



IN THE HIGH COURT OF NAMIBIA

CASE NO: LCA 15/2010

In the matter between:

JB COOLING & REFRIGERATION CC

APPELLANT

And

KASTRO KAVENDJAA

FIRST RESPONDENT

PHILIP MWANDINGI (ARBITRATOR)

SECOND RESPONDENT

CORAM: UEITELE, AJ

Heard on: 01 October 2010

Delivered on: 03 April 2012

JUDGMENT

UEITELE, AJ:

[1] The appellant appealed in terms of section 89 (1) (a) of the Labour Act, 2007 (Act No. 11 of 2007) (I will, in this judgment, referred to it as “the Act”) against the whole of an arbitrator’s (I will, in this judgment, referred to the arbitrator as the second respondent) award made in terms of section 86 of the Act by second respondent on 5 February 2010, against appellant in

favour of Kastro Kavendjaa (whom I will refer to as the first respondent in this judgment).

[2] The appellant was represented by Ms Van der Merwe and the first respondent appeared in person.

Background

[3] On 02 December 2009, the first respondent referred a dispute of unfair labour practice to the Labour Commissioner. The summary of dispute annexed to Form LC 21 sets out the basis of the referral as follows:

- “3.1 first respondent has been working for appellant for a period of three months and nine days in Angola, Luanda
- 3.2 first respondent and appellant agreed that appellant shall pay first respondent N\$ 7 000-00 per month;
- 3.3 the appellant failed to honour the agreement of N\$ 7 000-00 per month and only paid first respondent N\$ 2 700-00 per month;
- 3.4 appellant failed to pay first respondent for August 2009 and November 2009;
- 3.5 first respondent thus claims N\$ 19 900 -00 which is outstanding according to the agreement.”

[4] On 05 February 2010 the second respondent made an award in favour of the first respondent and ordered the appellant to pay to the first respondent a amount of N\$ 19 900-00 together with N\$ 4 846-52 and N\$ 14 000-00.

[5] The appellant now appeals against the orders made by the second respondent, the notice of appeal states that the appellant intends to appeal against the whole of the award of second respondent made on or about the 4th of February 2010 alternatively the 05 February 2010.

[6] Section 89 (1) (a) of the Act restricts an appellant's right to appeal to this court against an arbitrator's award made in terms of section 86, to questions of *law only*. Section 89(1)(a) of the Act, 2007 in material part provides as follows:

“89 (1) A party to a dispute may appeal to the Labour Court against an Arbitrator's award in terms of Section 86-

- (a) on any question of law alone; or
- (b) in the case of award in a dispute initially referred to the Labour Commissioner in terms of Section 7 (1) (a) on question of fact, law or mixed fact and law”.

[7] The provisions of section 89 of the Act were considered by this Court in the unreported judgment of ***Shoprite Namibia (Pty) Ltd Appellant v Faustino Moises Paulo: Case No.: LCA 02/2010*** where Parker J said:

“The predicative adjective ‘alone’ qualifying ‘law’ means ‘without others present’. (*Concise Oxford Dictionary*, 10th edn) Accordingly, the interpretation and application of s. 89 (1) (a) lead indubitably to the conclusion that this Court is entitled to hear an appeal on a question of law alone if the matter, as in the instant case, does not fall under s. 89 (1) (b). A ‘question of law alone’ means a question of law alone without anything else present, e.g. opinion or fact. It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is ‘not a matter of form but a matter of substance ... necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon J).’

[8] It thus follows that in so far as the Notice of Appeal purports to appeal against the whole of the arbitration award it is defective. I am, however, of the view that the defect is ameliorated by the fact that the appellant tabulates the different grounds on which the appeal is based. The question which thus needs to be answered is thus whether each ground of appeal is within the ambit of section 89?

CONSIDERATION OF THE DIFFERENT GROUNDS OF APPEAL

First ground of Appeal

[9] The first ground of appeal is formulated as follows: “Whether or not, on the basis of the exhibits and all other relevant facts, first respondent was employed by appellant?” Miss Van der Merwe who appeared for the appellant argued that the first respondent bore the *onus* to prove that he was an employee of the appellant. She further argues that there is no evidence on record that the first respondent performed duties for the appellant, therefore there is no evidence on record that the respondent was employed by the appellant.

[10] In considering whether an appeal is on a question of law or fact O’Linn J (As he then was) said in ***President of the Republic of Namibia and Others v Vlasiu*** 1996 NR 36 (LC) at page 43:

“It would appear that we are required to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order. That is a question of law. If it did then the appeal must fail. If it did not, then this Court may amend or set aside that decision or order or make any other decision or order according to the requirements of the law and fairness. It will be convenient therefore to determine the facts which were common cause or not in issue before the Court *a quo* and then to determine what relevant

findings of fact were made by that Court. It is upon the basis of all those facts that the correctness or otherwise of the decision and order of the Court *a quo* must then be considered.' It is clear from this judgment that: C

1. It was a question of law to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order.
2. For the purpose of determining such a question of law, the facts as found by the Court from which an appeal is desired, are the facts on which the question of law must be argued.”

[11] It thus follows that we first have to determine the facts which were common cause or not in issue before the second respondent and then to determine what relevant findings the second respondent made and then ask the question whether on the facts found by the second respondent he made the correct decision.

[12] The facts that are common cause are as follows:

- (a) During July 2009 the first respondent heard (from an employee of Appellant), that the appellant was looking for somebody to work in Angola, and first respondent went there to enquire about the vacancy;
- (b) At the appellant's offices the first respondent met a certain Ms Van Zyl, this Ms Van Zyl asked first respondent to bring his CV. First respondent went back, fetched the CV and gave it to Ms Van Zyl;
- (c) Ms Van Zyl said she would fax the CV to Brendell in Angola and first respondent must come back the following day to hear what the view of Brendell is. When he came back the following day

Ms van Zyl informed him that Ms Brendell has confirmed that first respondent could go to Angola.

- (d) Mr Brendell is the sole member's interest holder of the appellant;
- (e) Brehum, an Angolan company, was created as a strategic company to enable appellant to operate business in Angola;
- (f) The appellant arranged for the travelling of first respondent to Angola and paid the expenses of his return to Namibia;
- (g) The appellant paid the first respondent's salary into his bank account in Namibia;
- (h) The first respondent on his arrival in Angola was met by Mr Brendell and was given work instructions by Mr Brendell.
- (i) The letters marked as Exhibits 1 and 2 were issued by Ms Van Zyl the administrative manger of appellant;

[13] The second respondent found that *“all the correspondences like the letters Exhibit (1) and (2) the bank transaction Exhibit 3 clearly indicate that JB Cooling and Refrigeration cc was and has been the employer of the applicant at all relevant times. As such the claim that he (i.e. first respondent) was employed by Brehum Comercio e Prestacao de Services Limitada, must be rejected as a fabrication of the highest order.”*

[14] I agree with Ms Van der Merwe that the *onus* was on the first respondent to prove that he was an employee of the appellant, but what Ms Van der Merwe overlooked is the fact that the *onus* never shifts from the

party upon whom it originally rested, but the burden of adducing evidence in rebuttal occasionally shifts, this was aptly stated by Corbett JA in the South African case of ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** 1977 (3) SA 534 (A) at page 548 : A-B

“As was pointed out by DAVIS, A.J.A., in *Pillay v Krishna and Another*, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another*, 1959 (4) SA 712 (AD) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus ". In this sense the onus can never shift from the party upon whom it originally rested. **The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.**” {My Emphasis}

[15] I am of the view that in the light of the facts that were common cause and the exhibits, the first respondent had adduced sufficient evidence to shift the onus of adducing evidence in rebuttal onto the appellant. The appellant thus bore the *onus* to rebut the evidence placed before the second respondent.

[16] The question therefore is did the appellant discharge the burden of rebutting the evidence placed before the second respondent?

[17] Ms Van der Merwe argued that the first respondent failed to discharge the onus resting on him because the letter of appointment *simpliciter* does

not prove status of employment. She relied on the case of ***Bucher v Kalahari Express Airlines*** 2002 (2) 104 NLC where the headnote *inter alia* reads as follows:

“The Court had to decide whether a document issued by the Respondent was a letter of appointment and constitute an employment relationship...The document was found not to be a letter of appointment. The letter was only issued to enable Appellant to rent a house and that subject to certain conditions Respondent would at some time in the future engage the services of the complainant when certain criteria were met.”

[18] I have no qualms with the headnote but what was the *ratio decidendi* in that case? The *ratio decidendi* was articulated as follows by Levi J at page 113:

“I am satisfied that the complainant was not truthful when he claimed that the letter dated 11 June 1997 written by Campion was a letter of appointment. I am satisfied that the complainant lied when he said he was employed in June and July by respondent at N\$ 12 000-00 per month. I am satisfied that on a balance of probabilities this letter was given to complainant by Campion to enable him to lease his house.”

[19] In the present matter there is no finding by the arbitrator that the first respondent lied. In contrast the facts (i.e. that the first respondent was recruited in Namibia by the appellant, worked for Brendell in Angola and was controlled by Brendell in Angola, Brendell is the 100% members' interest holder of applicant and his salaries were paid by appellant into first respondent bank account, appellant assisted first respondent to obtain a passport and to open a bank account, Brehum was created as a strategic company to enable appellant to operate business in Angola), placed before the second respondent all point to the existence of an employment relationship and the appellant has failed to rebut the evidence so placed

before the second respondent. I am thus satisfied that on the facts found by the second respondent he was right to make the decision he made.

Second and Third grounds of Appeal

[20] I am of the view that the second and third grounds of appeal deal with one and same aspects and a finding on ground two will dispose of the appeal on ground three. The second ground of appeal is formulated as follows: “Second respondent’s jurisdiction to award payment in the amount of N\$ 19 758-40 together with N\$ 4 846-52 and N\$ 14 000-00, while respondent prayed for payment in the amount of N\$ 19 758-40 only”.

[21] I am satisfied that it is a question of law as to whether the second respondent has jurisdiction to award a remedy not claimed by the first respondent.

[22] The second respondent made the following award after he found that the first respondent was employed by the appellant.

“The respondent, JB Cooling & Refrigeration cc, must pay the applicant Mr Kastro Kavendjaa, the claimed amount or underpayment N\$ 19 748-40- plus N\$ 4846-52 (payment for three weeks), plus another N\$ 14 000-00 (Salary for December 2009 and January 2010).”

[23] As I have indicated in paragraph 3 above the first respondent claimed N\$ 19 900 -00 which was ‘outstanding according to the agreement’ when he referred the dispute to the Labour Commissioner.

[24] In the unreported judgment of **Shoprite Namibia (Pty) Ltd Appellant v Faustino Moises Paulo: Case No.: LCA 02/2010** Parker J said:

“It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is ‘not a matter of form but a matter of substance ... necessary to enable appeals to be justly disposed of (*Johnson v Johnson* [1969] 1 W.L.R. 1044 at 1046 *per* Brandon J).’ The *locus classicus* of a similar proposition of law by the Court is found in *S v Gey Van Pittius and Another* 1990 NR 35 at 36H where Strydom AJP (as he then was) stated, ‘The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues.’ My Emphasis

[25] I am of the view that I need no authority to hold that the principle enunciated by the Court (in the **Shoprite case supra**) applies with equal force to the formulation of particulars of claim/summary of dispute of facts. I am thus of the view that the second respondent had no power to make an award not claimed by the first respondent. Ms Van der Merwe referred me to the case of **Double v Delport** 1949 (2) SA 621 (N) where it was held that

“The magistrate, however, granted judgment for the defendant. This he should not have done for the reason that the defendant, in his plea, only asked for a dismissal of the plaintiff’s case. Thus the magistrate in granting judgment in the defendant’s favour granted more than was actually asked for.”

I agree with that conclusion and I accordingly hold that the second respondent acted *ultra vires* when he granted orders for the payment of N\$ 4 846-52 and N\$ 14 000-00.

[26] The evidence on record is that the appellant and the first respondent agreed to a salary of N\$ 7 000-00 per month but the first respondent was only paid N\$ 3077-76 for the month of August 2009, N\$ 1 724-18 for the month of September 2009 and N\$ 3099-05 for the month of October 2009 and for November 2009 no payments were made. He further testified that the agreement with Ms Van Zyl was that for every three months that he worked in Angola he will be given one week off and that he will be paid for the week that he was off.

[27] The first respondent further testified he had worked three months and was given a week off during November 2009 and that is when he came to Namibia and discovered that the payments that were made to him were not as agreed. I am thus of view that the amount to which the first respondent is entitled to is a matter of arithmetics.

Fourth, fifth and sixth grounds of Appeal

[28] The fourth to sixth grounds of ground of appeal are formulated as follows:

- “4 Mrs Lena van Zyl seemed unable to differentiate between herself as Mrs Lena van Zyl and the appellant. She could also not understand that she was attending the proceedings as a representative of appellant and not in a personal capacity, even after it was explained to her several times. She could also not understand that she had the right to call witnesses, including Mr Brendel. She however indicated that she was taking personal responsibility for the mistake she made by giving a letter to first respondent confirming his employment by appellant and the salary that was to be paid to him. It was very unfortunate when appellant’s representative was unable to understand the process. Out of the aforesaid, the following questions of law arise:
- (a) In these circumstances, whether or not second respondent may have continued with the conciliation / arbitration proceedings?

(b) In these circumstances can it be said that appellant received a fair arbitration hearing as envisaged in article 12 of the Constitution of the Republic of Namibia?

5 From a reading of form LC 21, being the form completed for referral of the labour dispute between the parties for conciliation or arbitration, the nature of the dispute referred for conciliation or arbitration was an unfair labour practice. The referral document was not signed by first respondent and / or his representative. There is furthermore no summary attached thereto stating the subject matter and the facts and circumstances that gave rise to the dispute. The referral document is furthermore silent on the nature of the relief sought against appellant. Pursuant to the aforesaid referral, second respondent ordered appellant to pay first respondent a total amount of N\$ 38 594.92. Out of the aforesaid, the following question of law arises:

(a) Whether or not second respondent had jurisdiction to continue with the conciliation / arbitration proceedings and award an arbitration award against appellant for payment to first respondent in the total amount of N\$ 38 594.92 while form LC 21 is defective in various respects?

6 *Ex facie* the record of the proceedings, the following question of law is also raised: Whereas the person who presided as arbitrator and handed down an arbitration award was the same person who conducted the conciliation proceedings; whether or not appellant received a fair hearing by a tribunal as envisaged by article 12 of the Constitution of the Republic of Namibia?"

[29] Ms Van der Merwe in her written heads argued that because Ms van Zyl did not appreciate the difference between herself and the appellant it was evident that she had no appreciation of the nature of the proceedings she was engaged in and therefore the second respondent should not have proceeded with arbitration proceedings because the appellant did not receive a fair hearing as envisaged in Article 12 of the Constitution of the Republic of Namibia.

[30] I have pointed out above that section 89 (1) of the Act restricts appeals to this Court on a question of law alone from arbitration proceedings. The fourth, fifth and sixth grounds of appeal are not questions of law but rather point to defects in the arbitration proceedings. Where the complaint against an order of an arbitrator relates to the manner in which the arbitration proceedings were conducted, the act prescribes a specific remedy, namely a review of the proceedings. See section 89(4) & (5) of the Act, which reads as follows:

- “(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award-
- (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or
 - (b) if the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption.
- (5) A defect referred to in subsection (4) means-
- (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.”

[31] It thus follow that the fourth, fifth and sixth grounds of appeal are not within the ambit of section 89 (1) and are dismissed.

[32] In the result I make the following order:

- 1) The second respondent’s award is set aside and replaced with the following order:

- (a) The Court finds that the first respondent (Mr. Kastro Kavendjaa) was employed by the Appellant.
- (b) The appellant's failure to pay the first respondent the amount of N\$ 7 000-00 per month as agreed upon amounts to unfair labour practice as contemplated in section 50 of the Act.
- (c) The appellant is ordered to pay the first respondent the difference between N\$ 7 000-00 per month x 4 months) and the amount of N\$ 7 900-99 being the amount paid by the appellant to the first respondent.
- (d) The amount referred to in paragraph (c) attracts interest at the rate of 20% per annum calculated from the date of judgment to date of payment.
- (e) The appellant must pay the amount referred to in paragraph (c) together with the interest on that amount (if any) to the office of the Labour Commissioner or the appellant must submit proof to the office of the Labour Commissioner that it has paid the amount to the first respondent.

2) There is no order as to costs.

UEITELE, AJ

ON BEHALF OF THE PLAINTIFF:

Ms. Van der Merwe

INSTRUCTED BY:

Van der Merwe-Greeff Inc.

ON BEHALF OF THE FIRST RESPONDENT

In Person

ON BEHALF OF THE SECOND RESPONDENT

No Appearance