



CASE NO.: LC 40/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

FAUSTINO MOISES PAULO

APPLICANT

and

SHOPRITE NAMIBIA (PTY) LTD

1ST RESPONDENT

PAUL J MALAN

2ND RESPONDENT

KAREN SMITH

3RD RESPONDENT

CORAM: DAMASEB, JP

Heard on: 12 October 2011

Delivered on: 1 June 2012

JUDGMENT:

DAMASEB, JP [1] This is an application seeking certain declaratory relief by an employee against an employer, and it implicates the interpretation of the Labour Act (No. 11 of 2007), hereafter referred to as the '2007 Labour Act'. The facts giving rise to the application fall within a

very narrow compass and are, on the material issues, common cause.

[2] The applicant was dismissed by the employer (first respondent) on 3 June 2009 following a disciplinary hearing. He then referred a dispute of unfair dismissal to the Labour Commissioner. The dispute was then arbitrated and a decision rendered on 22 December 2010, holding that he had been unfairly dismissed with consequential relief as follows:

"AWARD

I have considered a reinstatement with full payment. I believe the relationship has not broken down at all!

I accordingly make the following order:

1. The respondent (Shoprite Namibia (Pty)Ltd must reinstate the applicant (Faustino Moises Paulo) and compensate him for unfair dismissal, full salary from the date of his dismissal to the date of this award i.e. July, August, September, October, November and December 2009, that is N\$23 364.26 x 6 months = N\$140 185.56.
2. The amount of N\$140 185.56 should be paid on or before the 22nd of January 2009 to the applicant.
3. Mr Faustino must resume his work on the same terms and conditions that prevailed before his unfair dismissal.
4. He must report for duty at 8h00 on the 28th December 2009. The respondent must accept the applicant in its employment as directed in this Award without undue restriction thereto.
5. No order as to cost is made.

6. This award will be filed with the Labour Court in terms of section 87 of the Labour Court in terms of section 87 of the Labour Act (Act 11 of 2007)."

[3] The first respondent appealed this award on 18 January 2010 and sought its suspension pending appeal on 22 January 2011 on urgent basis, as it was its right to do in terms of s. 89(1) and s. 89(7) respectively, of the 2007 Labour Act. The application seeking suspension was opposed.

[4] The arbitrator's award was then suspended by Hoff, J on 26 March, pending the finalisation of the appeal aforesaid. The exact terms of the order issued by Hoff J read:

"In the result I am satisfied that applicant has made out a case as prayed for in its notice of motion and the following order is made:

1. The arbitration award CRWK 510-09 dated 22 December 2009 given in favour of first respondent by the arbitrator Emma Nikanor is hereby stayed pending the finalization of the appeal instituted by the applicant on 18 February 2010.
2. Applicant shall provide security to first respondent's legal practitioner in favour of first respondent in the amount of N\$140 185.56 on or before 16 April 2010 which amount plus interest would become payable immediately upon dismissal of applicant's appeal.
3. No order as to costs is made."

[5] The appeal against the arbitrator's award was dismissed by Parker J on 7 March 2011. In the wake of the appeal being dismissed, the parties locked horns on the interpretation, or rather, effect of Hoff, J's order of suspension against the backdrop of the dismissal of the appeal. The applicant concedes in his founding papers that after the appeal was dismissed by Parker J, the first respondent authorised the payment of the back-pay from date of dismissal until the date of the arbitration award. The present dispute arises because the first respondent denies liability to pay the applicant any remuneration from the date of the suspension of the award until the dismissal of the appeal. The respondent's stance is that it is not liable to pay to the applicant any benefits for the period between the suspension ordered by the Hoff J and the dismissal of the appeal by Parker J.

[6] That resulted in the present proceedings. The parties have narrowed down the dispute to the adjudication of the following salient declaratory relief:

- "2. Declaring that the first respondent has failed to comply with the orders of the Honourable Court dated 26 March 2006 and 07 March 2011 respectively directing that the

arbitration award CRWK520-09 dated 22 December 2009 given in favour of the applicant by the arbitrator Emma Nikanor is stayed pending the finalisation of the appeal noted by the applicant on 18 January 2010.

4. Declaring that the first respondent is liable to pay the remuneration of the applicant for the period March 2010 to February 2011 in accordance with the arbitration award under case number CRWK 520.09" (emphasis added)

Whether or not the respondents are liable for contempt for failure to comply with this court's order(s) will depend on the effect of the suspension of the award pending appeal.

[7] The respondent's case is that the employer/employee relationship is of such nature that an employee is not entitled to remuneration in respect of services not actually rendered to the employer. It maintains that the suspension of the execution of the arbitration award had the effect of extinguishing (not merely suspending) any right to compensation / remuneration that the applicant acquired from the date of suspension and the date of dismissal of the appeal. The argument goes further that the scheme created by the 2007 Labour Act is that if an employee wants to retain the benefit of being remunerated between the suspension of the award and the dismissal of

the appeal, he/she must seek such an order from the Labour Court. Absent such an order, it is said, two common law principles take effect: (a) that the noting of an appeal suspends the operation of judgment being appealed against; and (b) that an employee is not entitled to remuneration for work not actually performed.

[8] Mr Ueitele has relied on South African jurisprudence in support of his argument that the legislature had intended that the employee's right to remuneration is not extinguished by the suspension order and that 'reinstatement' entitles an employee to back-pay from the date of dismissal. I have considered the authorities cited by Mr Ueitele against the backdrop of the applicable South African legislation. The South African legislation differs from its Namibian counterpart in significant respects. Firstly, the Namibian legislation does not (as does its South African counterpart¹) give power to the arbitrator to order retrospective reinstatement to the date of dismissal on terms applicable at the time of dismissal. Section 86(15) of the 2007 Labour Act in so far as it is relevant, empowers the arbitrator to make an award, including: "(d) an order of reinstatement of an

¹ Section 193(1)(b) of the RSA, Labor Relations Act of 1995 (Act no 66 of 1996)

employee; (e) an award of compensation." The 2007 Labour Act has abandoned 're-employment' as a possible remedy (vide s. 46(1)(a)(ii) of the 1992 Labour Act).

[9] It must now be obvious that Namibia's 2007 Labour Act does not contemplate retrospectivity in reinstatement. This has led Parker to conclude in his book *'Labour Law in Namibia'*² that the word 'reinstatement' in s 86(15)(d) of the 2007 Labour Act ought to bear its ordinary, grammatical meaning in the employment context"; interpreted by McNally, JA in *Chegetu Municipality v Manyora*³ as follows:

"I conclude therefore that 'reinstatement' in the employment context means no more than putting a person again into his previous job. You cannot put him back into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding backpay and/or compensation. But mere reinstatement does not necessarily imply that backpay and/or compensation automatically follows."

[10] The dictum of the Zimbabwean Supreme Court accords with the interpretation given to the word 'reinstatement' in the 1992 Labour Act in the case of *Transnamib Holdings*

² 2012, University of Namibia Press at p.192

³ 1997 (1) SA 662 (ZSC) at 665H

*Ltd v Engelbrecht*⁴ to the effect that the mere use of the words "in the position which he or she had or would have been had he or she not been so dismissed" does not necessarily mean that the reinstatement in that "position" runs from the date of dismissal. In paragraph 4.3 of his heads of Argument, Mr Ueitele quotes from a South African case of *Equity Aviation v CCMA & Others* for which he has not provided any citation or copy. I have not been able to trace the particular case but he quotes from it as follows:

"The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they assume employment on the same terms and conditions that prevailed at the time of their dismissal."

As I have shown, in terms of the 2007 Labour Act (s.86(15)), reinstatement is not the 'primary' remedy; an award of compensation is considered just as important. Save for that difference, nothing in the interpretation of the word 'reinstatement' by the highest courts of the three jurisdictions recognises the right of an employee

⁴ 2005 NR 372 (SC) at 381E-G

who has been found to have been unfairly dismissed, to be automatically entitled to back pay and/or compensation.

[11] The second difference is that the 2007 Labour Act now includes a position, not found in the 1992 Labour Act, or in RSA LRA⁵, in s 89(9)(b)(ii) which empowers the Court to impose as a condition of suspension of an award pending appeal:

“(i) ...

(b) the continuation of the employer’s obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time. [Underlining supplied for emphasis]

[12] It is the underlined portion of the 2007 Labour Act which Mr Maasdorp, for respondents, relies on for the conclusion he wants the Court to reach that if an employee does not obtain a court order in terms of s 89(9)(b)(ii), he/she loses the right to remuneration even after the appeal which had been suspended is resolved in favour of the employee.

⁵ Labor Relations Act 66 of 1995

[13] Mr Ueitele (for the applicant) submitted that the fact that the applicant did not resume duties as ordered by the arbitrator, was attributable to the first respondent who told him not to report for duty. He relies on the fact, admitted on the papers, that the applicant tendered his services but was turned away, for the invocation of the rule in *Meyers v SA Railways & Harbours*⁶ that if the fact that the employee did not render his labour was due to his employer, he would be entitled to be paid notwithstanding that no service had been rendered by him.

[14] Sec 21(2) of the 1992 Labour Act, for the first time altered the common law position in terms of which in a civil case the noting of an appeal suspends the operation of a judgment pending the outcome of the appeal.⁷ It did so by providing that:

“(2) The noting of an appeal under subsection (1) shall not stay the execution of the Labour Court’s or a district labour court’s judgment or order, unless the Labour Court on application directs otherwise.”

⁶ 1924 AD 85 at 90C

⁷ *South Cape Corporation v Engineering Management Services* 1977 (3) SA 534 at 544H-545A.

[15] The 2007 Labour Act modified the position and introduced a distinction between an award adverse to the employee and that adverse to an employer. It states:

“section 89(6)- When an appeal is noted in terms of subsection (1), or an application for review is made in terms of subsection (4), the appeal or application-

- (a) operates to suspend any part of the award that is adverse to the interest of an employee; and
- (b) does not operate to suspend any part of the award that is adverse to the interest of an employer.

The employer is then given the right to seek suspension of an award adverse to it as follows:

“(7) An employer against whom an adverse award has been made may apply to Labour Court for an order varying the effect of subsection (6), and the Court may make an appropriate order.

As for for the exercise of the discretion to suspend an award adverse to the employer, the 2007 Labour Act states:

“(8) When considering an application in terms of subsection (7), the Labour Court must -

- (a) Consider any irreparable harm that would result to the employee and employer respectively if the award, or any part of it, were suspended, or were not suspended;
- (b) If the balance of irreparable harm favours neither the employer nor employee

conclusively, determine the matter in favour of the employee."

Subsection (9) then provides as follows:

- "(9) The Labour Court may-
- (a) order that all or any part of the award be suspended; and
 - (b) attach conditions to its order, including but not limited to-
 - (i) conditions requiring the payment of a monetary award into Court; or
 - (ii) the continuation of the employer's to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.

[16] Mr Maasdorp argues that the latter provision is a recognition of the common law position that an employee is not entitled to remuneration for services not actually rendered. The common law principle is stated unambiguously by all the judges of appeal who participated in the decision in *Boyd v Stuttaford & Co*⁸. In that case, De Villiers CJ approved the following statement of the law:⁹ that an employee does not lose his right to his full salary if, during the period of his employment, he is able and willing to perform his services, but is prevented, not by personal unfitness, but by external circumstances over

⁸ 1910 AD 100

⁹ At 115

which he has no control, from actually performing his duties: Innes J put it thus in the same case (at p 116):

"A man who lets his services, like a like a man who lets his house, undertakes to afford to the lessee the due enjoyment of the subject matter of the contract. If he does not do so, then the governing principles is that he cannot claim the wages ..."

Solomon J put is as follows (at 122):

"A contract of service is one of "*locatio conducio*", the servant being the located of the services, which he undertakes to render, and the master being the conductor. The general principle underlying such a contract is that the hire is to be paid in return for the services rendered, and the logical deduction therefrom would be that pay is not due for services which have not been rendered. Solomon J then went on (at p 122) to adopt the following statement by Voet to ameliorate the potentiation hardship if no exception were allowed tot he first statement of principle:

"If it is owing to the servant that his services are not rendered, the wage must be diminished in proportion to the time during which the services were not rendered; but if it is owing to the master that the services were not rendered, then the contrary is the rule."

[17] For present purposes, the ratio discernible from *Boyd* is that if the non-performance of the services by the employee arises from factors over which he has control, then he is not entitled to his remuneration.

[18] The principle was applied by the Appellate Division in *Meyer v SA Railways and Harbour*¹⁰ where the employee by operation of law (following a criminal complaint and arrest) became incapable of performing his services as an employee during the period of his suspension. There was no mala fides or unreasonable conduct on the part of the employer in laying the criminal complaint in which the police acted which resulted in the invocation of the law that resulted in the employee being unable to render his services. The Appellate Division held that he was not entitled to remuneration during the period from his arrest to his acquittal in the criminal court.

[19] In the case before me, the applicant had the possibility to call to his aid section 89(9)(b)(ii) of the 2007 Labour Act and request the court to continue the employer's obligation to pay him remuneration even though he was not going to render services during the period of the Court's suspension of the arbitration award. The arbitrator had found that the employer/employee relationship had not broken down at all. The applicant therefore had a good basis to invite the exercise of the Court's discretion to order the payment of remuneration

¹⁰ 1924 AD 85

during the period of suspension until dismissal of the appeal. He did not. The employer had not acted mala fide or unreasonably by seeking a remedy of suspension permissible under law which the Court had, in any event, found justified when it granted the order of suspension.

[20] In my view, the exception to the rule in *Meyer's* case relied on by Mr. Ueitele does not apply because the fact that the applicant (employee of first respondent) did not work between the suspension of the award and the dismissal of the appeal, was as a result of the exercise by the first respondent (as employer) of its right of appeal and to seek the suspension of the arbitrator's award, pending appeal. It could not have been the intention of Parliament that the employer be punished for doing that which the law allows him to do; especially when regard is had that the employee was not without a remedy.

[21] If the employer does not seek a suspension, s 89(6) takes effect and the employee is entitled to execute in so far as execution is possible. However, if the employer does obtain suspension, the only way in which the employee can avoid the operation of the common law principle as set out in *Boyd's* case, is to ask of the Court (presumably

when considering the suspension application of the employer) to invoke s89(9)(b)(ii) and to keep alive the employer's obligation to continue remunerating the employee, "even if the employee is not working during that time."

[22] I agree with the respondent's reasoning that if the Act is not interpreted in that way s89(9)(b)(ii) would be superfluous. The legislature is presumed not to intend such a result. I come to the conclusion therefore, as regards the first head of relief sought, that the employee's failure to have availed himself of the remedy provided for in s89(9)(b)(ii) had the effect that in terms of the common law, the employer had no obligation to remunerate him for work not actually done in view of Hoff J's order suspending the arbitrator's award pending the appeal. That is so even though the applicant had tendered to return to work.

[23] As for the second part of the relief, it has since become apparent that the respondent's failure to implement certain aspects of the arbitrator's award was the result of 'miscommunications and alleged logistical difficulties' and that the employee's entitlement thereto

is not disputed by the employer. To the extent that the 'logistical' difficulties may not have been overcome on the date of this judgement and the need for the relief remains relevant, I will make an order, based on the employer's concessions, declaring that the applicant is entitled to payment of any unpaid amount and return of any benefits ordered by the arbitrator as being due to the applicant from the first respondent, as compensation for the unlawful dismissal as directed by the arbitrator.

[24] The issue has been pleaded and fully argued whether the respondents are in contempt in not giving effect to the arbitrator's award. Having come to the conclusion that the first respondent had no obligation to remunerate the applicant for services rendered from the suspension of the award to the dismissal of the appeal, it follows that it, and the other respondents are not in contempt for refusing to remunerate the applicant for that period. As regards the non-payment and extension of other benefits stated in paragraph 52 of the answering papers, as being due to miscommunication and logistical difficulties, I am satisfied on the *Plascon-Evans* test that they were not in willful default in not honoring them. Accordingly, they are not liable for contempt. I want to stress, however,

that they are bound to honour the arbitrator's award in full until the moment the suspension of the award was granted by Hoff J. Should that not happen, the applicant is entitled to approach this court on the same papers to have that order given effect to.

[25] I make the following order:

- a) The relief directed at securing remuneration and benefits for the applicant for the period after the suspension of the award by Hoff J, until the dismissal of the appeal by Parker J (contained in paragraph 1 & 2 of the prayer for relief agreed by the parties to be in dispute), is dismissed.

- b) It is hereby declared that the applicant is entitled to all the remuneration and benefits as directed by the arbitrator, effective from the date of his unlawful dismissal by first respondent, to the date on which the suspension of the arbitrator's award was given by Hoff J.

- c) No case has been made out to commit any of the respondents for contempt.
- d) In the event of a failure to give effect to the arbitrator's award effective from the date of the applicant's dismissal until the date the award was suspended, the applicant is entitled to approach the court on the same papers (duly amplified) and on 10 days notice to the respondents, for its enforcement.
- e) There shall no order as to costs.

DAMASEB, JP

ON BEHALF OF THE APPLICANT:

Mr. S.F UEITELE

Instructed by:

UEITELE & HANS LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENTS:

MR. R. MAASDORP

Instructed by:

GF KOPPLINGER LEGAL PRACTITIONERS