

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case number: HC-MD-LAB-APP-AAA-2023/00052

In the matter between:

ESSOP AHMED

APPELLANT

and

SALIMBO MUMBIYA

FIRST RESPONDENT

MUBIYANA MASTER

SECOND RESPONDENT

ARBITRATOR MAIBA BESTER SINVULA

THIRD RESPONDENT

Neutral citation: *Ahmed v Mumbiya* (HC-MD-LAB-APP-AAA-2023/00052)
[2024] NALCMD 17 (8 May 2024)

Coram: DE JAGER AJ

Heard: 15 March 2024

Delivered: 8 May 2024

Flynote: Labour appeal – Unopposed – Arbitrator erred in law in awarding compensation based on conclusions not supported by the evidence.

Summary: The first and second respondents, Salimbo Mumbiya and Mubiyana Master, used to work for the appellant, Essop Ahmed. They referred

an unfair dismissal dispute to the labour commissioner. The arbitrator found the dismissal was substantively and procedurally unfair and awarded Mumbiya compensation of 12 months' remuneration for four years of service and Master six months' remuneration for two years of service. Before the court is an unopposed appeal by Ahmed against the arbitration award. Ahmed prays that the award be set aside. The questions of law are whether the arbitrator erred in law in awarding Mumbiya compensation of 12 months' remuneration for four years of service and awarding Master compensation of six months' remuneration for two years of service while the conclusions that they were employed by Ahmed for four years and two years respectively are not supported by the evidence.

Held that, in respect of Mumbiya, the arbitrator erred in law in awarding her compensation of 12 months' remuneration, severance pay, and notice pay on the basis that she was employed by Ahmed for four years, while the evidence does not support that conclusion.

Held that, in respect of Master, the arbitrator erred in law in awarding him compensation of six months' remuneration, severance pay, and notice pay on the basis that he was employed by Ahmed for two years, while the evidence does not support that conclusion.

Held that the appeal succeeds in part.

ORDER

1. The appeal is partly upheld.
2. Paragraph 26(c) of the arbitration award dated 7 June 2023, reading as follows, is set aside.

'(c) The respondent is hereby ordered to compensate the applicants. The 1st applicant to be paid 12 months remuneration. That is N\$ 1500 x 12 = 18000.00, N\$

346.18 X 4 – 1384.72 (severance pay) plus N\$ 1500.00 (Notice) Total amount is N\$ 21230.00.

2nd applicant to be compensated to six months as follows; N\$ 1700.00 x 6 = N\$ 10200.00, plus N\$ 1700.00 (notice) and N\$ 392.33 x 2 = 784.67 (severance pay. Total N\$ 12684.67

Total payable by the respondent on or before 31 July 2023 is N\$ 33914.67.'

3. The matter is referred back to arbitrator Maiba Bester Sinvula to determine the appropriate relief after considering the contents of paragraphs [15] to [17] and [21] to [25] of the judgment.

4. The matter is finalised and removed from the roll.

JUDGMENT

DE JAGER AJ:

Introduction

[1] The first respondent, Salimbo Mumbiya, and the second respondent, Mubiyana Master, used to work for the appellant, Essop Ahmed, as domestic worker and gardener, respectively. They referred an unfair dismissal dispute to the labour commissioner. Mumbiya's summary of dispute states she wants leave days, severance pay and holidays, and Master's refers to leave days and 'service' pay. Self-evidently, what they claim in their summaries of dispute is unclear. The arbitration award states that Mumbiya and Master seek compensation, leave days' payment, and severance pay. The award further states they were dismissed on 3 February 2022, and the arbitrator found their dismissal substantively and procedurally unfair. Curiously, the form LC 21 is dated 12 January 2022, indicates the dispute arose on 4 January 2022 and bears an acknowledgement of receipt stamp from the labour commissioner

dated 12 January 2022. The issue before the court does not concern those dates nor the nature of the relief claimed. The form LC 41 notice of appeal, in passing, states that Master was not dismissed, but no question of law emanates from that statement.

[2] Before the court is an appeal noted by Ahmed against the arbitration award, praying that it be set aside, and the issue raised concerns the length of the periods that the employees were employed by Ahmed and the compensation awarded to them based on their lengths of service. The arbitrator awarded Mumbiya compensation of 12 months' remuneration for four years of service, and for Master, she awarded six months' remuneration for two years of service. She also awarded them notice and severance pay. Mumbiya, in her summary of dispute, says she worked for Ahmed from 2018 to 2022, and Master says he worked from 11 December 2019 to 4 January 2022. Ahmed's notice of appeal claims that Mumbiya was re-employed on a second contract on 20 February 2021 and Master on a third contract on 10 January 2021, and, in essence, those periods of employment do not justify the compensation awarded.

[3] The appeal is unopposed.

The form LC 41 notice of appeal

[4] Ahmed's form LC 41 notice of appeal lists the following as questions of law (set out in the subparagraphs), some of which contain grounds of appeal (set out in the sub-subparagraphs):

(a) Whether the arbitrator erred in law in terms of s 89 of the Labour Act 11 of 2007 (the Act). That so-called question is so vague it amounts to no question at all. Section 89 has 11 subsections. The court cannot discern what the question entails and cannot determine the appeal on that question. Furthermore, the form LC 41 notice of appeal contains no grounds of appeal for that so-called question.

(b) Whether the arbitrator erred in law in awarding Mumbiya compensation of 12 months for four years of service.

- (i) Mumbiya did not work for Ahmed for four complete years.
 - (ii) Mumbiya was first employed on 26 September 2018 and re-employed with a second contract on 20 February 2021.
 - (iii) Mumbiya did not complete a full year's service with Ahmed.
 - (iv) The first contract's start date and the second contract's end date do not make up four years of service.
- (c) Whether the arbitrator erred in law in awarding Master compensation of six months for two years of service.
- (i) Master did not work for Ahmed for two complete years.
 - (ii) Master was first employed by Ahmed during the last week of December 2019 or the first week of January 2020. After Master received his salary at the end of January 2020, he did not return to work as he took new employment as a construction worker.
 - (iii) Master was re-employed with a second contract in April 2020. After receiving his salary in August 2020, he disappeared without notice. Enquiries revealed he went to a funeral in Botswana. Ahmed did not hear from him again until January 2021.
 - (iv) Master was re-employed with a third contract on 10 January 2021.
 - (v) After Ahmed's wife dismissed Master, Ahmed requested Master that he come back a week later. When Master returned a week later, Ahmed requested him to return at the end of the month. Master preferred to claim unfair dismissal and did not return to work. That was not a dismissal. No question of law is raised on that point, hence the court does not deal with it.
- (d) Whether the arbitrator erred in making the award without considering and not even mentioning the issues listed in paragraph [4](b) to (c)(iv) above, which were made known during the arbitration process. Based on the arguments

advanced on Ahmed's behalf, that question translates to whether the evidence supports the arbitrator's conclusions on the periods of service.

(e) Whether the arbitrator erred by not considering or mentioning the closing arguments, the employment dates, and the final payments made to Mumbiya and Master. Save for the reference to the final payments made, for which there are no grounds of appeal and on which the court, as a result, does not determine the appeal, the remainder of the question relates to the question in the preceding paragraph.

The award

[5] The following appears from the award.

[6] The arbitrator was required to decide whether the dismissal was procedurally and substantively fair or not and to determine the appropriate relief, if any.

[7] The award records it is common cause that Ahmed employed Mumbiya and Master, that their services were terminated, and that there was no disciplinary hearing.

[8] The arbitrator says the testimony of Ahmed's first witness, Ntelamo Bwendo, whom Ahmed employed as a driver, is irrelevant as he did not testify about the dismissal. She says he only testified about overtime and transport, which was not part of the dispute. For Ahmed's second witness, Bernard Kasumala, the arbitrator says he, too, did not testify about the dismissal, and his testimony is unreliable. She does not say why it is unreliable. Ahmed's third witness, Scooter Kasuka, testified that in December 2020, Master was employed at the farm and began work as a gardener in January 2021, but he, too, did not testify on the dismissal. It appears that the arbitrator did not take any of Ahmed's witnesses' testimony into account.

[9] In respect of Mumbiya's testimony, the arbitrator notes the issue started when Ahmed's wife complained about missing clothing and the following morning, on 3 February 2022, she was called by Ahmed and Master to be

informed they were dismissed with immediate effect. The award records Mumbiya said no reason was given for her dismissal, but according to her, the reason was her refusal to continue giving Ahmed body massages and 'sexual abuse'.

[10] For Master's testimony, the arbitrator notes that he was called on 3 February 2022 and Ahmed informed him of his dismissal, and no reason was given for his dismissal.

[11] The arbitrator says Ahmed does not clearly state whether the employees were dismissed for misconduct. She further states that no valid and fair reason was given to justify the dismissal, and she concludes that it was substantively unfair. She further concludes it was procedurally unfair as there was no disciplinary hearing.

[12] The award records Mumbiya's monthly salary as N\$1500 and Master's as N\$1700. When dealing with the relief, the arbitrator simply states that she is of the considered view that it will be fair to compensate Mumbiya for 12 months' remuneration since she worked for four years and six months' remuneration for Master who served for two years and that they further be paid notice pay under s 31 of the Act and severance pay under s 35 thereof. The arbitrator gave no indication on which testimony she came to conclude that Mumbiya worked for four years and master served for two years.

Determination

[13] The court will consider the appeal pertaining to the two employees separately, starting with Mumbiya.

[14] It is common cause that Mumbiya was dismissed. Ahmed does not take issue with the arbitrator's finding that her dismissal was unfair substantively and procedurally. The question arises whether the arbitrator erred in awarding Mumbiya compensation of 12 months' remuneration for four years of service.

[15] Mumbiya says she started working in 2018, but she cannot recall the month. She says she worked for Ahmed until 3 February 2022. Ahmed did not

challenge Mumbiya's period of employment under cross-examination, but there is no evidence on record that Mumbiya started working for Ahmed in February 2018 for the arbitrator to have concluded that Mumbiya served for four years. It must also be kept in mind that Ahmed's case was presented before Mumbiya presented her case, and the following, which transpired during Kasuka's testimony, must also be considered.

[16] Kasuka testified in support of Ahmed's case. While under cross-examination, Kasuka says Mumbiya stopped working for Ahmed in December 2020. Mumbiya did not challenge that fact. When Ahmed re-examined Kasuka, Mumbiya interjected, and it came to light that Ahmed sent Mumbiya a text message that she must not come to work the next day and he did not want to see her at his house from that day, Mumbiya told Ahmed that he must then pay her, Ahmed paid her, and from there Mumbiya stayed home one or two months when Ahmed's wife collected her to go back to work. Ahmed challenged that testimony when he cross-examined Mumbiya but not with reference to the fact that Mumbiya's period of employment was interrupted.

[17] The sum of the evidence above shows the following. Mumbiya was first employed in 2018, albeit not exactly on 26 September 2018 as per the form LC 41 notice of appeal, but there is also no evidence that it was as early as February 2018 as Mumbiya says. Mumbiya left Ahmed's employ in December 2020 and was re-employed by him one or two months after December 2020, albeit not exactly on 20 February 2021 as per the form LC 41 notice of appeal, until 3 February 2022, by which time Mumbiya barely completed a full year's uninterrupted service with Ahmed.

[18] The arbitrator awarded Mumbiya compensation of 12 months' remuneration on the basis that she was employed for four years. Self-evidently, the conclusion that Ahmed employed Mumbiya for four years is not supported by the evidence above, which largely supports the issues listed in paragraphs [4](b)(i) to (iv) above. The court finds the arbitrator erred in law in awarding Mumbiya compensation of 12 months' remuneration, severance pay, and notice pay based on the conclusion that she served for four years which is not supported by the evidence.

[19] The court now deals with Master.

[20] The arbitrator says it is common cause that Master was dismissed. The evidence does not support that conclusion. Since no question of law is raised in Ahmed's form LC 41 notice of appeal in that regard, the court does not determine the appeal on that basis.

[21] Bwendo, who testified on behalf of Ahmed, confirms that during February and March (must be 2020) Master left the job to work for a construction company. He also confirms that in August (must be 2020), Master left to go to a funeral, but he came back four months later in December 2020. Under cross-examination, Bwendo says he could not remember which month Master left for the construction work, but he went to look for Master when Ahmed's wife asked him to do so. He says he found Master, but Master was drunk, and Bwendo then told Master he would tell the boss that he did not find Master. Bwendo says the next day, he heard that Master would probably not go back because he was busy with the construction work. Under cross-examination, Bwendo wanted to find out from Master whether what Bwendo said was true but Master did not give any clear indication what his version of the events was. Bwendo also says he started working in 2020 and found Master there and he does not know when exactly Master started working for Ahmed in 2020.

[22] Kasuka, who also testified for Ahmed, confirms that in August 2020, Master was there, but he went to a funeral and came back in December 2020, asking Ahmed's wife for a job at the farm. He also confirms that in January 2021, Ahmed's wife brought Master with some ladies and replaced all employees at the house. He confirms in December 2020, Master worked at the farm, and in January 2021, he came to work at the house. From his testimony, it appears that Kasuka knew that Master had left for four months. Kasuka says Master went away for a funeral, and when he came back, Ahmed's wife 'brought him', and he met Master at the house in January 2021. While Kasuka was under cross-examination, Master says he went to Zambia on 12 February 2020, and on 4 April (must be 2020), he came back and went to work on the fifth.

[23] Master's testimony includes the following. He started working on 11 December 2019 up to February 2022. During cross-examination, it was established that for December 2019, Master worked for Ahmed's wife at the farm, not for Ahmed at the house. As a result, he only started working for Ahmed in January 2020. It was also established that Master was absent from work for two months because of a funeral, but Ahmed's version was that the absence was for four months, not two months. When asked about the two months he did not go to work, Master said he had a funeral and Ahmed gave him permission for that. It was put to Master in cross-examination that he was not paid for four months at the end of 2020 because he did not work those four months. Those months were September, October, November and December 2020.

[24] After Master was cross-examined, Ahmed said the statement he wanted to make was that Mumbiya was re-employed in February (must be 2021), but then he was stopped by the arbitrator, and she directed him to closing arguments to be submitted in writing. In other words, the arbitrator did not give Ahmed an opportunity to testify himself even though it appeared that he wanted to but he should, however, have done so while he presented his case, not at the end of the employees' case. In his written submissions, Ahmed says Mumbiya's start date of employment was 20 February 2021 and that her first date of employment cannot be used to calculate her start date because she had interrupted service. In respect of Master, he says he did not work during February and March 2020, and he disappeared without notice from August to December 2020. Ahmed says that Master's start date is 10 January 2021.

[25] The sum of the evidence above shows the following. Master was first employed in January 2020. He left for February and March 2020. He came back in April 2020. He then left after August 2020 and came back to work for Ahmed at the house in January 2021 until 3 February 2022. Master did not work for Ahmed for two complete uninterrupted years at the time of his dismissal on 3 February 2022.

[26] The arbitrator awarded Master compensation of six months' remuneration on the basis that he was employed for two years. Self-evidently,

the conclusion that Ahmed employed Master for two years is not supported by the evidence above, which largely supports the issues listed in paragraphs [4] (c)(i) to (iv) above. The court finds the arbitrator erred in law in awarding Master compensation of six months' remuneration, severance pay, and notice pay based on the conclusion that he served for two years which is not supported by the evidence.

Conclusion

[27] In conclusion, it is ordered that:

1. The appeal is partly upheld.
2. Paragraph 26(c) of the arbitration award dated 7 June 2023, reading as follows, is set aside.

'(c) The respondent is hereby ordered to compensate the applicants. The 1st applicant to be paid 12 months remuneration. That is N\$ 1500 x 12 = 18000.00, N\$ 346.18 X 4 – 1384.72 (severance pay) plus N\$ 1500.00 (Notice) Total amount is N\$ 21230.00.

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Total payable by the respondent on or before 31 July 2023 is N\$ 33914.67.'

3. The matter is referred back to arbitrator Maiba Bester Sinvula to determine the appropriate relief after considering the contents of paragraphs [15] to [17] and [21] to [25] of the judgment.
4. The matter is finalised and removed from the roll.

B de Jager
Acting Judge

APPEARANCES

APPELLANT: H J Awaseb
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