



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: LC 68/2011

In the matter between:

FASHION RETAILERS (PTY) LTD T/A AMERICAN SWISS**JEWELLERS****APPLICANT**

and

BRUCELENE M/L KURZ**1ST RESPONDENT****KLEOPAS GEINGOB****2ND RESPONDENT****THE LABOUR COMMISSIONER****3RD RESPONDENT****MINISTER OF LABOUR & SOCIAL WELFARE****4TH RESPONDENT**

Neutral citation: *Fashion Retailers (Pty) Ltd t/a American Swiss Jewellers v Kurz* (LC 68/2011) [2012] NALCMD 15 (25 October 2012)

Coram: GEIER J**Heard:** 25 October 2012**Delivered:** 25 October 2012

Flynote & Summary: Labour law – Section 134(c) of the Labour Act 2007 – Applicant seeking costs order against arbitrator - In terms of the section arbitrator appointed in terms of Labour Act 2007 not incurring any personal civil liability if, acting in terms of any provision of this Act, he/she did something, or failed to do

something, in 'good faith' in the performance of his/her functions in terms of the Labour Act – Term 'good faith' is not defined – Decided that these words can be interpreted to mean with '*honesty or sincerity of intention*' or '*proceeding from- or characterised by genuine feelings, free from pretence or deceit*' – Rationale behind immunity afforded by section reaffirmed – Dictum *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)* at 471C-E approved – In the present instance court finding on the facts that actions of arbitrator – On a balance of probabilities – Could not be said to have acted in 'bad faith' – Arbitrator therefore not losing immunity afforded by Section 134(c) of the Labour Act, – Special costs order refused.

ORDER

1. The proceedings conducted before the 2nd respondent on 16 August 2010 and 16th May 2011 as well as the arbitration award dated 16th May 2011 are hereby set aside.
2. The application for a special costs order against 2nd respondent is refused.

JUDGMENT

GEIER J:

[1] The applicant seeks on various grounds to review and set aside the arbitration proceedings and award made by the 2nd respondent in favour of the 1st respondent on 16th May 2011. Save for the 2nd respondent, against whom a costs order *de bonis propriis* is sought, the application was not opposed on the merits.

THE MERITS

[2] Regarding the merits of the review, the matter can be disposed of quite neatly with reference to the time- bar provisions, as contained in Section 86 (2)(a) and (b) of the Labour Act 2007, which prescribes a period of 6 months, within which a dispute regarding a dismissal must be referred to the Office of the Labour Commissioner and, in regard to any other dismissal, that such referral can only be made within a period of 12 months, after the dispute has arisen.

[3] It appeared originally from the referral documentation that the complaint was indicated to be a dispute regarding a so called 'unfair retrenchment'. It seemed therefore that the 12 months period, set by Section 86(2)(b), would be applicable to such dispute.

[4] If one has regard to the 1st respondent's 'summary of dispute' it appears there that the 1st respondent essentially complains of the fact that she was not retrenched in accordance with the Namibian Labour Act.

[5] It is common cause that the 1st respondent resigned from her employment with the applicant with effect of the 30th of June 2009.

[6] Any claim the 1st respondent would therefore have had in this regard flows from the obligation imposed by the applicable provisions of part F of the Labour Act which obligations thus arose upon the resignation of the 1st respondent on 30 June 2009, and the referral made only on 13 July 2010 is therefore outside the applicable period.

[7] In any event it appears also from the finding of the arbitrator in that he characterised the 1st respondent's complaint rather as a constructive dismissal.

[8] On this characterisation of the 1st respondent's complaint a 6 months prescriptive period would be applicable which would have commenced to run from date of the 1st respondent's resignation on 30 June 2009.

[9] It is clear that also in this instance the referral took place outside the prescriptive period provided for in Section 86(2)(a) of the Labour Act for these cases.

[10] As the referral in this instance was out of time and no condonation or extension of the applicable periods was sought the review must succeed on the merits on this point alone.

THE COSTS ISSUE

[11] On the issue of costs no Heads of Argument were filled on behalf of 2nd respondent, who also did not appear at the hearing.

[12] The applicant however, persisted to pursue an adverse cost order against him on the following main grounds:

(a) that the 2nd respondent failed to stop the arbitration proceedings in circumstances where it was clear that they were time- barred;

(b) that the 2nd respondent's conduct warranted such order - by virtue of what was stated on the record by him - to wit :

'and by the powers vested in me' ... ;

'... these proceedings are mine and these arbitration proceedings are done with the, not the formal legalities ...';

‘ ... I do not know why you are trying to complicate things here and whether you are trying to undermine the authority or whether you are thinking that we do not know what we are doing ...’;

‘ ... You white people do not want to pay the workers ...’ ;

‘ ... What is the difficulty with you?’ ‘The record shows that you were there when she testified chairperson that is your baby’. ‘Again your unilateral decision making relates to why employer in this matter has clearly said they believe they will not receive a fair hearing, but as you are making false accusations about my unilateral that is not true and I also want to reprimand and order you to count your as to how you are expressing yourself and your rights ...’.

(c) that the 2nd respondent was observed to have various discussions with the first respondent’s representative outside the arbitration proceedings.

(d) that he dealt with parties differently - he argued on various occasions with the applicant’s representative and that this conduct showed that he did not act in good faith;

[13] Thus it was submitted and that the 2nd respondent did not execute his duties in good faith.

[14] The 2nd respondent in his answering affidavits did however set out what his *bona fide* understanding of the prescriptive provisions of Section 86 (2) where.

[15] As regards the failure to allow the representative of applicant a hearing regarding the representation of the 1st respondent at the outset of the proceedings, he explained that he had indicated to Mr Raines, who appeared on behalf of the applicant at the arbitration proceedings, that he had approved such application in order to ensure an equal playing field.

[16] This is indeed borne out by the record, but does not explain why the 2nd respondent did not give Mr Raines an opportunity to state the applicant's case in this regard.

[17] This aspect can at the most found a review.

[18] On the time- bar issue the second respondent makes the point, which is also borne out by the record, that he was of the view that - as the complaint had already passed a so- called 'screening test' in the office of the Labour Commissioner - that the matter had thus competently been referred to him as arbitrator - and that this belief – although it might have been mistaken - led him to find that the requirements of the Labour Act had been satisfied and that his actions where thus not frivolous or vexatious.

[19] He also stated that the mere fact that a complaint was lodged outside the 12 month period did not mean that the matter had elapsed automatically as there would still be an opportunity for this to be condoned.

[20] That maybe so but the fact of the matter remains that no such application was ever made and obviously, in view of the 2nd respondents ruling, did not have to be contemplated.

[21] Curiously the 2nd respondent stated also that he was of the mistaken, but *bona fide* belief, that condonation was granted.

[22] As regards the allegations of bias, the 2nd respondent, obviously, denied them all with reference to his training and on the basis that he had no personal relationship with the 1st respondent and her representative Mr lilonga. He was at pains to point

out how eminently fair the proceedings had been and that he had also not unduly interfered with Mr Raines' cross-examination.

[23] I might add that there was also an issue regarding in the filing of Heads of Argument which dispute, in my view, can however not be solved on the papers.

[24] It is clear that the costs issue must be decided with reference to the exemption provision set by Section 134(c) of the Labour Act which is to the effect that also the arbitrators appointed in terms of the Act will not incur any personal civil liability if, acting in terms of any provision of this Act, they did something or failed to do something in good faith in the performance of their functions in terms of the Act.

[25] The term 'good faith' is not defined in the Act, but Mr Van Vuuren, who appeared on behalf of the applicant, submitted with reference to the South African Concise Oxford Dictionary that these words can be interpreted to mean 'honesty or sincerity of intention' or 'proceeding from- or characterised by genuine feelings, free from pretence or deceit'.

[26] Accepting this, the question therefore arises : can the 2nd respondent's actions here be characterised as being genuine and free of pretence or deceit, or, put differently, has the applicant managed to prove on a preponderance of probabilities that the 2nd respondent was *mala fide* in the exercise of his functions?.

[27] Mr Van Vuuren submitted that the overall conduct of the 2nd respondent proved such *mala fides* and that also the fact that the 2nd respondent did not allow Mr Raines the opportunity to be heard on the representation issue, his refusal of the recusal application and of the time- bar applications showed such intent.

[28] I have already indicated herein above that some justification for the 2nd respondent's actions emerged from his answering papers, which answers were to some degree reflected in the record.

[29] If one has regard to the complained of utterances listed in the applicant's heads of argument they can be analysed one by one as follows:

(a) ' ... And by the powers invested in me ...' : I can see nothing offensive in this statement.

(b) ' ... These proceedings are mine and these arbitration proceedings are done with, not the formal legalities ...' : This statement seems to refer in essence to the requirement to conduct labour proceedings in a less formalistic manner - also this statement is not offensive in my view.

(c) ' ...I do not know why you are trying to complicate the things here and whether you are trying to undermine the authority or whether you are thinking that we do not know what we are doing? ...' : It seems as if the 2nd respondent felt that his competence was questioned and this might have prompted his reaction to such perception – but - all in all - I cannot glean from this relied upon a passage any *mala fides*.

(d) ' ... You white people do not want to pay the workers...'. I will return to this aspect.

(e) ' ... What is the difficulty with you? ...' : also as far as this statement is concerned I cannot detect any *mala fides* except that this statement is again indicative of a personality clash which seems to emerge from the record between the 2nd respondent and Mr Raines.

(f) 'The record shows that there were not there when she testified chairperson that is your baby. 'Your unilateral decision making relates to why the employer in this matter as has clearly said they believe they will not receive a fair hearing, but as you are making false accusations about my unilateral that it is not true and I also want to reprimand you and order you to count your words as to how you are expressing yourself and your rights ...' : Again it emerges that the 2nd respondent felt attacked and that he expressed his reaction to such attack in an inelegant fashion.

[30] All this however is a far cry from not acting in a *bona fide* fashion - although it is also clear on the other hand - that a presiding officer, faced with accusations of bias, should determine such a matter objectively on the facts and should not feel personally affronted.

[31] What would however have weighed heavily with me - and on which basis I would un-hesitantly have acceded to the adverse cost prayer - are the alleged racist's remarks made by the 2nd respondent.¹

[32] If those were indeed the 2nd respondent's views they would clearly have disqualified him from ever again carrying out any of his functions which conduct I would also have condemned in the strongest possible terms.

[33] Unfortunately for the applicant this issue falls to be determined with reference to the approach to disputed facts in motion proceedings, commonly known as the '*Plascon- Evans*' or '*Stellenvale*' Rule².

[34] Although Mr Van Vuuren has impressed on me that the applicant's version in this regard was confirmed by Messrs Fourie and Raines, I cannot find that the applicant's version can prevail in this instance on the application of that test.

¹ ' ... You white people do not want to pay the workers... '.

² See for instance : *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635A

[35] By making this finding I do in no manner whatsoever wish to indicate thereby that I regard the testimony of the said deponents of the applicant's papers as untrustworthy or that I question their credibility in any manner whatsoever.

[36] However, on the strict application of the referred to test I am constrained to make this finding on this particular issue in the favour of the 2nd respondent.

[37] Mr Van Vuuren also referred me to the decision of the Labour Court, Port Elizabeth, made in *Inzuzu IT Consulting (Pty) Ltd v CCMA & Others*.³ In that case the presiding officer had not read the papers and had not acquainted himself with the rules and the contents of a rescission application which he had to decide. The applicants in this matter therefore had to incur the further costs necessitated by further legal steps in order to have the resultant a finding set aside in such premises.

[38] It was held that the particular presiding officer was not shielded by the provisions of Section 126 of the applicable South African Labour Legislation.

[39] The same cannot be said of the 2nd respondent in this matter. What is however relevant to this matter is what was said in that decision⁴ regarding the general underlying principles to the immunity and protection afforded to the judiciary in general as applicable also to arbitrators:

'(T)he decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to rule fearlessly. Litigants like those depending on the administrative processes) are not 'entitled to a perfect process, free from innocent (i.e. non *mala fide* errors'. The threat of an action for damages would 'unduly hamper expeditious consideration and disposal' of litigation. In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although

³ See : [2010] 12 BLLR at page 1288

⁴ With reference to what was stated by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 471C-E*

damages are not indeterminate in any particular case, the 'floodgate argument' (with all its holes) does find application.' ... Similar considerations apply to the immunity afforded to arbitrators and quasi- arbitrators, i.e persons who (usually by virtue of a contract) are entrusted with an adjudicative function that imposes on them a duty to act impartially'.

'The Legislature was clearly aware of the aforesaid principles. Section 125 of the Act expressly provides that the CCMA (inclusive of persons acting as commissioners in terms of the Act) is not liable for any loss suffered by any person as any result of any act performed or omitted in good faith in the course of exercising the functions of the CCMA'.

[40] This principle has also been woven into the provisions of the Namibian labour legislation, as expressed in Section 134(c).

[41] Given the content of the founding papers and the record it is clear that the applicant also in this instance was not exposed to a flawless process. It is so that the applicant had reason to feel aggrieved particularly regarding the outcome of the arbitration proceedings as a whole which brought with it the need to bring this review together with the related troubles of having to reconstruct the record and the incurring of further costs.

[42] All in all and given the attempts at explaining his actions I cannot find on a balance of probabilities that the 2nd respondent was not executing his duties '*honestly*' or *without 'sincerity of intention'* or that he '*proceeded from- or that the proceedings were characterised not by 'genuine feelings'*, and were not '*free from racial pretence or deceit*'. He has thus not lost the shield afforded by Section 134(c) of the Labour Act 2007.

[43] In the result the proceedings conducted before the 2nd respondent on 16 August 2010 and 16th May 2011 as well as the arbitration award dated 16th May 2011 are hereby set aside.

[44] The application for a special costs order against 2nd respondent is refused.

H GEIER

Judge

APPEARANCES

APPLICANT: A van Vuuren
Instructed by GF Köpplinger Legal Practitioners,
Windhoek.

1st to 4th RESPONDENTS: No appearance