REPORTABLE

CASE NO: LCA 51/2012

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

JOHN FREDERICK SWARTS **APPELLANT**

and

TUBE-O-FLEX NAMIBIA (PTY) LTD **1ST RESPONDENT**
B.M. SHINGUADJA N.O. **2ND RESPONDENT**

Neutral citation: *Swarts v Tube-O-Flex Namibia (Pty) Ltd (LCA 51/2012) [2013] NALCMD 8 (27 March 2013)*

CORAM: **SMUTS, J**

Heard on: 15 February 2013

Delivered on: 27 March 2013

Flynote: Appeal against an arbitrator's ruling that the appellant was not an employee of the first respondent. Question arising as to whether this was a question of fact or law and thus not appealable under s 89 of Act 11 of 2007. The court concluded that it was a question of law and not appealable.

ORDER

The appeal is accordingly dismissed for this reason. No order as to costs is made.

JUDGMENT

SMUTS, J

[1] The question raised in this appeal is whether the appellant is an employee of the respondent for the purpose of the Labour Act, 11 of 2007 (the Act). An arbitrator ruled that he is not an employee. The appellant appeals against that ruling. An antecedent question which arises for determination in this appeal is whether the arbitrator's ruling on this issue constitutes a question of law or not, and thus appealable.

[2] These questions have arisen in the following way. The appellant referred a dispute to the office of the Labour Commissioner in July 2012, complaining of a unilateral change to his terms and conditions of employment. The complaint was against the first respondent. (It is referred to as the respondent in this judgment. The arbitrator was incorrectly cited as the second respondent. He is referred to by his designation.)

The proceedings before the arbitrator

[3] When the dispute was referred to conciliation and arbitration, the respondent took the point that the appellant was not an employee and that there was accordingly no jurisdiction to determine the dispute. Although the ruling by the arbitrator initially referred to the matter arising in the course of conciliation, it would appear that the arbitrator was appointed as such to determine the dispute. The ruling which he made was in the exercise of his functions as an arbitrator.

[4] The arbitrator heard evidence on this preliminary issue. The manager of the respondent testified on its behalf whereafter the appellant gave evidence. Most of the relevant factual matter was not in dispute between the parties.

[5] It emerged that the appellant is a shareholder (15%) and a director of the respondent. He had been employed by the respondent for some 22 years. During that period he was primarily involved in sales on its behalf. He worked his way up to the position of managing director. He retired when the majority shareholding in the respondent changed hands. He remained a director and shareholder and was asked to stay on and continue with sales. His designation was changed to that of sales director.

[6] The appellant was paid on a commission basis (which the board sought to change by means of a resolution to which the appellant had not consented, giving rise to the referral).

[7] The appellant had been engaged in sales in this way for some six year after his retirement. His commission was however calculated with reference to a percentage of all the respondent's sales in respect of which a certain gross profit percentage had been achieved, and not with reference to the sales he himself had generated. It was not in issue that he conducted sales on behalf of the respondent and in doing so was subject to the ultimate control of the respondent's managing director and could be disciplined by the latter.

[8] The appellant was provided with a motor vehicle and cellphone for the purpose of conducting sales. His working hours were not regulated as was the case with other employees. He was not required to be in attendance at the respondent's offices at designated hours. His evidence was that he only performed administrative functions at the respondent's offices. He conducted sales by using the cellphone provided to him and seeing clients on site and not at the respondent's offices. It was not contested that his hours at work and mode of operation were accepted by the respondent's managing director and that this had been the case for the past six years following his retirement.

[9] It was also not disputed that the appellant did not take or claim annual leave. It would appear that he took time off and attended to sales at his own discretion. It was also not placed in dispute that the appellant assisted employees of the respondent

engaged in sales in the execution of their duties by providing advice to them and assisting them in their work.

[10] The respondent's manager testified that the respondent had approximately ten employees comprising sales persons, accountants, store assistants, cleaners and a driver. Each of them had a contract of employment. The appellant did not have such a contract after his retirement.

[12] It emerged as undisputed that the appellant's remuneration was designated as director's fees in the books of the respondent. The appellant was not registered at the Social Security Commission as an employee.

[13] The appellant testified that his remuneration was different to the other directors. He would not provide invoices but received payment from the respondent as a percentage of its total sales. He further testified that he did not engage in any sales or employment for any other entity. He also testified that his sales were in excess of any other sales person employed by the respondent because of his experience and connections. He pointed out that in addition to his commission earnings, he would, like other shareholders, receive dividends. He pointed out that when the managing director requested him to be at the business during its usual working hours, he had pointed out to him that he was not a permanent employee and had declined to do so.

The arbitrator's ruling

[14] The arbitrator found that the applicant is not an employee of the respondent. He cited a number of cases which dealt with the question of whether a director can be classified as an employee with full employee benefits as contained in Labour Act[1].

[1]The South African case he cited was *Brown v Oak Industries (SA) (Pty) Ltd* (1987) 8ILJ 510 (IC) but not the considered and closely reasoned appeal judgment delivered by a full bench reported as *Oak Industries (SA) (Pty) Ltd v John NO and Another* (1987) 8 ILJ 756 (N)

[15] In determining whether the applicant is an employee or not, the arbitrator relied on the factual circumstances surrounding the arrangement between applicant and the respondent. He relied on the case of *Secretary of State for Business, Enterprise and Regulatory Reform v Neufled and Howe* [2009] EWCA Civ 290 CA where it was stated that:

> 'on the vexing question it held that whether a shareholder or director is an employee is a question of fact for Employment Tribunal to determine (Arbitral Tribunal in the case Namibia.' (sic)

[16] The arbitrator further relied on what is termed the 'pragmatic approach' discussed in the work by Parker, *Labour Law in Namibia*, where it is stated:

> 'In England, the issue of whether a person is an employee is a question of fact.'

The work continued, after reference to English authority…

> 'It is therefore submitted that whether a person is an employee is a question to be resolved by the determiner of fact. However, where the question a person is an employee turns solely on the interpretation and application of a written contract of employment then, the question is a question of law.'

[17] The arbitrator also referred to *Secretary of State for Business, Enterprise and Regulatory Reform v Neufled and Howe* [2009] EWCA Civ where it is stated:

'. . .a director of a company will not, merely by virtue of being a director, be an employee. He will have to prove more than his appointment as a director. Has he been paid a salary or just fees for being a director? Has he acted as an employee, for example, by working the hours required by his contract and not taking more than the holiday entitlement under it?'

'if there is no written contract then this will be an important consideration and may suggest there is no employment relationship. Nonetheless, the conduct of the company and the individual may enable the Tribunal to conclude that there is such a relationship.'

[18] The arbitrator stressed the following facts in coming to his conclusion:

- 'That the applicant, is first of all, one of the Directors on the board of the respondent;
- That the applicant is shareholder and owner of the respondent with 15% of stake;

- That the applicant is Sales Director for the respondent;
- That the applicant is remunerated by way of a commission which according to the respondent's witness is reflected as the Director's fees in the respondent's books of account;
- That the applicant does not have working hours, nor does he ask or apply for leave, and;
- That the applicant is issued with the respondent's cellphone and provide with the vehicle'. (sic)

[19] The arbitrator also referred to the statement made by applicant in his evidence in chief that '. . .there was an agreement between or among the directors and shareholders . . . this was not an employment contract (agreement)' and further that '. . . Mr Victor (Managing Director) at one point had tried to make him work 08h00 – 17h00, which he denied'.[2]

[20] Taking these aspects into account and the 'King report's recommendation on the "appropriate balance of power and authority of the board" being exercised by these two directors/shareholders,' the arbitrator resolved once and for all that there was no contract of employment between the respondent and the applicant and to find otherwise would be a fallacy.' (sic)

The appeal

[21] The arbitrator was at pains to point out that he considered the question as to whether the appellant was an employer of the respondent is one of fact. He did so with reference to the work by Parker, J and English authority. The view expressed by Parker J on the issue is also with reference to English authority. It is not quite clear to me why the arbitrator made so much of the issue.

[2] The applicant in fact stated that 'Mr Victor did say nothing further'.

[22] Mr Boltman who appeared for the appellant pointed out that the English statute, the Employment Rights Act, defines an employee as an individual who has entered into or works under a contract of employment. The existence or otherwise of an employment contract would, it seems to me, be a question of fact, as has been found by the English courts.

[23] The definition of employee in the Act would however appear to cast the protective net of the Act somewhat wider by defining an employer thus:

> 'Employee means an individual, other than an independent contractor, who –
>
> Works for another person and who receives, or is entitled to receive, remuneration for that work; or
> In any manner assists in carrying on or conducting the business of an employer;

[24] The related definition of employer is in the following terms:

'"Employer" means any person, including the State who –

> "employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
> permits an individual to assist that person in any manner in the carrying or, conducting that person's business."

[25] A recent amendment to the Act added s 128A[3] which created a presumption of employment arising in the following circumstances:

'For the purpose of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following factors is present:-

> "the manner in which the individual works is subject to the control or direction of that other person;
> the individual's hours of work are subject to the control or direction of that other person;
> in the case of an individual who works for an organization, the individual's work forms an integral part of the organization;
> the individual has worked for that other person for an average of at least 20 hours per month over the past three months;
> the individual is economically dependent on that person for whom he/she works or render services;
> the individual is provided with tools of trade or work equipment by that other person;

[3] Imported by Act 2 of 2012

> the individual only works for or renders services to that other person; or
> any other prescribed factor."

[26] Section 89(1) of the Act restricts appeals to this court against awards of arbitrators to any question of the law alone. The question arises as to whether this question is one of law or fact.

[27] When I raised this issue with Mr Boltman, he first argued that the arbitrator's finding was unreasonable or was not reasonably made and for this reason constituted a question of law alone. When I queried this, he referred me to *Nampower v Nantinda*[4], an unreported judgment of this court which relied on earlier decisions of this court for the view that it constitutes a question of law if an appellant can show that an arbitrator's conclusion could not have reasonably have been reached. This is entirely different to the proposition put forward by Mr Boltman of a ruling being unreasonable or that an arbitrator was unreasonable in making an award. In *Nantinda* reliance was placed upon the approach adopted by the full court in *Rumingo and Other v Van Wyk*[5]… summarised in *Nantinda* as follows[6]:

'The full bench in that matter made it clear that a conclusion reached (by a lower court) upon evidence which the court of appeal cannot agree with would amount to a question of law. This approach is also consistent with that of a subsequent full bench decision in Visagie v Namibia Development Corporation[7] where the court, in my respectful view, correctly adopted the approach of Scott JA in Betha and Others v BTR Sarmcor [8] that a question in law would amount to one where a finding of fact made by a lower court is one which no court could reasonably have made. Scott JA referred to the rationale underpinning this approach being that the finding in question was so vitiated by a lack of reason as to be tantamount as be no founding at all. That in my view aptly describes the finding of the arbitrator in this matter. As was further stated by Scott JA, it would amount to a question of law where there was no evidence which could reasonably support a finding of fact or "where the evidence is such that a proper evaluation of

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[4] Unreported 22/3/2012, case No. LC 38/2008.
[5] 1997 NR 102 (HC) at 105 D-E.
[6] At par [28].
[7] 1999 NR 219 (HC) at 224 C-H.
[8] 1998 (3) SA 349 (SCA).

that evidence leads inexorably to the conclusion that no reasonable court could have made that finding…'

[28] On the question as to the distinction between questions of fact and law, Scott, JA in Betha v BTR Sarmcol[9] with respect lucidly explained the position thus (after referring to not dissimilar provisions in the then applicable Labour Relations Act, 28 of 1956 which also essentially restricted further appeals to questions of law):

'Accordingly, the extent to which it (then court of appeal) may interfere with such findings is far more limited than the test set out above (to findings of fact in criminal appeal). As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 et seq; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666B--D.) The inquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all.

The limitation on this Court's ordinary appellate jurisdiction in cases of this nature applies not only to the LAC's findings in relation to primary facts, ie those which are directly established by evidence, but also to secondary facts, ie those which are established by inference from the primary facts. The reason is that the drawing of an inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) at 810H--811G.)

It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only when there is no evidence which could reasonably support a finding of fact or where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made the finding that this Court will be entitled to interfere.

I do not understand the decision in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* 1995 (3) SA 22 (A) to be inconsistent with the above proposition. The 'finding' of the LAC referred to at 31I with which this Court disagreed was not a finding of fact in the true sense but a finding involving a value judgment. (Compare *Media Workers*

[9] Supra at 405.

Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 795C--797J.)

The provision in s 17C(1)(a) limiting the Court's jurisdiction in relation to findings of fact is somewhat anomalous inasmuch as the LAC does not hear evidence and has before it the same material which is before this Court. It does not therefore have the advantages of a court of first instance and is in no better position than this Court to make findings of fact. However, Parliament in its wisdom decided to make the LAC the final arbiter on issues of fact. It may well be that its reason for doing so is related to the composition of the LAC or simply to limit the number of appeals coming to this Court. But whatever the reason, this Court is not entitled, because it disapproves of the wisdom of the provision, simply to ignore it or apply some test different from the well-established test which is to be applied when there is no appeal on questions of fact.'

[29] It would follow that this court would not interfere with findings of fact, even where these entail drawing an inference for the purpose of establishing a secondary fact – such as employment – unless they are findings which no court could reasonably have made. As was stressed by Scott, JA in relation to a similarly worded provision, the legislature has for its own reasons – presumably primarily related to the need for obtaining finality and certainty expeditiously in labour disputes, also evident in the shorter peremptory prescriptive provisions – decided that appeals from arbitrators are to be confined to questions of law alone. This court is obliged to give effect to that legislative choice made, even though arbitrators have frequently shown in appeals to this court that they have some difficulty in making proper factual determinations. This court is thus not free to substitute its own findings of fact for those of the arbitrator, unless no reasonable court could have made them.

[30] The arbitrator quoted both the definition of employee and s 128A in his ruling. After referring to the latter, he correctly acknowledged that a presumption of employment would arise if one of the eventualities spelt out in the section were to be established[10] and also correctly, that this presumption is rebuttable.

[10] This section thus creates a presumption of employment where one or more of the eventualities set out are established. It makes it clear that a court is to have regard to the substance of the relationship, rather than the contractual form or designation used. This is in keeping with the approach of *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

[31] After referring to the facts, the arbitrator found that, although the appellant assisted the respondent in its business, he was not an employee of the respondent and set aside his complaint which would need to be based upon an employment relationship. Although the arbitrator did not expressly find that the respondent discharged the onus upon it of establishing that there was not an employment relationship, his finding after a reference to this presumption and his treatment of the facts would indicate that he found that the respondent had rebutted the presumption.

[32] The finding that the appellant was an employee is in my view a finding of fact of the kind described by Scott JA as a secondary fact, established by inference from the primary facts. As he stressed, it is no less a finding of fact than a finding in relation to a primary fact.[11]

[33] The finding reached by the arbitrator on what was a tricky factual question before him was not in my view one which no reasonable court could have reached in the circumstances. He had prefaced his analysis of the facts with the applicable statutory test in the light of the presumption brought about by s 128A. He then referred to authorities[12] before approaching the facts in finally reaching his conclusion on the question. It is thus not open to me to substitute a finding of fact (of employment) for that of the arbitrator (of no employment), even if I were inclined to reach a different conclusion. That course is not open to me by virtue of s 89 of the Act which has limited appeals to his court on questions of law alone.

[34] The question raised by this appeal, thus not being one of law alone, means that it is not open to me to interfere with the factual ruling made by the arbitrator. This court

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[11] See also *Magmoed v Janse Van Rensburg and Others* 1993(1) SA 777 (A) at 810H-811G for the instructive treatment of the subject by Cortbett, AJ.

[12] A surprising omission from the authorities referred to was *Paxton v Namib Rand Desert Trails (Pty) Ltd* 1996 NR 109 (LC) where this court provided a helpful and detailed analysis on the question of whether a person is an employee or not, including explaining that the expression in the definition of the words “any other person who in any other manner assists in the carrying on or conducting of the business of any employer,” also contained in the 1992 Labour Act, would not prize the common law’s grip from the statute in determining whether the relationship was one of employment or not.

does not have jurisdiction to do so. The appeal is accordingly dismissed for this reason. No order as to costs is made.

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DF SMUTS

Judge

APPEARANCES

APPELLANT: J Boltman
Instructed by G.F Köpplinger Legal Practitioners

RESPONDENT: A Kamanja
Instructed by Sisa Namandje & Co. Inc.