



## **SUMMARY**

'Reportable'

**CASE NO.: LCA 17/2011**

### **IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**NATIONAL HOUSING ENTERPRISE v MAUREEN HINDA-MBAZIIRA AND 2 OTHERS**

**PARKER J**

*2012 April 3*

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**Labour Law** - Labour Act (Act No. 11 of 2007), s. 86(1) and (2)(a) – Interpretation thereof – Court finding that for s. 86(1) and 2(a) to have meaning, they must be interpreted purposively and intextually with s. 82(7), (8) and (9) – Court accordingly interpreting s. 86(2)(a) to mean that the six-month time limit begins to run after all reasonable steps, including disciplinary hearing and subsequent appeal (i.e domestic remedies) have failed to resolve or settle the dispute – Consequently, in instant case, Court finding that the respondent referred the dispute to the Labour Commissioner within the time limit and so the arbitrator had jurisdiction to arbitrate the dispute after conciliation had failed to resolve it.

**Labour Law** - Labour Act (Act No. 11 of 2007), s. 86(2) – Court finding that what a party refers to Labour Commissioner is 'dispute' not 'dismissal' *simpliciter* and nude – Court concluding that not every dismissal begets a dispute in terms of the Labour Act – Court finding that it is where a dismissal has given rise to a dispute that a dispute that concerns a dismissal has arisen which may be referred to the Labour Commissioner – In instant case the dispute between the employer and employee arose when the appeal against dismissal was dismissed and the employee was accordingly informed.

**Labour Law** - Arbitral award – Court finding that arbitrator misconceived her duty under the reference which was to determine whether the dismissal of employee is unfair – Consequently, Court concluding that the award is not final and so it is invalid – Consequently, Court remitting matter to the Labour Commissioner for him to refer the dispute to another arbitrator to resolve the dispute through arbitration.

**Labour Law** - Labour Act (Act No. 11 of 2007), s. 89 – Court finding that in terms thereof what a party may appeal from is the arbitration award not an order that ensues after being filed in terms of s. 87(1)(b) – Court not determining the position where an award has become an order of the Court on the basis that the present award is invalid *ab initio*.

*Held*, that the six-month time limit in terms of s. 86(2)(a) of Act No. 11 of 2007 begins to run after all reasonable steps, including disciplinary hearing and subsequent appeal (i.e domestic remedies) have failed to resolve or settle the dispute.

*Held*, further that in terms of Act No. 11 of 2007 'dispute' is not synonymous with 'dismissal': for, not every dismissal begets a dispute in our Labour Law, which a party may refer to the Labour Commissioner in terms of the Act.

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**NATIONAL HOUSING ENTERPRISE**

**Applicant**

and

**MAUREEN HINDA-MBAZIIRA**

**First Respondent**

**MINISTER OF LABOUR AND SOCIAL WELFARE**

**Second Respondent**

**ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA**

**Third Respondent**

**CORAM: PARKER J**

Heard on: 2012 March 2

Delivered on: 2012 April 3

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## **JUDGMENT**

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**PARKER J:** [1] The first respondent (the employee) was charged by the appellant (the employer) with certain charges of irregularities and she faced a disciplinary hearing. The hearing was concluded by the chairperson of the disciplinary hearing finding the first respondent guilty on some of the charges on 6 March 2009, followed by the chairperson recommending to the Chief Executive Officer (CEO) of the appellant to demote the first respondent or terminate her services. The CEO took a decision to terminate the services of the first respondent. The decision was communicated to the first respondent via a letter or memo, dated 27 April 2009. She received the letter or memo on 30 April 2009. The last sentence of the communication is replete with superlative relevancy as I shall demonstrate in due course. It reads:

*'Ms M Hinda-Mbaziira (the first respondent) has a right to appeal against this decision, if she so desires, in line with company policy and rules of natural justice.'*

[Italicized for emphasis]

[2] I have italicized those parts of the last sentence for a good reason which will become apparent in due course. The first respondent took advantage – as it was her entitlement to do – of the company policy and rules of natural justice and appealed from the decision of the CEO to dismiss her to the appeal body of the appellant, being the appellant's Board of Directors ('the NHE appeal body'). The appeal body dismissed her appeal on 8 December 2009, and that decision was communicated to the first respondent's representative on 9 December 2009. The matter did not rest there. Having exhausted domestic remedies – and this is significant in these proceedings as will become apparent shortly – the first respondent referred a dispute of 'unfair dismissal and unfair labour practice' to the Labour Commissioner on 7 May 2010 in accordance with Part B of Chapter 8 of the Labour Act, 2007 (Act No. 11 of 2007). The Labour Commissioner referred the dispute to a conciliator to resolve the dispute through conciliation. When conciliation failed to resolve the dispute, the dispute was referred to arbitration. Arbitration proceeded, and the arbitrator delivered her award on 9 February 2011.

[3] The appellant, represented by Mr Barnard, now appeals from that award, and the appellant raises a number of what it calls grounds of appeal spread over 15 paragraphs. Of course, there are not essentially and substantially fifteen grounds of appeal. Mr Barnard, counsel for the appellant, submitted that the appellant was no longer pursuing the ground of appeal set out in para 3 of the notice of appeal. The ground set out under para 4, too (that is the constitutional challenge), was also not pursued. That is a wise move, in my opinion, as I see that counsel submits that the

appellant 'does not seek an order in terms of article 25(1)(a) or (b) of the Namibian Constitution' to 'set aside ... section 89(1)(a)'; but as I said in *Trustco Insurance v Deeds Registries Regulation Board* 2010 (2) NR 565, the basic human rights contained in Ch 3 of the Namibian Constitution are justifiable basic human rights because the Constitution says so in art 25(2). That being the case, any treatment of the appellant's constitutional challenge will be academic; but this Court is not in the business of entering upon academic discourse. For this reason, Mr Marcus counsel for the second and third respondents did not make any oral submission respecting the constitutional challenge.

[4] It is appropriate at this juncture to consider the interpretation and application of relevant provisions of the Labour Act. For instance, s. 82 provides:

- '(7) A party to a dispute may refer the dispute in the prescribed form to –
  - (a) the Labour Commissioner; or
  - (b) any Labour office.'
  
- (8) The party who refers the dispute must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute.
  
- (9) The Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute, must –
  - (a) refer the dispute to a conciliator to attempt to resolve the dispute through conciliation;
  - (b) ...
  - (c) ... '

[5] It is worth noting that as respects s. 82 (7) of the Labour Act there is no time limit within which a party must, if he or she or it desires, refer a dispute to the Labour Commissioner. What is more important is this: a party must in terms of s. 82 (9) establish to a degree that is sufficient to make the Labour Commissioner to be

satisfied that 'the parties have taken all reasonable steps to resolve or settle the dispute' before the Labour Commissioner shall 'refer the dispute to a conciliator to attempt to resolve the dispute through conciliation.' I hold the firm view that 'reasonable steps' include a disciplinary hearing at the first instance and a subsequent appeal, if an appeal becomes necessary in a particular case. These are domestic remedies. The Labour Commissioner, in my view, will, therefore, not be so satisfied if, for instance, no disciplinary hearing at the first instance and no subsequent appeal – in accordance with the employer's own disciplinary code or suchlike contractual prescription or a collective agreement – have taken place in an attempt to resolve or settle the dispute.

[6] This interpretation leads inexorably and reasonably to the conclusion that s. 86(1) and (2) must perforce be read intertextually with s. 82(7), (8) and (9); otherwise s. 86(2)(a) will not have purposive meaning: it will be hanging. In this regard, one must not lose sight of the fact that what a party may refer to the Labour Commissioner is 'dispute' not 'a dismissal' or any suchlike complaint *simpliciter* and nude. 'Dispute' is, therefore, not synonymous with 'dismissal': for, it is not every dismissal that begets a dispute as a matter of course in our Labour Law. Parliament was alive to this simple but significant legal fact. Suppose, for example, employer Y dismisses his employee X. The dismissal becomes the subject of a dispute – that is, 'the dispute concerns a dismissal', in the language of s. 86 (2) (a) – only if X feels aggrieved as a result of his dismissal. However, if X decides to move on with his life without complaining about his dismissal there is a dismissal but there is no dispute between X and Y as far as X is concerned. By a parity of reasoning, if Y is satisfied that he has succeeded in dismissing X and Y is happy X has taken the dismissal on his chin without complaining and Y requires nothing from X, e.g. to repossess from X official accommodation Y had given to X or Y has paid all terminal benefits due to X

and X, too, requires nothing from Y, there is no dispute between Y and X arising from the dismissal, that, is a dispute that concerns a 'dismissal' which 'any party' (i.e. X or Y) may refer to the Labour Commissioner in terms of s. 86(1) and (2) of the Labour Act: X and Y are happy and contented that they are out of each other's life. There is no dispute between them, as a matter of law.

[7] In this regard, take for example, s. 38 of the Act. It reads – quite significantly:

'38. (1) If there is a *dispute* about the non-compliance with contravention, application or interpretation of this Chapter, any party to the dispute may refer *the dispute* in writing to the Labour Commissioner.

(2) The person who refers *the dispute* must satisfy the Labour Commissioner that a copy of the notice of a *dispute* has been served on all other parties to the dispute.

(3) The Labour Commissioner must refer *the dispute* to an arbitrator to resolve *the dispute* through arbitration in accordance with Part C of Chapter 8 of this Act.'

(Italicized for emphasis)

Thus, under s. 38 of the Act, for instance, what a party may refer to the Labour Commissioner is a 'dispute' not, for example, 'a contravention, application or interpretation of' Chapter 3 of the Act, but a dispute which concerns, for example, 'a contravention' of Chapter 3 of the Act. By a parity of reasoning, as I have said more than once, under s. 86(2)(a) what a party may refer to the Labour Commissioner is a dispute, which concerns a dismissal, that is, where a dispute that 'concerns a dismissal' has arisen; not just a dismissal *simpliciter* and nude.

[8] The interpretation of s. 86(1) and (2) I have undertaken above impels me to this conclusion: The six-month time limit relates to the time a dispute which

'concerns a dismissal' has crystallized, in the sense that all reasonable steps, including domestic remedies, have been pursued without success to resolve or settle the dispute. This conclusion is buttressed, in the instant proceedings, by the fact that the 'company policy' of the appellant entitled and, indeed expected, the dismissed employee to appeal from the decision to dismiss her and not to run to the Labour Commissioner immediately she received the dismissal notice. Any contrary argument would render nugatory the CEO's well-meaning instruction to the first respondent that she was at liberty, pursuant to company policy and rules of natural justice, to appeal from his decision to dismiss her to the NHE appeal body. Thus, any argument that in the present proceedings the six-month time limit begins to run from the date the first respondent was informed she had been dismissed misses the point. It misses the unseverable intertextuality between s. 82 (7), (8) and (9) and s. 86 (1) and (2) of the Labour Act.

[9] For all the foregoing, I find that on 30 April 2009 there was 'a dismissal' but there was no 'dispute' that 'concerns a dismissal' between the appellant and the first respondent which any one of them could have reported to the Labour Commissioner within the meaning of s. 86 (2) (a) of the Labour Act, taking into account s. 82 (9) of the Act, coupled with the fact that in the scheme of the alternative dispute resolution scheme (ADR) under the Labour Act, no arbitration can lawfully take place without the 'dispute' involved having remained unresolved or unsettled after conciliation. Accordingly, I find that the appellant's contention that the six-month time limit under s. 86 (2)(a) began to run from 30 April 2009 has no basis in the law of the Labour Act. I am, therefore, confident in my rejection of the appellant's contention. The first respondent referred the dispute which concerns dismissal to the Labour Commissioner on 7 May 2010, and so I find that the referral was made within the six-month time limit under the s. 86(2)(a). That being the case, I find the bevy of cases



referred to me by counsel on this issue to be of no assistance on the point under consideration; and, *a priori*, the arbitrator's rejection of the appellant's contention then before her cannot be faulted. The arbitrator had jurisdiction to conduct the arbitration, as she did. The ground of appeal based on s. 86(1) and (2)(a) of the Labour Act must therefore fail, and it fails. This conclusion disposes of the grounds of appeal set out in paras 1 and 2 of the notice of appeal.

[10] Having held that the arbitrator had jurisdiction to conduct the arbitration referred to her, the next logical question that arises for determination is, therefore, this: Did the arbitrator deal with the referral that was before her? The referral is about a dispute concerning 'unfair dismissal' and 'unfair labour practice'. I accept Mr. Barnard's submission that the arbitrator does not find that the dismissal of the first respondent is unfair within the meaning of s. 33 of the Labour Act; neither does the arbitrator find that the appellant committed unfair labour practice against the first respondent. I did not hear Mr Soni to argue the other way. It seems to me clear on the record that the arbitrator failed to make a clear and unequivocal finding of unfair dismissal. Mr. Barnard characterizes this failure on the part of the arbitrator as the 'essential flaw in the arbitrator's award'. I accept counsel's submission, but I do not accept counsel's further submission that for that reason, the CEO's decision, confirmed on appeal by the NHE appeal body should – without more – stand. Counsel concludes, 'for the above reason, the complaints of the (first) respondent should have been dismissed with costs, and the decision to dismiss the respondent in terms of s. 30 of the Labour Act, should have been confirmed.'

[11] Counsel's argument is, with respect, superficially attractive, but it is over simplistic and self-serving, seeing that s. 30 of the Act deals with 'Termination of Employment on Notice'. In any case, the fact which Mr. Barnard himself adverts to is

that the arbitrator failed to deal with the reference that was submitted to her inasmuch as the arbitrator failed to make any recognizable finding that the dismissal is unfair, as I have found previously. The arbitrator has, thus, in my view, misconceived his duty under the reference, which is to determine whether the dismissal of the first respondent is unfair; and if she found it to be unfair to make an appropriate order in terms of s. 86(15) and (16) of the Labour Act. Although, the arbitrator has delivered an award, embodying certain orders, I hold that the award is invalid because the arbitrator's decision does not bring an end to the dispute as to whether the first respondent was unfairly dismissed. In this regard, it has been said that an award must be final; in the sense that it must be complete so much so that it deals with all matters submitted to the arbitrator and it leaves no matter unsettled (Butler and Finsen, *Arbitration in South Africa: Law and Practice*, 1993; para: 7.3).

[12] In the instant matter the award is invalid because it has not brought to an end the dispute between the parties as to whether the first respondent's dismissal is unfair. In that sense, the award is incomplete for it does not deal with the question of unfair dismissal: it leaves the dispute in the reference unsettled.

[13] In the circumstances, it is my view that the proper course for this Court to pursue in order to do justice to the parties is to remit the matter to the Labour Commissioner for him to refer the dispute to arbitration before an arbitrator, other than the present arbitrator, for such arbitrator to resolve the dispute.

[14] For the sake of completeness, I shall now deal with Mr. Soni's argument about the fact that the arbitral award has become an order of the Court on filing the award in the Court in terms of s. 87(1)(b) of the Labour Act. In the scheme of s. 89 of the Act what a party is entitled to appeal against is the arbitral award, as

Mr Barnard submitted, that is, the decision of the arbitrator (see Butler and Finsen, *ibid*: para 7.1) and not an order of the Court in terms of s. 87(1) of the Act; and such party must note the appeal within 30 days after the award has been served on him or her; although on good cause shown, the Labour Court may condone the late noting of the appeal.

[15] In the instant case, the appellant noted the present appeal on 4 March 2011, that is, within the statutory time limit. The only fly in the ointment is that by then the award had, in the language of Henning AJ in *NedBank Namibia Ltd v Jacqueline Wanda Louw* Case No. LC 66/2010 (Unreported) at p. 19, been 'elevated into an order of the Court' in terms of s. 87(1)(b) of the Labour Act. An urgent application has been launched by the appellant on 15 February 2012 to declare the writ of execution that issued from the Court on 20 January 2012 to be null and void and to set aside same under Case No. LC 21/2011. I need not deal with this issue of the award being elevated into an order of the Court because by agreement between the parties an order was made by this Court on 17 February 2012 under Case No. LC 21/2011 removing the application from the Roll and in which the first respondent undertakes not to proceed with execution steps to enforce the order of the Court pending finalization of this appeal.

[16] There is also the issue of whether the grounds of appeal, apart from the question of the jurisdiction of the arbitrator, are questions of law alone. It will not be proper for this Court to treat this issue on account of the fact that I have held that the award as it stands is invalid *ab initio*.

[17] In virtue of the foregoing reasoning and conclusions, the appeal succeeds; and in the circumstances it is fair and reasonable (as I have said earlier) to remit the matter to the Labour Commissioner. In the result, I make the following order:

1. The arbitration award under Case No. CRWK 361-10 made by arbitrator Ms T Mwafufya-Shilongo is set aside.
2. The matter is remitted to the Labour Commissioner and the Labour Commissioner must refer the dispute to arbitration to be conducted by an arbitrator other than Ms T Mwafufya-Shilongo to resolve the dispute.
3. There is no order as to costs.

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**PARKER J**

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