SUMMARY

'*Reportable'*

CASE NO.: LCA 84/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY NAMIBIA LIMITED v LINDA SCHULTZ

PARKER J

2011 May 27

Labour Law - Section 89(1) – Appeal in terms of against arbitral award made in terms of s. 86 of the Labour Act, 2007 (Act No. 11 of 2007) – Such appeal must be on question of law alone – Court finding that third, fourth and fifth grounds of appeal are based on questions of fact – Consequently, Court dismissing grounds of appeal on the basis of operation of s. 89(1) (a) of Act No. 11 of 2007.

Labour Law - Section 89(1) – Appeal in terms of against arbitral award made in terms of s. 86 of Act No. 11 of 2007 – Appellant contending in sixth ground of appeal that arbitration proceedings not fair because the arbitrator also conducted the conciliation proceedings – Court rejecting ground as baseless – Court holding that in terms of s. 86(5) and (6) of Act No. 11 of 2007 the same arbitrator must attempt to conciliate before embarking on arbitration if conciliation has been unsuccessful in resolving the dispute.

Labour Law - Section 33 of Act No. 11 of 2007 – Court holding that where the complaint is unfair dismissal the only onus the employee bears is establishing he or she is an employee and that he or she has been dismissed – Court holding further that employer alone bears onus of proving dismissal is fair substantively and procedurally and such proof must be conclusive proof not prima facie proof – Court holding therefore that employee never bears any burden to rebut any prima facie proof.

Labour Law - Subrule (16) of rule 17 of Act No. 11 of 2007 – Court finding that in interpreting subrule (16) of rule 17 one must read it together with subrule (6) of rule 17 – Having done that Court coming to the conclusion that in virtue of rule 17(6) and on the facts and circumstances of the case the respondent who has been served with notice of appeal should not be denied her entitlement to be heard, although she has failed to comply with subrule (16) of rule 17.

Held, that in virtue of rule 17(6) of the Rules of the Labour Court, the Labour Court should not drive from the judgement seat a respondent who has been served with notice of appeal although the respondent has failed to file grounds of opposition in terms of rule 17(16)(b). Whether or not the Court should deny such a respondent his or her entitlement to be heard under rule 17(6) depends upon the facts and circumstances of the case, including whether the respondent has given reasonable explanation for his or her failure.

Held, further that nowhere in Act No. 11 of 2007 does the Parliament indicate the slightest intention that the employer need only place before the Court prima facie proof, which the employee must rebut, in satisfaction of the requirements of s. 33(1) of the Act, namely, that the employer had a good and valid reason to dismiss the employee and the employer did so procedurally fairly. The employee never bears onus to prove that his or her dismissal is unfair.

Held, further that the alternative resolution of dispute (ADR) mechanism provided by Act No. 11 of 2007 requires the same arbitrator to attempt to

resolve the dispute through conciliation before embarking on arbitration, if conciliation has been unsuccessful in resolving the dispute.

CASE NO.: LCA 84/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY NAMIBIA LIMITED

Appellant

and

LINDA SCHULTZ

Respondent

CORAM: PARKER J

Heard on: 2011 April 1
Delivered on: 2011 May 27

JUDGMENT

PARKER J

[1] These proceedings are under Case No. LCA 84/2010 and they concern an appeal brought on 23 September 2010 by the appellant ('respondent' in the arbitral tribunal) against the arbitration award

made by the arbitrator, dated 24 August 2010, in favour of the respondent ('complainant' in the arbitral tribunal). It may conduce to the understanding of the case to traverse the background events leading up to the bringing of the present appeal.

[2] The respondent appeared before the appellant's internal disciplinary hearing committee ('disciplinary committee') regarding a charge of unauthorized leave and failing to obey work instructions. The respondent was subsequently dismissed from her employment with the appellant on 19 March 2009, in terms of the decision of the disciplinary committee. The respondent consequently filed an internal appeal with the appellant in respect of the said disciplinary committee's finding and sanction. The appeal hearing committee ('the appeal committee') upheld the decision of the disciplinary committee. Aggrieved by the decision of the appeal committee, the respondent referred a dispute of unfair dismissal, unfair labour practice and payment of severance package to the Office of the Labour Commissioner in terms of section 86(1) of the Labour Act, 2007 (Act No. 11 of 2007). Mr. Shinguandja, the Labour Commissioner, was designated as the conciliator-cum-arbitrator to deal with the referral. In terms of s. 86(5) and (6) of Act No. 11 of 2007, the conciliator-cum-arbitrator commenced with conciliation and thereafter proceeded to conduct arbitration because the conciliation was unsuccessful. The arbitration proceedings were held on 12 August 2009 and 30 July 2010 and eventually concluded on 24 August 2010 with the delivery of an arbitration award in favour of the respondent, as aforesaid. In terms of the said award, the appellant was ordered to reinstate, accept and receive the respondent at 08h00

on 1 September 2010 in the position in she had occupied before the dismissal or in any comparable position without loss of income and entitlements.

[3] I pause here to note that after filing the notice of appeal, as aforesaid, the appellant, on 27 September 2010, launched a review application with this selfsame Court, praying this Court to review the said arbitral award. It is for this reason that the respondent raised a preliminary objection based on *lis alibi pendens*. In his oral submission, Mr. Hinda, counsel for the respondent, did not pursue the objection. I think Mr. Hinda was wise in doing so: Act No. 11 of 2007 does not in principle restrict the party aggrieved by the award of arbitration to one form of remedy. In any case, the requirements of appeal proceedings and review proceedings are different; and after the result of the appeal proceedings is known, the aggrieved party may decide it would serve no purpose to pursue the review proceeding, too. That is all that I can say about the objection of *lis alibi pendens* in these proceedings.

[4] As I have intimated previously, the present proceedings concern an appeal and that is my burden in these proceedings – to determine the appeal under Case No. LCA 84/2010.

[5] The appellant has raised a preliminary objection based on the respondent's non-compliance with rule 17(16) (b) of the Labour Court Rules. According to the appellant the respondent did not within 21 days of receiving the appeal record, or at all, deliver a statement, with any

accompanying relevant documents, stating the grounds on which she opposed the appeal. That being the case, so Mr. Denk, counsel for the appellant argued, the appellant is prejudiced thereby; and the consequence, according to counsel, that should follow is that the respondent is not properly before this Court. It is worth noting that counsel did not share with the Court the respects in which the appellant is prejudiced.

[6] The respondent launched an application in which the respondent prays for condonation of her non-compliance with the said rule 17(16 (b). The appellant opposes the application. In dealing with the respective positions of the parties, I make the following findings of law. If it was the intention of the Rules maker that a breach of rule 17(16) (b) should result in the offending party not being permitted to take part in the proceedings, the Rules maker would have made such of his intention known clearly and expressly in the rule. In this regard see, for instance, rule 7(3) of the rules of district labour courts in the previous Labour Act, 1992 (Act No. 6 of 1992) which provides:

> (3) Except with leave of the chairperson on good cause shown, a respondent who has not served a reply in accordance with this rule (i.e. rule (7)) *shall not be entitled to take part in the proceedings of the court.* (Italicized for emphasis)

[7] On the contrary, rule 17(6) is emphatic in its formulation and effect in this way:

> Any person served with a notice of appeal pursuant to subrule (5) *is entitled to appear and be heard at the hearing of the appeal*. (Italicized for emphasis)

A fortiori; the Rules maker has not subjected subrule (6) to subrule (16) of rule 17, or to any other rule. In any case, the respondent has explained why she did not file grounds of opposition to the notice of appeal which I find to be reasonable, particularly if regard is had to paras 4.1-4.4 of the respondent's supporting affidavit. I particularly take note of the fact that the appellant, as I have intimated previously, has filed both an appeal and a review, based on virtually the same grounds and the respondent has responded to them in the review matter. Based on that, Mr Hinda, counsel for the respondent, submitted that the appellant knew on what grounds the respondent opposed the appeal, too, and so therefore in his view the appellant could not be prejudiced. I accept Mr Hinda's argument. In any case, as I have said previously, counsel for the appellant does not share with the Court the respects in which the appellant is prejudiced by the respondent's non-compliance with rule 17 (16) (b). Whether or not the Court should deny the respondent his or her entitlement to be heard under rule 17 (6) depends on the facts and circumstances of the case, including whether the respondent has placed before the Court a reasonable explanation for his or her failure. Going by the width of the wording of rule 17(6) and what I have said with regard to rule 17(6), read intertextually with rule 17(16) (b), and having taken into account the facts and circumstances of the case, including the respondent's reasonable explanation as to why she has not complied with rule 17 (16) (b), I am confident in my rejection of the appellant's point *in limine*. I do not think, in the

circumstances, this Court should drive the respondent from the judgment seat when she has been served with notice of appeal. I now pass to consider the merits of the appeal; and I do so by treating the grounds of appeal seriatim.

First and second grounds

[8] I must say the appellant's first ground of appeal has, with respect, not a wraith of merit: it is based on the appellant's misreading of the clear and unambiguous wording of s. 33 of Act No. 11 of 2007. The interpretation and application of s. 33 has this result in the statutory labour law under our Labour Act; that is to say, an employer who has dismissed his or her employee must prove that he or she had not only a valid reason but also a fair reason for so dismissing and also that he or she followed procedures in accordance with s. 33(b) (i) or (ii), as the case may be. This is trite; and that much both counsel accept. Nowhere in Act No. 11 of 2007 do the Parliament show the slightest intention that such employer need only place before the Court prima facie proof in satisfaction of the said requirements of s. 33 (1) of Act No. 11 of 2007 and which the employee must rebut. It is only the employer – and he or she alone – bears the onus of satisfying the Court that he or she had a valid and fair reason for dismissing the employee and that he or she did so procedurally fairly within the meaning of s. 33(1)(a) or (b), as the case may be, of Act No. 11 of 2007. The employee *never* – by any legal imagination – bears the onus of establishing that his or her dismissal is unfair. (Italicized for emphasis)

[9] In terms of s. 33 (1) of Act No. 11 of 2007, the only onus cast on the other party (i.e. like the respondent in the present proceedings) is to satisfy the tribunal that he or she is an employee – within the meaning of s. 1 of Act No. 11 of 2007 – and that he or she was dismissed by his or her employer (i.e. like the appellant in these proceedings). The clear and unambiguous wording of s. 33(1) bears out this irrefragable conclusion. That is also trite. With the greatest deference to counsel, I do not, therefore, give any respectable look – as far as the present proceedings are concerned – to the cases referred to me by counsel: they are of no assistance on the point under consideration. The cases are, for example, *Natal & Others v South African Breweries Ltd* [2001] 2 BLLR 186 (LC); *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty)* 1977 (3) SA 534 (A); and *Passano v Leissler* 2004 NR 10. Those cases are not concerned with the interpretation and application of s. 33(1) of Act 11 of 2007 or its comparable provisions in the previous Act, i.e. s. 46 (3) and (4) thereof.

[10] It seems to me clear from the record placed before this Court for purposes of the present appeal that the arbitrator in the tribunal below had sufficient and incontrovertible evidence before him, showing that the respondent was an employee of the appellant and that she was dismissed by the appellant. In that event this Court cannot fault the arbitrator in concluding that the respondent had discharged the onus cast on her to establish that she was an employee of the appellant and that she was dismissed by the appellant. That being the case, it is of no moment that the respondent did not testify or was not asked by the

arbitrator ‘whether she wanted to testify on (in) her own behalf, call witnesses or close her case.’

[11] To start with; the respondent had no case to answer apart from establishing to the satisfaction of the tribunal that she was an employee of the appellant and that she was dismissed by the appellant which was not disputed, as I have held previously. I accept as sound law the arbitrator’s statement that ‘there is no legal requirement that the applicant (‘the respondent’) must testify in his/her case’; of course, with only the qualification thereanent expressed previously, that is, the burden of the respondent to establish that she was an employee of the appellant and that she was dismissed by the appellant. As I say, if counsel’s submission, ‘to testify (in) on her own behalf, call witnesses or close her case’, means that the respondent should have testified to establish anything apart from the fact that she was an employee and she was dismissed; then, with respect, counsel is palpably wrong: that is not part of our statutory Labour Law under s. 33(1) of Act No. 11 of 2007, as I have explained previously. It is not part of our statutory Labour Law under s. 33(1) of Act No. 11 of 2007 ‘that’, as counsel submitted, ‘the prima facie proof of the evidence established by the appellant during arbitration proceedings became conclusive proof in the absence of the respondent’s testimony in rebuttal.’

[12] Consequently, I find that by his views on the point under consideration, the arbitrator was on solid, unshakable legal ground as to his understanding of the law. What the arbitrator expresses is sound in law; what counsel submits is, with the greatest deference to counsel, is

not sound in law. Accordingly, I hold that the first and second grounds of appeal have no merit; and are therefore rejected. I now pass to consider the third and fourth grounds.

Third and Fourth grounds

[13] I find that the third and fourth grounds of appeal concern factual findings by the arbitrator: they raise questions of fact. These grounds of appeal, therefore, fall foul of s. 89(1) (a) of Act No. 11 of 2007. The chapeau in para 3.3 and the opening words of para 4.3 are cleverly crafted. Nevertheless, what remains indubitably true is that the said chapeau and the said opening words cannot metamorphose that which is clearly a question of fact into a question of law, capable of bringing s. 89(1)(a) into play. Accordingly, the third and fourth grounds are rejected on the basis of operation of law, that is, s. 89(1) (a) of Act No. 11 of 2007.

Fifth ground

[14] This ground of appeal concerns the arbitrator's award of reinstatement of the respondent. The appellant contends that 'the arbitrator erred in law in finding that the respondent should be reinstated.' This ground is so inelegantly drafted that it is difficult to find the sense of the meaning of the ground. To start with the arbitrator did not '*find* that the respondent should be reinstated'. The arbitrator *granted* an award of reinstatement which the arbitrator is entitled by law to grant, that is, in terms of s. 86(15) (d) of Act No. 11 of 2007. (Italicized for emphasis) In sum, as a matter of law the arbitrator's decision is intra vires s. 86(15)(d) of Act No. 11 of 2007. The appellant

has not shown that as a matter of law the arbitrator acted ultra vires; and the appellant does not attack the exercise of discretion on any ground – common law, statutory or constitutional (see *Gideon Jacobus du Preez v Minister of Finance* Case No. A 74/2009 (judgment delivered on 23 March 2011)); neither would the appellant have been right in raising those review grounds, bearing in mind that the present are appeal proceedings. Indeed, the basis of the fifth ground of appeal is encapsulated in the following words at para 52 of the notice of appeal thus:

> The appellant adduced credible evidence that the employment relationship between the parties has (was) irretrievably broken down.

The issue as to whether the appellant adduced credible evidence does undoubtedly raise a question of fact; and so it is outside the purview of s. 89(1) (a) of Act No. 11 of 2007. In my judgement, therefore, the fifth ground, too, fails. Accordingly, the third and fourth grounds are rejected also on the basis of operation of law, that is, s. 89(1) (a) of Act No. 11 of 2007. I now pass to deal with the sixth and last ground of appeal.

Sixth ground

[15] The basis of the sixth ground of appeal is that the arbitral proceedings were not fair just because 'the arbitrator also conducted the conciliation proceedings.' This argument is, with respect, so weak that it does not even begin to get off the starting blocks. It is clear from the scheme of the alternative resolution of dispute (ADR) mechanism

under Act No. 11 of 2007 that it does not offend the Act for X who conducts conciliation also conducts arbitration in respect of the same dispute, if X's conciliation effort is unsuccessful. Indeed, subsections (5) and (6) of s. 85 of the Act provide in mandatory terms thus:

> (5) Unless the dispute has already been conciliated, *the arbitrator must* attempt to resolve the dispute through conciliation *before* beginning arbitration.
>
> (6) If the conciliation attempt is unsuccessful, *the arbitrator must begin arbitration*.
> (Italicized for emphasis)

[16] In my judgement, therefore, I hold that there is not even a phantom of merit in the sixth ground. The sixth ground is, accordingly, rejected as singularly lacking in merit.

[17] For the aforegoing reasoning and conclusions, I hold that the appeal must fail; whereupon I make the following order:

(1) The appeal is dismissed.

(2) There is no order as to costs.

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PARKER J

COUNSEL ON BEHALF OF THE APPELLANT: Adv. A Denk

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