REPORTABLE

CASE NO: SA 73/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NICOLAAS SWARTBOOI	**First Appellant**
MARIA GAES	**Second Appellant**
and	
MWANAWINA SONNYBOY MBENGELA N.O.	**First Respondent**
LABOUR COMMISSIONER	**Second Respondent**
METHEALTH NAMIBIAN ADMINISTRATORS (PTY) LTD	**Third Respondent**

Coram: DAMASEB DCJ, SMUTS JA and CHOMBA AJA

Heard: **19 October 2015**

Delivered: **24 November 2015**

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and CHOMBA AJA concurring):

[1] This appeal concerns the nature and ambit of a review of an arbitrator's award under s 89(4) of the Labour Act 11 of 2007 (the Act). The issue as to

whether there had been a tacit relocation of the appellants' employment with the third respondent is also raised in this appeal.

Factual background

[2] These issues arise in the following way. The appellants were both employees of the third respondent. They were dismissed by the third respondent on 28 May 2010 following separate disciplinary proceedings instituted against each of them.

[3] The appellants each had fixed term contracts of employment with the third respondent. These ran from 1 April 2007 until 31 March 2010. Their employment with the third respondent was however dependent upon the latter's service agreement to administer the medical aid scheme for public service employees known as PSEMAS.

[4] After the fixed term had come to an end on 31 March 2010, they continued to work for the third respondent and were paid for the month of April 2010. On 10 May 2010, the appellants received a notice dated 5 May 2010 from the third respondent seeking to extend their contracts of employment until 31 May 2010. The appellants were informed that the third respondent's contract to administer PSEMAS had been renewed and that all positions would be advertised internally and externally and that the process of recruitment would be completed by 31 May 2010.

[5] In the meantime, the appellants received notices of charges to be faced by each of them in disciplinary hearings to be conducted on 20 May 2010. They both faced separate and unrelated charges of poor performance and insubordination. They were each found guilty of contravening those charges and were dismissed from the service of the third respondent on 28 May 2010.

[6] On 29 June 2010 and 3 August 2010 respectively, the first and second appellants each referred a dispute of unfair dismissal to the office of the Labour Commissioner.

[7] These referrals proceeded together to arbitration. The arbitration proceedings were held on 27 November and 13 December 2010. The first respondent was the arbitrator in those proceedings and made an award on 18 July 2011, finding that both the appellants had been unfairly dismissed and ordered their reinstatement to their employment with the third respondent as from 1 August 2011. The arbitrator also ordered the third respondent to pay to each of the appellants specific amounts reflecting 12 months of their respective remuneration.

Review application

[8] On 17 August 2011 the third respondent instituted a review application in the Labour Court, seeking to set aside the award and substituting it for a finding that the appellants' dismissal had been fair. The appellants were cited as respondents in the review application together with the Labour Commissioner and

the arbitrator. The latter two officials did not oppose the review application. Nor did they oppose or take part in this appeal.

[9] The review application contains a number of review grounds, not always stated with clarity or properly supported by factual material. For the sake of completeness, they are all referred to even though most were not raised in argument before this court (or in the court below).

[10] The first review ground raised is one which is characterised as a gross irregularity. It is contended that the arbitrator was confused as to the pleas of guilty in the disciplinary proceedings, which the deponent to the founding affidavit states occurred in respect of both hearings. It is further stated that, if the arbitrator had applied his mind to the digital recording of the disciplinary proceedings, which the deponent says was provided as an exhibit in the arbitration proceedings, then the confusion would have been prevented. This, it is stated, resulted in a gross irregularity.

[11] It was conceded that the next ground raised did not amount to misconduct or a gross irregularity on its own. The point raised is that the award stated that the referral was in compliance with ss 82(7) and 86(1)*(a)* of the Act. These sections respectively refer to conciliation and arbitration. It was contended that the reference to both sections in the award demonstrates confusion on the part of the arbitrator and the failure to apply his mind properly to the nature of the

proceedings. This point is however placed into its proper perspective in the answering affidavit, as set out below.

[12] The point is also taken that the appellants' employment with the third respondent would have come to an end on 31 May 2010 and that the arbitrator failed to apply his mind or exceeded his powers by awarding more than an additional three days compensation, from the date of dismissal (on 28 May 2010) to the end of the period of employment, as purportedly extended by the third respondent (to 31 May 2010).

[13] The third respondent also took a point concerning the consideration of its heads of argument. In the award, it is stated that the third respondent had not filed its heads of argument on the due date and the award was prepared 'in the absence of the (third) respondent's written arguments'. In the review application, it is stated that heads of argument should have been filed by no later than 23 December 2010. But it is also stated that the arbitrator fell ill and that the parties did not file heads of argument at the time. The third respondent's heads of argument were only filed on 5 July 2011. The point is taken that the failure to consider those heads amounted to bias on the part of the arbitrator and constituted a gross irregularity.

[14] It was also contended in the review application that the arbitrator committed a gross irregularity or exceeded his powers by awarding compensation for a period of 12 months without taking into account that the dismissals took place on 28 May

2010 and that the arbitration proceedings were concluded on 13 December 2010 and that the award was only issued on 18 July 2011 as a result of the arbitrator's illness. The point was thus taken that compensation could and should not have been for a period after 13 December 2010.

[15] The review application concluded that the arbitrator had acted 'grossly irregular' *(sic)* as envisaged by s 89(5)*(a)* and that the award should be set aside.

[16] The review application was opposed by both appellants. They filed answering affidavits. They took issue with a number of factual averments raised in the third respondent's founding affidavit in support of the review application. They pointed out that the reference in the award to ss 82 and 86 was standard procedure as the arbitrator had first engaged in conciliation before proceeding to arbitrate the dispute, as is expressly envisaged by the Act.

[17] As far as the heads of argument were concerned, the appellants stated they filed theirs on time on 22 December 2010. They confirmed that respondent did not provide its argument on the due date as required by a ruling of the arbitrator to the effect that heads of argument were to be filed by 22 December 2010 (and not 23 December as stated in the founding affidavit). They pointed out that the third respondent's heads of argument were filed some six months late and that no explanation was tendered for the failure to have done so before then. Nor was a condonation application filed. The appellants thus denied that there was any

irregularity on the part of the arbitrator in not considering the third respondent's heads of argument filed so hopelessly out of time.

[18] The appellants also pointed out that the review application was factually inaccurate by stating that both appellants had pleaded guilty. The first appellant stated that he pleaded not guilty. This is confirmed in the transcribed record of proceedings before the arbitrator. It is furthermore pointed out that even though the second appellant had pleaded guilty, her plea explanation raised issues of an exculpatory nature. The chairperson of the hearing proceeded to hear evidence and submissions on the charges against her, as is reflected in the record he provided in the arbitration proceedings and in his oral evidence.

[19] The appellants also pointed out that the compact disc comprising the digital recording of the disciplinary proceedings, although referred to in evidence in the arbitration proceedings, was never tendered as evidence in those proceedings or handed in as an exhibit. This is also borne out by the transcript of the oral proceedings in the arbitration.

[20] The appellants also took issue with the third respondent's contentions concerning the extension and subsequent termination of their fixed term contracts. The appellants instead argued that there had been a tacit relocation of their employment agreements when their fixed terms came to an end on 31 March 2010. They pointed out that they had continued to work for the third respondent after 1 April 2010 and were paid for their services for that month.

[21] Despite this factual matter having been placed squarely in issue by the appellants and a genuine dispute of fact raised, the third respondent failed to file a replying affidavit in the review application. The well-established approach[1] to disputed facts in motion proceedings is to be followed. Given the dispute of fact was not referred to in evidence (or even dealt with in reply), the court is bound to accept the version of the respondents in the review (now appellants) and the facts admitted by them as contained in the third respondent's founding affidavit.

The decision of the Labour Court

[22] The review application was heard by the Labour Court on 13 August 2012. Judgment was promptly delivered on 23 August 2012. That court set aside the award in its entirety and declared that the appellants' employment agreements with the third respondent had expired by effluxion of time on 31 May 2010. The court found that the appellants' employment had been extended to that date and that it was not competent for the arbitrator to have reinstated them for a subsequent period. The learned judge noted in his judgment that the other review grounds raised in the application had not been argued before him and thus found for the third respondent on the point that the appellants could not be reinstated, given that their contracts of employment would have already expired (on 31 May 2010).

[1]See *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21H; *Rally for Democracy & Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 99.

[23] It would appear that the point was taken by the appellants in the court below that the review application had not been properly brought under s 89(4) and (5) of the Act in that the third respondent had not established a defect in the proceedings as contemplated by those sub-sections. But the Labour Court dismissed this argument in the following way:

> 'The Labour Act, 2011 like all other Acts of Parliament is subject to the Constitution. Article 18 of the Constitution enjoins administrative bodies and officials to act fairly and reasonably. It provides that persons aggrieved by unfair and unreasonable decisions shall have the right to seek redress before a competent court.
>
> Section 89(5) of the Labour Act cannot be understood to whittle away the provisions of Art 18 of the Constitution. It must live in harmony with and subject to Art 18 of the Constitution. In my view, the submissions based on s 89 of the Labour Act cannot be upheld.'

Proceedings on appeal

[24] The appellants applied for and were refused leave to appeal. This court granted their petition for leave to appeal on the question as to whether there had been a tacit relocation of the appellants' employment contracts. Prior to the hearing of this appeal, the parties were invited to file supplementary written argument on the question as to whether the review of the award had been properly brought under ss 89(4) and (5) of the Act and, if not, whether it was open to the Labour Court to set aside the award.

[25] Counsel for both sides provided both written and oral argument on this question. Mr Rukoro, for the appellants, referred to each of the review grounds raised by the third respondent in the founding affidavit and contended that they were not only unsupported factually but that each did not amount to a defect in the proceedings as contemplated by s 89.

[26] Mr Hinda, SC, who appeared for the third respondent, argued that the statement in the award by the arbitrator that ‘nothing was placed before me to justify that indeed the applicants committed these offences’ demonstrated the failure on the part of the arbitrator to consider written submissions and the evidence of the third respondent and thus amounted to a grossly irregularity. He further contended that the arbitrator’s approach in ordering the reinstatement of the appellants and making an award for compensation of 12 months was one which no reasonable court or tribunal could possibly make and thus amounted to a gross irregularity and should be set aside.

Section 89 and the statutory scheme

[27] Section 89 is contained in Part C of Chapter 8 of the Act. This Chapter deals with the prevention and resolution of disputes. Part C in turn concerns the arbitration of disputes. Section 89, entitled ‘appeals or reviews of arbitration awards’, is to be considered within the overall scheme of the Act and particularly the dispute resolution regime envisaged by the Act.

[28] The Act brought about far reaching changes to the regime governing the resolution of labour disputes. District labour courts were abolished and the jurisdiction of the Labour Court became more confined. The focus under the Act shifted to alternative dispute resolution through conciliation and, where required, the arbitration of labour disputes by specialised arbitration tribunals under the auspices of the Labour Commissioner. Part C emphasises the need for the speedy determination of those disputes and the need for finality. Arbitrators are enjoined to determine matters fairly and quickly[2] and to deal with the substantial merits of disputes with a minimum of formality.[3]

[29] Part C of the Act also restricts the participation of legal practitioners in arbitration proceedings to instances where the parties agree to that or where the arbitrator is satisfied that the complexity of the matter justified their involvement and the other party would not be prejudiced. As was stressed by the High Court[4] and recently adopted by this court in *NAFINU v Nedbank Namibia Ltd and another*[5]:

> 'The overriding intention of the legislature concerning the resolution of disputes is that this should be achieved with a minimum of legal formality and with due speed. This is not only laudable but particularly appropriate to labour issues. I stress that it is within this context that the Act places greater emphasis on alternative dispute

[2]Section 86(7)*(a).*

[3]Section 86(7)*(b).*

[4]*Namdeb Diamond Corporation v Mineworkers Union of Namibia & others,* Case No LC 103/2011. As followed in *Meatco v Namibia Food & Allied Workers Union & others* 2013 (3) NR 777 (LC) and *Haimbili & another v Transnamib Holdings Ltd & others* 2014 (1) NR 201 (CC).

[5] Case No SA 26/2015 on 19 August 2015 para 23.

resolution and confines the issues to be adjudicated upon by this court (in terms of) s 117'.

[30] In keeping with this statutory intention, the legislature decided to limit appeals in s 89 to questions of law alone, noted within a period of 30 days after an award had been served upon a party.

[31] The legislature further determined to confine reviews of arbitration tribunals to defects in the arbitration proceedings as defined. Reviews are also to be instituted within 30 days after an award had been served upon a party or, if the defect involves corruption, within six weeks after it had been discovered. A defect in arbitration proceedings is defined in s 89(5) to mean:

'(a) that the arbitrator –

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the arbitrator's power; or

(b) that the award has been improperly obtained.'

[32] It follows that a party seeking to invoke the review jurisdiction afforded by s 89 is confined to the narrow review grounds which constitute a defect in the proceedings, as contemplated by s 89(5). Not only would a party need to establish one or more of the defects in the proceedings as envisaged by s 89(5),

but it would be incumbent on that party to set out the factual basis in a review application for contending that such a defect occurred. The mere resort to labelling conduct of the arbitrator as amounting to a gross irregularity or misconduct would not suffice in the absence of a factual basis establishing a defect in the proceedings.

[33] The Act furthermore provides that arbitration tribunals established in s 85 are tribunals for the purpose of Art 12 of the Constitution. As a tribunal under Art 12, those proceedings would not, as a consequence and by their nature as tribunals under Art 12, constitute administrative action for the purpose of Art 18 of the Constitution. This is because the Act envisages that the proceedings before an arbitrator under s 86 would amount to those before a competent tribunal affording redress as contemplated by Art 12. The exercise of that adjudicative function of a court or tribunal under Art 12 would not constitute an act of an administrative body or official under Art 18, just as legislative decision making of a deliberative elected legislative body, whose members are accountable to the electorate, would not constitute administrative action for the purpose of Art 18.[6] Article 18 cannot thus prize the confined review grounds stipulated in s 89 any wider. Mr Hinda, on behalf of the third respondent, correctly conceded that Art 18 does not apply to proceedings before arbitrators constituted under s 85.

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[6] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), followed by this court in *Mbanderu Traditional Authority & another v Kahuure & others* 2008 (1) NR 55 (SC) para 21.

[34] The question accordingly arises as to whether the third respondent had established a defect as contemplated by s 89(5).

[35] As is the case in all reviews, there is no onus on the decision maker – in this instance the arbitrator – whose conduct is the subject matter of the review to justify his conduct.[7] On the contrary, it is for the applicant in review proceedings under s 89(4) to establish one or more in the category of defects in the proceedings as contemplated by s 89(5).

Application of these principles to the facts

[36] Mr Hinda on behalf of the third respondent essentially only argued two of the review grounds, as outlined above. Given the factual material raised in the answering affidavit concerning the digital recording of the disciplinary proceedings and the approach to disputed facts in motion proceedings, the review ground, incorporating and based upon that issue as well as the claim concerning pleas of guilty, was correctly not persisted with.

[37] Mr Hinda also correctly accepted that there could not have been an irregularity in the proceedings in failing to take into account heads of argument filed so hopelessly out of time - more than six (6) months out of time in the context of proceedings which should be heard and finalised with expedition. The lateness of those heads is compounded by the absence of any explanation or an application for condonation directed to the arbitrator. Nor is this (and other

[7] *Mbanderu Traditional Authority & another v Kahuure & others,* 2008 (1) NR 55 (SC), para 46 and the authorities collected there.

aspects) dealt with in reply. The assertion that the failure to take into account those (very late) heads amounted to bias on the part of the arbitrator was rightly not raised in either the Labour Court or this court. Quite how that could amount to bias is not explained. Unsupported claims of bias or impropriety are to be discouraged and could even be visited by an adverse cost order in appropriate cases.

[38] But Mr Hinda contended that the arbitrators' statement in the award - to the effect that 'nothing' had been placed before him to justify the commission of the disciplinary infractions - demonstrated an irregularity by failing to take into account the version of the third respondent in the arbitration proceedings. That statement in the award is to be considered in the context of the award viewed as a whole and should not be viewed in isolation. The award elsewhere refers to and deals with the third respondent's version. The arbitrator would appear to have taken that material into account, despite his statement to the contrary relied upon by counsel. But more importantly for the third respondent, this point would rather be directed at arguing that the arbitrator had been wrong in his evaluation of the evidence and thus be the subject matter of an appeal and not a review. The fact that appeals are limited to questions of law alone may explain why the third respondent instituted review proceedings instead. But that cannot elevate an argument directed at an evaluation of facts (raising in essence the correctness of the decision) to a gross irregularity amounting to a defect in the proceedings.[8]

[8] *Schoch NO & others v Bhettay & others* 1974 (4) SAA 860 (A) at 866E-F. Rose Innes *Judicial Review Administrative Tribunals at 14.*

[39] The other ground raised on appeal (and in the court below) concerned the tenure of the appellants' employment and that it was not competent to award reinstatement and 12 months' pay on the grounds that their terms of employment ran out on 31 May 2010.

[40] Mr Hinda argued that the arbitrator had adopted a wrong approach to the issue. This is also the language of an appeal, as is demonstrated by the nature of the objection to the finding. Even though the conclusion reached would appear to amount to a question of law, the approach adopted by the arbitrator in reaching it cannot be said to amount to a defect in the proceedings in any of the senses as contemplated in s 89(5).

[41] It would appear that the Labour Court was alive to the third respondent's predicament that not one of the review grounds raised in the application amounted to a defect in the proceedings as contemplated by s 89(5). Hence the reliance by that court upon Art 18 of the Constitution to review and set aside the award. As I have already set out, an arbitrator's decision would not amount to administrative action and Art 18 does not apply to arbitration tribunals established under s 85 of the Act and cannot be invoked to review those proceedings. The clear wording in s 89 confining reviews to the stipulated categories of defects must be given effect to.

[42] The review application, having failed to establish a defect in the proceedings as contemplated by s 89(5), should have been dismissed for this

reason. The appeal against the Labour Court's decision to set aside the award on review thus succeeds.

[43] It follows that it is not necessary for this court to consider the question as to whether there had been a tacit relocation of the appellants' contracts of employment.

The appellants' relief and the order of this court

[44] Having concluded that the review challenge to the arbitrator's award should have been dismissed, the question arises as to the nature of the order to be made by this court.

[45] The arbitrator's award directed that the appellants be reinstated with effect from 1 August 2011 and that they each receive a year's pay in the sums of N$83 988 and N$105 233,40 (less PAYE) for the first and second appellant respectively.

[46] The appellants had been dismissed in May 2010, nearly five and a half years before this appeal was heard. Their positions with the third respondent would no doubt have been filled in the intervening period. The Labour Court has declined to order reinstatement in cases of delay, given that prejudice could result to innocent third parties who have positions held by successful appellants.[9] Other

[9] *Edgars Stores (Namibia) Ltd v Olivier & others* (LCA 67/2009) [2010] NAHC 39 (18/06/2010); *Shiimi v Windhoek Schlachterei (Pty) Ltd* NLLP 2002 (2) 244 NLC.

factors to be taken into account in declining to order reinstatement have been where the employment relationship has broken down or trust irredeemably damaged.[10] These factors are not exhaustive. Plainly the remedying award is not only to be fair to employees but also to employers. In this instance, the delay of more than five years from the dismissals renders a reinstatement impractical, inappropriate and unfair to an employer as was understandably accepted by Mr Rukoro on behalf of the appellants.

[47] The arbitrator's award includes an order directing the third respondent to pay each of the appellants 12 months' pay. This would appear to have been at least partially motivated by the length of time taken to hand down the award – some 7 months as opposed to the 30 day period provided for in s 86(18). In the absence of exceptional circumstances, an award of that magnitude (12 months' pay) would seem to be at the outer range of awards for pay to be made in arbitration proceedings under s 86. Despite the size of the awards, no basis has been laid why this award should be interfered with, especially in view of the fact that it would not be practical or appropriate for the reasons set out to confirm the award reinstating the appellants. On the contrary, the circumstances of this matter warrant the exclusion of reinstatement from the award in the order to be given by this court under s 19 of the Supreme Court Act 15 of 1990, as well as justifying an order directing that interest be paid on the sums payable in terms of the award.

[48] The following order is made:

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[10] *House and Home v Majiedt & others* (LCA 46/2011) [2012] NALC 31 (22/08/2012) para 12.

1. The appeal succeeds and the order of the Labour Court is set aside and replaced with the following order:

> 'The application to review the arbitration award (No CRWK 50710) is dismissed and no order is made as to the costs of the application.'

2. Paragraph 58(ii) of the award directing the third respondent to pay the appellants 12 months' salary in the amounts of N$83 988 in the case of the first appellant and N$105 233,40 in the case of the second appellant is confirmed.

3. Paragraph 58(i) of the award reinstating the appellants to their employ with effect from 1 August 2011 is set aside.

4. Interest on the amounts set out in paragraph 2 above at the legal rate from 31 July 2011 to date of payment is to be paid by the third respondent to the appellants.

5. The third respondent is to pay the appellants' costs on appeal. These costs include the costs of one instructing and one instructed counsel.

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SMUTS JA

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DAMASEB DCJ

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CHOMBA AJA

APPEARANCES

APPELLANTS:	S Rukoro Instructed by Director: Legal Aid
THIRD RESPONDENT:	G S Hinda, SC Instructed by Tjituri Law Chambers