

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2023/00015

In the matter between:

NAMIBIAN STANDARDS INSTITUTION

APPELLANT

and

OFFICE OF THE LABOUR COMMISSIONER

1st RESPONDENT

NDATEELELA NDAHAFHA HAMUKWAYA

2nd RESPONDENT

GERTRUDE HANGULA HAUKONGO

3rd RESPONDENT

Neutral citation: *Namibian Standards Institution v Office of the Labour Commissioner* (HC-MD-LAB-APP-AAA-2023/00015) [2023]
NALCMD 53 (3 November 2023)

Coram: Usiku J

Heard: 12 May 2023

Delivered: 3 November 2023

Flynote: Labour law – Appeal against arbitrator’s decision refusing to rescind an arbitration award granted in absence of the appellant – Appeal against entire arbitral award granted in the absence of the appellant – Court upheld the appeal against the decision refusing rescission application – Court struck from the roll the appeal against the arbitral award on the basis that the rescission application is still live

before the arbitrator and appeal court may only intervene when the proceedings at arbitration are complete.

Summary: The third respondent was an employee of the appellant. She was dismissed from employment on 8 July 2020. On 12 August 2020 she referred a dispute of unfair dismissal to the Labour Commissioner. An arbitrator was appointed and the matter was ultimately postponed to 22 February 2022 for arbitration hearing. On the date of the arbitration hearing, the appellant did not show up. The arbitrator, after having contacted the appellant telephonically, decided to proceed with the hearing in the absence of the appellant. After hearing the third respondent, the arbitrator found that the dismissal of the third respondent was procedurally and substantively unfair, and ordered, among other things, that the third respondent be re-instated. The appellant applied for rescission of the award. The arbitrator dismissed the application. In dismissing the rescission application, the arbitrator relied mainly on her version of events that took place on 22 February 2022 when she contacted the representatives of the appellants in respect of appellant's non-appearance at the arbitration proceedings.

Held that the arbitrator ought to have afforded the appellant an opportunity to address her on the version of events as set out by her, before she took the decision to dismiss the rescission application. The failure to do so amounted to a violation of *the audi alteram partem* rule.

Held further that, the arbitrator's decision refusing to rescind the default award is set aside and the matter is remitted to the Labour Commissioner to be heard by a different arbitrator.

ORDER

1. The decision made by the arbitrator on 30 January 2023 refusing to rescind the arbitration award dated 29 August 2022, under case number CRWK841-20, is hereby set aside.
2. The matter is remitted to the Labour Commissioner to refer the appellant's rescission application lodged on 27 September 2022, for a hearing to be conducted by an arbitrator other than Ms Ndateelela Hamukwaya.

3. Ms Ndateelela Hamukwaya is granted leave to file an answering affidavit, if so advised, in response to the appellant's rescission application lodged on 27 September 2022, within the time frames to be determined by the new arbitrator.
 4. The appellant and the third respondent may file a replying affidavit, if so advised, within timeframes to be determined by the new arbitrator.
 5. The appeal against the arbitrator's award dated 29 August 2022 is struck from the roll on account that such award is not yet final as it is still a subject of the rescission application, and is therefore, not appealable.
 6. There is no order as to costs.
 7. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This is an appeal against a decision by an arbitrator made on 30 January 2023, dismissing the appellant's rescission application and against the entire arbitration award issued by the arbitrator on 29 August 2022, which was varied on 29 September 2022.

Background

[2] The third respondent, Ms Gertrude Haukongo, was employed by the appellant, Namibia Standards Institution, as Executive Secretary for General Manager: Corporate Communication, Marketing and Human Resources, since April 2008.

[3] On 8 July 2020, she was dismissed from the employment following some 'disengagement negotiations'. On 16 July 2020, she lodged an internal appeal, which was subsequently dismissed.

[4] On 12 August 2020, she referred a dispute of unfair dismissal to the Office of the Labour Commissioner. An arbitrator was appointed and the matter was eventually postponed to 22 February 2022 for hearing.

[5] On 22 February 2022, the appellant did not attend the hearing. After having satisfied herself that the appellant was notified of the date of the hearing and having telephonically contacted the appellant, the arbitrator decided to proceed with the hearing in the absence of the appellant.

[6] Having heard evidence from the third respondent, the arbitrator found that in the absence of any version from the appellant, the third respondent had made out a *prima facie* case against the appellant and ruled that the dismissal of the third respondent was procedurally and substantively unfair. On 29 August 2022, the arbitrator then made an award in the following terms:

- a) the dismissal of the third respondent was procedurally and substantively unfair;
- (b) the appellant is ordered to reinstate the third respondent in an equal or comparable position she held, effective from 1 October 2022;
- (c) the appellant is ordered to pay the third respondent 12 months' payment as compensation;
- (d) the compensation is calculated as follows: N\$19 000 x 12 months = N\$228 000;
- (e) the compensation amount must be paid on or before 30 September 2022 and proof of payment must be forwarded to the Office of the Labour Commissioner, Windhoek. The appropriate interest will accrue on the said amount if not paid by the date stipulated in the award at the rate in terms of the Prescribed Rates of Interest Act, 1975 (Act No 55 of 1975).

[7] On 29 September 2022, the arbitrator varied her ruling in terms of s 88 of the Labour Act 11 of 2007 ('the Act'). The effect of the variation was to correct the date on which the arbitration hearing took place. In the ruling, the hearing was incorrectly stated to have taken place on 16 February 2022. The variation corrects that date to read that the hearing took place on 22 February 2022.

[8] Unhappy with the foregoing award, the appellant launched a rescission application on 27 September 2022.

[9] On 30 January 2023, the arbitrator dismissed the appellant's rescission application. The dismissal is principally premised on the basis that the appellant was informed of the arbitration hearing date and that the arbitrator personally spoke to the appellant's representative on 22 February 2022 and informed her that if the appellant did not show up in 45 minutes, the matter would proceed in the absence of the appellant. In the arbitrator's opinion the appellant had waived its right to be heard at the arbitration hearing.

[10] Aggrieved by the dismissal of the rescission application, the appellant noted the present appeal on 16 February 2023.

The appeal

[11] The appellant notes the appeal on the following grounds:

Dismissal of rescission application

(a) the arbitrator committed an error in law by failing to afford the appellant opportunity to make written or oral submissions before the arbitrator made her ruling dismissing the rescission application on 30 January 2023, which ruling relied entirely on her own version of events;

(b) the arbitrator erred in law in finding that:

(i) the notice postponing the arbitration hearing to 22 February 2022 was confirmed by the parties;

(ii) it is undisputed that the appellant was duly served with the notice of set down on 20 October 2021 which was received and confirmed and that;

(iii) the appellant was fully aware of the matter and chose to ignore the hearing date by not showing up.

The appellant submits that no reasonable arbitrator could have made those findings on the facts.

(c) the arbitrator, in determining the rescission application, failed to consider, make findings and provide reasons on the prospects of success on the merits, in the arbitration proceedings;

Arbitration award dated 29 August 2022

(d) the arbitrator erred in law in awarding the third respondent compensation in the amount of N\$228 000. The appellant argues that no reasonable arbitrator could have made such an order on the evidence before the arbitrator;

(e) the arbitrator erred in law in finding that the appellant failed to afford the third respondent opportunity to improve her performance, and as a result, the dismissal was both substantively and procedurally unfair. The appellant submits that no reasonable arbitrator could have made such finding on the evidence presented;

(f) the arbitrator committed an error in law alternatively, an irregularity, by determining the arbitration without requiring the minutes of the internal appeal record to be produced during arbitration. The appellant contends that no reasonable arbitrator would have determined the arbitration without requiring the minutes of the internal appeal to be included as part of the record before the arbitrator.

[12] The appellant submits that the arbitrator failed to dispense justice judiciously in both the arbitration and the rescission application, and prays that the appeal be upheld. The appellant further submits that the order of the arbitrator dismissing the rescission application be set aside and be replaced with an order setting aside the arbitration award granted on 29 August 2022. The appellant also submits that the arbitration proceedings be ordered to start *de novo* before a different arbitrator.

Third respondent's contentions

[13] The third respondent contends that the appellant is correct in its submission that the arbitrator ought to have afforded it an opportunity to make written or oral submission prior to her determination of the rescission application.

[14] The third respondent further contends that the appellant is correct in its submission that the arbitrator ought, by way of a statement, to have placed the

material within her knowledge upon which she intended to rely on in her adjudication of the rescission application, before the parties for comment.

[15] For the foregoing reasons, the third respondent submits that the appeal in respect of the arbitrator's order dismissing the rescission application must succeed.

[16] In regard to the appeal against the award of 29 August 2022, the third respondent argues that the appeal is noted outside the mandatory 30 days period contemplated in s 89(2) of the Act. The third respondent contends that the Act does not provide for the stay or suspension of the dies in s 89(2) pending the finalization of the rescission application. It is further the contention of the third respondent that the appellant's reliance on the decisions of *Kunene Regional Council v The Labour Commissioner*¹ and *Namibian Wildlife Resorts Limited v Maxuilili-Ankama*² is misplaced and that those decisions are wrong insofar as they suggest that a party's election to institute an application for rescission of an award stays or suspends the dies in s 89(2) and (4) of the Act, pending the finalisation of the rescission application.

[17] The third respondent therefore, submits that the court should make an order setting aside the arbitrator's decision that dismissed the rescission application and refer the matter back to the arbitrator to hear the rescission application afresh, after having afforded the parties opportunity to deal with the contents of the arbitrator's ruling of 30 January 2023.

Analysis

[18] In the matters of *Swart v Brand*³ and *Namibia Bureau De Change Pty Ltd v Mwandling NO*⁴, a presiding officer, in both of those matters, took a decision not to rescind a decision granted upon default of a respondent to appear at a hearing. In both of those matters, the decision not to rescind was taken on the basis of the

¹ *Kunene Regional Council v The Labour Commissioner* (HC-MD-LAB-MOT-REV-2019/00363) [2020] NALCMD (1 October 2020).

² *Namibia Wildlife Resorts Limited v Maxuilili-Ankama* (HC-MD-LAB-MOT-REV-2019/00381) [2022] NALCMD 29 (20 May 2022).

³ *Swart v Brand* (SA17/2002) [2003] NASC 16 (28 October 2003).

⁴ *Namibia Bureau De Change Pty Ltd v Mwandling NO* LCA 65/2013 [2014] NALCMD 31 (25 July 2014).

presiding officer's version of the events of what transpired on the day when the application for default judgment was considered. The presiding officer did not afford the respondent an opportunity, orally or in writing, to address him/her on his/her version. In both the abovementioned matters, the court on appeal, held that the presiding officer's failure to give the respondent an opportunity to deal with his/her version of events was a violation of the *audi alteram partem* rule. The court therefore, held that the presiding officer's decision, in both cases, was wrong.

[19] In the present matter, the arbitrator took the decision not to rescind the award on the basis of her version of the events that took place prior to and on 22 February 2022. The arbitrator did not afford the appellant an opportunity, either orally or in writing, to address her on her version of those events. For this reason, I agree with the submissions made by both the appellant and the third respondent that the appeal in respect of the arbitrator's decision dismissing the appellant's application for rescission, must succeed on this ground alone. I shall therefore, make an order to that effect.

[20] The application for rescission was set in motion by way of an application supported by an affidavit. If the arbitrator, upon perusing the affidavit supporting the rescission application, had detected material factual inaccuracies, which she deemed fit to contradict, she could have recused herself from hearing the rescission application, in which case it would have been up to the third respondent to offer her (the arbitrator) as a deponent to a supporting affidavit in opposition to the rescission application.⁵ I am further of the view that where an arbitrator is of a view that there are material factual inaccuracy in the papers before arbitration, which she deems necessary to contradict, she is entitled to recuse herself from hearing the application and may, if she is so advised, depose to an affidavit, stating the correct facts, without her being offered by either of the parties as a deponent.

[21] Seeing that there was no full and proper hearing of the rescission application, I am of the view that the proper approach is to remit this matter to the Labour Commissioner for the hearing of the rescission application before a different arbitrator.

⁵ See *Swart v Brand* (supra).

[22] In regard to the appeal against the award of 29 August 2022, the general principle is that a default judgment is not per se, appealable. In the present matter, the proceedings regarding the rescission application are not complete. For as long as the arbitrator can, in principle, alter or reconsider his/her award, the appellant's remedy lies at the arbitration tribunal, not at the Labour Court. For the reasons foregoing, I am of the opinion that the appellant's appeal in respect of the award of 29 August 2022 is improperly before this court and stands to be struck from the roll.

[23] As regards the issue of costs, s 118 of the Act prohibits the court from making an order for costs against any party except in certain circumstances, which are not applicable to the present matter. I shall therefore, not make an order as to costs.

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

1. The decision made by the arbitrator on 30 January 2023 refusing to rescind the arbitration award dated 29 August 2022, under case number CRWK841-20, is hereby set aside.
2. The matter is remitted to the Labour Commissioner to refer the appellant's rescission application lodged on 27 September 2022, for a hearing to be conducted by an arbitrator other than Ms Ndateelela Hamukwaya.
3. Ms Hamukwaya is granted leave to file an answering affidavit, if so advised, in response to the appellant's rescission application within the timeframes to be determined by the new arbitrator.
4. The appellant and the third respondent may file a replying affidavit, if so advised, within timeframes to be determined by the new arbitrator.
5. The appeal against the arbitrator's award dated 29 August 2022 is struck from the roll on account that such award is not yet final, as it is still a subject of a rescission application, and is therefore, not appealable.
6. There is no order as to costs.
7. The matter is removed from the roll and is regarded finalised

B USIKU
Judge

APPEARANCES

APPELLANT: D Quickfall
Instructed by Köpplinger Boltman, Windhoek

RESPONDENTS: T Muhongo
Instructed by Appolos Shimakeleni Lawyers, Windhoek