



REPUBLIC OF NAMIBIA

CASE NO. LC 12/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

FISHERIES OBSERVER AGENCY

APPLICANT

and

NAMIBIA PUBLIC WORKERS UNION

FIRST RESPONDENT

GERTRUDE USIKU

SECOND RESPONDENT

CORAM: DAMASEB, JP

Heard: 7 November 2011

Delivered: 28 May 2012

JUDGMENT

DAMASEB, JP: [1] The respondent in this case is a registered trade union duly recognised by the appellant as the exclusive bargaining agent for the appellant's seagoing employees. The respondent has a recognition agreement with the appellant. In

that capacity, and as representative of its members, it declared a dispute of right¹ with the labour commissioner on behalf of its members for alleged failure to pay overtime. In the referral of dispute for conciliation or arbitration it stated the nature of the dispute as unfair discrimination, unfair labour practice, and the refusal to pay overtime as a dispute of right. It then provided a summary of the dispute of rights as arising from a failure by the appellant to pay overtime to the respondent's members contrary to a commitment by the appellant's management board to pay overtime to seagoing personnel on the disputed premise that overtime was already included in the employees' basic pay. The discrimination is implied in the allegation that shore-based employees of the appellant (control fisheries observers) are paid overtime when they are required to work beyond their normal working hours in terms of the Labour Act. The referral further alleged that the appellant had stated that they would restructure the basic salaries of the seagoing personnel so as to separate overtime from the basic salary but refused to negotiate.

[2] The matter proceeded to arbitration before arbitrator Ms Gertrude Usiku with both parties duly represented. The issue of the respondent's *locus standi* was never raised in those

¹ As defined in section 84(a) of the Labour Act.

proceedings. The appellant now argues on appeal that the respondent had no *locus standi* in the proceedings before the arbitrator. It ought to have raised that issue at the hearing to enable the arbitrator to deal with it. I reject the lack of *locus* argument; which clearly is opportunistic and frivolous. I see no reason in law or principle why an exclusive bargaining agent with a recognition agreement with an employer lacks locus to represent the interests of its members in respect of a subject matter which the appellant itself states is governed by a wage settlement agreement between the two parties.

[3] In the way the dispute was defined in the referral, the arbitrator was called upon to decide if the appellant, contrary to the labour Act², had failed to compensate the respondent's members (being seagoing personnel) for overtime actually worked. In my view, the further issue was whether the appellant, in respect of overtime, treated the seagoing employees less favourably than the shore-based employees.

[4] The position taken by the appellant at the hearing was that the respondent's members were in fact paid overtime but that same was (at the request of the respondent on behalf of its members) included in their basic pay in order to boost

² Section 89(1)(a) states that a party to a dispute may only appeal on any question of law and not facts.

their basic salaries to make the employees more credit-worthy for purposes of accessing, amongst others, home loans as their basic pay was very low. They relied on the wage settlement agreement concluded in 2006 between the parties for the period 2006 - 2009 to that effect. Their position further was that this arrangement was extended at the end of 2009 and that it was specifically agreed that the matter would be renegotiated between the parties. To appellant's surprise, it was said, the respondent changed tact after the agreement was concluded and then demanded overtime on top of what was already included in basic pay. It maintained that had they known that the matter would turn out in that way they would not have entered into the agreement they did and that they would have kept overtime separate from basic pay. In the heads of argument on appeal they dispute that the agreement combining overtime with basic pay was illegal and that, in any event, it was done at the instigation of the respondent and for the benefit of the seagoing personnel. As I understand the respondent's argument, the combining of overtime with basic pay was for a specific period of time (2006-2009). That time had come to pass and the appellant both in terms of the agreement which said the issue of overtime was to be renegotiated at the end of that period, and the undertaking by the appellant's board , was refusing to pay overtime due to its members as promised or to re-negotiate the issue of overtime. The respondents positively asserted, and repeated it in this court on appeal, that the

appellant had committed itself to pay overtime separately and to negotiate the salaries of the members. The unfair labour practice allegation was persisted with. It metamorphosed into the allegation that the appellant had created a fund into which overtime it levied and claimed from fishing vessels, was deposited. Before this fund was created, it was said, the levies (presumably in respect of overtime worked by employees) were paid directly to the seagoing personnel but that this ceased and that, as was put in the heads of argument on appeal, "three years of overtime was forgone".

[5] I find the respondent's case rather confusing. The heads of argument on appeal demonstrate this confusion: On the one hand it is suggested that there was an agreement to combine overtime with basic pay but that it had lapsed and required renegotiation. On the other hand, it is suggested that it was an unlawful agreement because such a thing was not allowed. Even worse, it is suggested that overtime was never paid for the entire period of 3 years that the parties had agreed the combining of overtime with basic pay would last and then be subject to review. I am not surprised that the arbitrator was confused by what she was being called upon to decide, as I will soon demonstrate.

[6] Be that as it may, the arbitrator proceeded with the arbitration and heard the evidence of the parties. I do not find it necessary to go give a blow by blow account of what each witness said as there was very little dispute on what I consider to be the critical issues for the determination of this appeal.

The Trade Union's Case

[7] The Respondent called two of its officials who are also employees of the appellant and who bear personal knowledge of the facts about which they testified. They are Mr Mutumbulwa and Mr Shimwooshili. The essence of their testimony was that an agreement was concluded in 2006 between the employer and the trade Union to combine the basic pay of the seagoing personnel with overtime to which they were entitled, so as to make the payslips of these employees more attractive to financial institutions for creditworthiness. The reason for this was, as conceded also by the appellant, that the seagoing personnel earned very low wages. The evidence of these witnesses amply demonstrated how low these wages are and leaves one to wonder why a public body such as the appellant would pay such low wages to its employees. The evidence of the two witnesses suggested that the reason proffered was that the employer did not have sufficient funds. That suggestion

was, rather strangely, not embraced by Mr Everson representing the employer in his cross-examination of the trade Union witnesses.

[8] The wage settlement agreement concluded was to last until 2009 and stated that it was to be reviewed at the end of that period. When the period ended the position was not reviewed and further agreement was concluded to continue to combine overtime with basic pay; in fact until 2011, even after the trade Union had declared the present dispute and made a referral to the Labour Commissioner.

[9] The Trade Union witnesses testified that the board of the employer sometime in 2010 committed itself to renegotiate the issue of wage increases in order to ameliorate the plight of the seagoing personnel but never saw it through, hence the present dispute.

[10] It is clear to me from the evidence of the two witnesses that the seagoing personnel accepted an agreement with the employer that four of the twelve hours a day they worked would constitute overtime and that based on that formula, the play

slips were generated which reflected a higher income than would otherwise be the case.

Employer's Case

[11] Mr Evenson, the Human Resources Manager of the employer, represented the appellant at the arbitration proceedings and also testified. His evidence, in essence, was that the agreement to combine basic pay and overtime was initiated by the Trade Union and that the employer agreed with it because it shared their plight over very low pay which made them unattractive to financial institutions. He, rather formalistically and pedantically, maintained that the employer would not have agreed to this arrangement had it known that in due course the trade union would declare a dispute over the matter. In his view, they would rather have continued with the basic pay and overtime being treated separately and paid separately. Everson accepted that the agreement combining basic pay and overtime was contrary to the Labour Act but maintained it was done because the employees wished to have it done that way.

Conclusions drawn on evidence

[12] Having regard to the oral testimony of the witnesses there is no doubt in my mind as to the following:

- a) The seagoing personnel worked 4 hours overtime for the period 2006 to 2011.

- b) Before the wage settlement agreement was entered into in 2006, the seagoing personnel earned very low wages that made it difficult for them to access credit;
- c) An agreement was then entered into to combine basic pay with the assumed four hours of overtime a day and that made the payslips of the seagoing personnel look more attractive.
- d) The respondent's members were indeed paid for the assumed 4 hours of overtime for the relevant period (i.e. 2006 - 2009), except that it was combined with basic pay to make their payslips look better.
- e) For the entire period of 2006 - 2011, i.e. until the present dispute was referred to the Labour Commissioner, the employees never received increases to their basic pay and the employer rather unreasonably assumed that for the duration of the agreement concluded in 2006 they had been absolved of the responsibility to improve the salaries of their employees,
- f) The respondent and their members had no choice but to agree to continue the agreement of combining basic pay and overtime, and to postpone renegotiation and review of the arrangement year after year - because if it stopped they would be back to the situation that basic pay would

still be low and their payslips would be unattractive to credit givers.

g) Both parties accepted that the arrangement to combine basic pay with overtime was probably unlawful. I prefer not to express any view on the lawfulness or otherwise of the arrangement to combine basic pay with overtime, as that might compromise the workers in view of the conclusion to which I come on the outcome of the appeal. I trust however that the Labour Commissioner will seek urgent legal opinion on the matter and guide the parties appropriately.

[13] The respondent did not lead any admissible evidence to sustain the allegation that the seagoing personnel were discriminated against compared to the shore-based employees.

The arbitrator's findings

[14] In view of what I have set out above, the factual finding by the arbitrator that the seagoing personnel worked overtime without being remunerated is not justified and is clearly against the weight of the evidence.

[15] Although I would not put it in the same terms as she did, I am inclined to agree with the arbitrator that the appellant

engaged in an unfair labour practice³ towards its seagoing personnel in assuming that for the lifespan of the agreement concluded in 2006, they had been absolved of the responsibility to improve the basic salary of their seagoing personnel and holding out the separation of basic pay and overtime as a threat to procure the employees agreement to extend, time and again, the review of the employee's wage structure in order to reverse the trend of what even on their own version are starvation wages being paid to their seagoing personnel.

[16] The arbitrator having wrongly found that the employees were not paid overtime, she proceeded to determine that they were "entitled to the money they have already worked for as overtime and have the right to the amount claimed for each hour in excess of their ordinary hours worked in terms of section 17(1) of the Labour Act and overtime be fully paid from date of this award onwards".

[17] As I have already pointed out, the finding that the seagoing personnel were not paid overtime is against the weight of the evidence and *that* finding cannot be allowed to

³ Section 50(1)(b) of the Labour Act reads:

"(1) It is an unfair labour practice for an employer or an employers' organisation-

(a)...;

(b) to bargain in bad faith."

stand. Secondly, the finding that the seagoing personnel claimed the amounts awarded as damages is flawed. They made no such claim. That much is obvious from my summary of their referral. A person seeking specified damages must not only plead it but must also lead evidence and prove it. It is incumbent upon a claimant seeking specific damages sounding in money to produce sufficient evidence substantiating the exact amount of his damage.⁴ Not only were the damages awarded not properly pleaded; they were intimated for the first time during oral submission after the evidence was led. More importantly, no admissible evidence whatsoever was led in evidence to support the amount of damages awarded by the arbitrator. The manner in which the arbitrator allowed the so-called evidence of the losses suffered after all parties had led evidence, and the appellant had even closed argument, was improper and in breach of the principle of *audi alteran partem* and breached appellant's right to a fair trial. The judgment and order of the arbitrator therefore stand to be vacated.

[19] Accordingly I make the following order:

(a) The appeal succeeds;

⁴ *Hersman v Shapiro* 1926 TPD 367 at 369; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Aaron's Whale Rock Trust v Murray & Robberts Ltd* 1992 (1) SA 652 (C) at 655.

(b) The award of the arbitrator, Ms Gertrude Usiku, dated 22 October 2011 is hereby set aside and declared to be of no force and effect.

DAMASEB, JP

ON BEHALF OF THE APPELLANT:

Mr. S Horn

Instructed by:

MB DE KLERK & ASSOCIATES

ON BEHALF OF THE RESPONDENT:

Mr T Ipumbu

Instructed by:

TITUS IPUMBU LEGAL PRACTITIONERS