council. The legal question that remained is that in terms of the requirement for the pension fund to become operational, the employer seeks a three month notice period before early retirement although that is not a requirement for resignation.

[3] The first respondent also brought a condonation application for the late filing of heads of argument which application is condoned.

The award by the labour commissioner

[4] This is an appeal against the arbitrator's award of 18 March 2022, under case number CRWK 808-21 where the second respondent ultimately found that:

‘1. That Appellant was solely bound by the terms of the fixed Term Employment contract regardless of whether he was eligible to go on Early Retirement subject to his other terms and conditions of Employment.

2. That notwithstanding the fact that the appointing authority being the CEO approved and signed the Applicant's Early Retirement application the Appellant was still bound by the terms of the fixed term employment contract to give three months' notice and that failure thereof amount to a breach of contract entitling the 1st Respondent to invoke the provisions of clause 7.3.2.

3. That Appellant was obliged to abide by the terms and conditions of the contract and that he failed.

4. That the Appellant was in breach of contract.

5. That there is no substance in the dispute (allegations) of the Appellant.'

[5] In the result the second respondent went on to award as follows:

'1. The Applicant's claim is hereby dismissed.

3. I make no order as to costs.'

[6] It seems that some of the facts in this matter, the parties are ad idem on and are not disputed: These are, that the appellant reached his early retirement age of 55 years and was a member of the Pension Fund of the first respondent. And as such the appellant went on early retirement with concomitant benefits in terms of the rules of the Retirement Fund which early retirement was approved by the then Chief Executive Officer and therefore, did not resign.

[7] The facts in dispute between the parties are, whether the appellant should have given three (3) months' notice when he went on early retirement or not, whether this three months' notice period is applicable to early retirement also or only applicable to an instance where the appellant resigned. Was it further possible to give the said notice as the appellant was already at the age of 59 years and 11months when he gave the notice?

Grounds of appeal

[8] The appellant contends that the second respondent erred in law:

- a) If regard is had to the Retirement Fund Rules which provides in rule 3.1 that an employee of the Council of the City of Windhoek shall join the Retirement fund as a condition of employment. The Appellant was a member of the Retirement Fund at the time he submitted his notice for early retirement which notice was approved by the then Chief Executive Officer as the appellant by then was eligible for early retirement.
- b) Rule 5.2.1 of the rules of the Retirement Fund for Local Authorities and Utility Services in Namibia provides as follows: 'A member who has reached age 55 years may retire on the last day of any month prior to his Normal Retirement Date.' The appellant was only left with 12 days from 30 November 2020 to

reach 60 years and therefore, it was not possible for him to give three (3) months' notice.

- c) The Appellant opted to go on early retirement on 30 November 2020 being the last day of the month of November.
- d) It is evidently clear that in this instance of early retirement there was no contractual obligation for the appellant to give three (3) months' notice but only in instances of resignation where the appellant was still to render services for a period of more than three (3) months, as sec 30(1) & (2) of the Labour Act 11 of 2007 is not applicable in this instance and therefore, the fixed-term employment contract terms and conditions being referred to by the second respondent finds no application due to impossibility and the fact that the appellant went on early retirement at the mentioned age.
- e) It is therefore, the appellant's submission that the second respondent erred in law in having ruled that notwithstanding the fact that the appellant went on early retirement at the age of 59 years and 11 months, he should have given three (3) months' notice. Any reasonable arbitrator applying his/her mind judicially could not have come to the conclusion of the second respondent.

The legal principles

[9] When dealing with determining questions of law on appeal in labour matters, the court can do no better than to refer to the matter of *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* ¹ wherein the Supreme Court points out what is understood regarding appeals that are limited to a question of law alone. O'Reagan AJA said:

[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will

¹ *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (SA 33/2013) [2016] NASC 3 (11 April 2016).

be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1)(a) as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.

[48] Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.

[49] The advantage of the approach outlined above is that it seeks to accommodate the legislative goal of the expeditious and inexpensive resolution of employment disputes, without abandoning the constitutional principle of the rule of law that requires labour disputes to be determined in a manner that is not arbitrary or perverse. It limits the appellate jurisdiction of the Labour Court by restricting its jurisdiction in relation to appeals on fact and on those questions of fairness that admit of more than one lawful outcome to the question whether the decision of the arbitrator is one that a reasonable arbitrator could have reached. Other appeals may be determined by the Labour Court on the basis of correctness. In outline, then, this is the approach that should be adopted in determining the scope of appeals against arbitration awards in terms of s 89(1)(a).²

[10] In the matter of *Jimmy-Naruses v Duiker Investment 142 (Pty) Ltd*,² Schimming-Chase AJ said the following:

‘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

²*Jimmy-Naruses v Duiker Investment 142 (Pty) Ltd* (HC-MD-LAB-APP-AAA-2020/00023) [2021] NALCMD 8 (15 March 2021).

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 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.'

[11] Just because the appellant or any superior authority would, on the same facts, have possibly reached a different finding that does not automatically justify an interference with the arbitrator's decision. In *Andima v Air Namibia (PTY) Limited and Another*³ the court specifically dealt with the question as to when a finding is perverse. It found:

'that a finding is perverse if: (a) it is based on inadmissible or irrelevant evidence, (b) it fails to take into account all the relevant evidence, and (c) it is against the weight of the evidence in that it cannot be supported by the evidence on the record. Accordingly, the finding would not be perverse and appellate interference would not be justified just because, on the same facts, the superior tribunal could have come to a different conclusion.'

[12] In *Reuter v Namibia Breweries Ltd*,⁴ Parker AJ said the following:

'The function to decide acceptance or rejection of evidence falls primarily within the province of the arbitration tribunal. The Labour Court will not interfere with arbitration tribunal's finding where no irregularity or misdirection are proved or apparent on the record. Where there is no misdirection on fact by the arbitrator the presumption is that the arbitrator's conclusion is correct and the Labour Court will only reverse the arbitrator's conclusion on fact if convinced that the conclusion is wrong.'

³ *Andima v Air Namibia (PTY) Limited and Another* (SA 40 of 2015) [2017] NASC 15 (12 May 2017).

⁴ *Reuter v Namibia Breweries Ltd* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NAHCMD 20 (08 August 2018).

Conclusion

[13] In this instance the court is satisfied that the conclusion reached by the Labour Commissioner is not clearly wrong and is a conclusion he was entitled to reach. I therefore, find no legal point available and for that reason the appeal must not succeed.

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

1. The appeal is dismissed with no order as to costs.
2. The matter is removed from the roll and regarded as finalized.

E RAKOW
Judge

APPEARANCES

APPELLANT: JN Tjitemisa
Of Tjitemisa & Associates, Windhoek

FIRST RESPONDENT: M Ikanga
Of Ikanga Legal Practitioners, Windhoek