

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 106/2015

In the matter between:

**SIEGFRIED TSUSEB**

**APPLICANT**

and

**COCA-COLA NAMIBIA  
BOTTLING COMPANY (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**MR HOLGER SIRCOULOMB**

**2<sup>ND</sup> RESPONDENT**

**LABOUR COMMISSIONER**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Tsuseb v Coca Cola Namibia Bottling Company (Pty) Ltd* (LC 106/2015) [2016] NALCMD 39 (06 October 2016)

**Coram:** UNENGU AJ

**Heard:** 14 July 2016

**Delivered:** 06 October 2016

**Flynote:** Labour Law – Review application – Applicant charged with and convicted of gross negligence for switching off a production machine – Dismissed by the first respondent in a disciplinary hearing – Labour Law – On review, applicant

alleged questions of law as grounds for review – No oral evidence was presented before the arbitrator – Labour Court dismissed the review application.

**Summary:** The applicant, a former employee of the first respondent was charged with and convicted of gross negligence, for switching off a production machine, in a disciplinary hearing. Aggrieved by the finding of guilty and the dismissal from his work, the applicant referred a dispute of unfair dismissal to the Office of the Labour Commissioner. No oral evidence was led during the arbitration proceedings. However, after considering written submissions from representatives of the applicant and first respondent, the arbitrator confirmed both the guilty finding and the dismissal by the disciplinary committee. Not happy with the award issued by the arbitrator, the applicant by notice of motion, sought an order from the Labour Court to review and set aside the award of the arbitrator. The Labour Court dismissed the application as the grounds specified in the notice of motion are questions of law, not defects as defined in the *Labour Act, 11 of 2007*.

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### ORDER

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- (i) The application is dismissed;
- (ii) The relief sought in terms of the notice of motion is refused;
- (iii) No costs order made.

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### JUDGMENT

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UNENGU AJ:

[1] This is a review application in which the applicant seeks an order from the Court to review and set aside an award issued on 18<sup>th</sup> day of June 2015 by the second respondent in favour of the first respondent.

[2] The application is brought following the provisions of *section 89(4) of the Labour Act, 11 of 2007* (hereinafter referred to as the Labour Act).

[3] *Section 89(4) of the Labour Act*,<sup>1</sup> 'provides that a party to a dispute who alleges a defect in arbitral proceedings may apply to the Labour Court for an order reviewing and setting aside the award within thirty days after the award has been served on him or her unless the alleged defect involves corruption in which case he must make the application within six weeks after he became aware of the corruption'.

[4] On its part, *section 89(5) of the Labour Act* defines a defect referred to in *section 89(4)* that:

- (a) The arbitrator has committed misconducted in relation to the duties of an arbitrator;
- (b) The arbitrator has committed a gross irregularity in the conduct of the arbitration;
- (c) The arbitrator has exceeded his power;
- (d) The award has been obtained improperly.'

[5] In his supporting affidavit,<sup>2</sup> the applicant alleges questions of law as grounds for review, not defects as provided in *section 89(4)* read with *section 89(5)* above.

[6] A proper reading of the alleged questions of law reveals that the majority thereof are allegations of fact with allegations of defects squeezed in between. These defects are the alleged misuse of power, bias on the part of the arbitrator and the failure to consider the evidence adequately.<sup>3</sup>

[7] The finding by the arbitrator being attacked on review reads:

'I hereby order that:

- a. The dismissal of the application was fair and that the outcome of the disciplinary hearing be upheld;
- b. No order as of costs;
- c. The matter be dismissed.'

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<sup>1</sup> Labour Act, No. 11 of 2007

<sup>2</sup> Affidavit paragraph 1, 2, 3, 5 and 6

<sup>3</sup> Paragraphs 1, 2, 3 and 3 of the affidavit

[8] This ruling was made after the arbitrator found that the first respondent had a valid reason (the applicant having been grossly negligent) to dismiss the applicant and that such dismissal was procedurally fair (as agreed to) as well as substantively fair.

Background facts:

[9] The applicant, Mr Siegfried Tsuseb, was employed by the first respondent as a technician. During 2014, the applicant was sent to Germany commencing 14 to 29 April 2014 for a training course to operate a machine being used by the first respondent for production purposes.

[10] Back from Germany, the applicant, while still working as a technician with the first respondent, was charged with a misconduct offence of gross negligence, alternatively negligence, on allegations that he switched off the machine he (applicant) was assigned to operate in the course of his employment causing the first respondent potential financial loss in the process or tarnishing the reputation of the company.

[11] As a result, the applicant was hauled before a disciplinary hearing and was found guilty of the charge preferred against him and was dismissed.

[12] Aggrieved by the verdict of the disciplinary committee and the punishment which followed, the applicant referred a dispute of unfair dismissal to the Office of the Labour Commissioner; who designated Holger Sircoulomb to conciliate and arbitrate the dispute.

[13] Apart from short handwritten notes by the arbitrator,<sup>4</sup> I was unable to find a proper and complete record of proceedings, which took place before him or at the disciplinary hearing.

[14] In his summary of the dispute, the applicant states that he was employed by the first respondent from 1<sup>st</sup> day of March 2014 until the date of his dismissal. He

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<sup>4</sup> See pages 29, 30 and 31 of the record.

further alleges that no evidence of gross negligence was led by the first respondent, except for leading questions to elicit answers of yes or no from the witness.

[15] These allegations however, could not be verified as no such statement could be found in the bundle forming part of the record of proceedings. The same applies to the averment in the summary of the dispute by the applicant that the break down (probably the switching off the machine) occurred as a result of the electrical or mechanical failure, which is apparently normal and a common occurrence in factories as well as in machineries.

[16] Therefore, a lack of records of the proceedings in both the disciplinary hearing and the arbitration proceedings, make it difficult for this Court to follow what happened in both the disciplinary hearing and the arbitration.

[17] In addition to the aforesaid, I could also not find the so-called agreement where it was agreed by the parties that the matter be resolved by way of a stated case, instead of leading oral evidence. Mr Simon Ekandjo also confirmed that no electronic record of proceedings was kept in the matter and of the oral agreement not to lead evidence hearing.

[18] As pointed out already in the judgement, no evidence in the form of oral evidence by witnesses under oath or evidence in the form of affidavits were presented by the parties before the arbitrator for consideration. What was presented before the arbitrator to consider the dispute were heads of argument from the representatives of the applicant and the first respondent.

[19] In terms of *section 86(7)(a) and (b) of the Labour Act*, the arbitrator may conduct arbitration proceedings in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly; and must deal with the substantial merits of the dispute with the minimum legal formalities. But this has to be done subject to the rules, in terms of the Labour Act.

[20] Therefore, I assume following the provisions of *Rule 86(7)*, the arbitrator was not wrong to allow the parties to file heads of argument in the place of oral evidence.

This was done in accordance with his powers in terms of the Labour Act and also in virtue of the agreement by the parties not to lead oral evidence by calling witnesses.

[21] However, the implication of not calling witnesses to testify in arbitration proceedings is that there is no direct evidence or evidence under oath about what transpired at the disciplinary hearing and arbitration proceedings.

[22] Further, during conciliation, the parties agreed that the issue of procedural fairness was not in dispute, therefore, the only issue to be resolved during the arbitration was the issue of substantive fairness. In his heads of argument, the applicant repeated and submitted that the disciplinary proceedings were done procedurally, as he was notified about the charges against him in time in line with the company's Internal Human Resource Code.

[23] In his heads of argument, Mr Simon Ekandjo, who acted on behalf of the applicant alleges that the Chairperson of the disciplinary hearing allowed Mr Lawrence, the representative for the first respondent, to ask leading questions contrary to the principles of natural justice and fairness. He also took issue with the charges preferred against the applicant for the reason being that he was still busy with his practical training on the machine and that the machine in question was still under commissioning and was not yet signed off by the first respondent at the time of the incident.

[24] It is also contended on behalf of the applicant that the machine could have been switched off by Mr Lawrence, who also had access to the controls of the machine, to blame the applicant, as the two had a bad relationship in their employment.

[25] In conclusion, Mr Ekandjo submitted that on a balance of probabilities, the first respondent acted unfairly by dismissing the applicant, claiming that he was experienced to operate the machine which is not the case.

[26] On his part, Mr Simon Raines for the respondent reiterated the issue of procedural fairness and agreed with the applicant's representative that it is no longer in dispute. Mr Raines disputes that the applicant only attended theoretical training in

Germany and referred to exhibit "A", which indicates that the applicant was trained for line 8KHS equipment for a period of 14 to 29 April 2014. According to him, the commissioning of the machine is not relevant to this case and that no proof thereof has been submitted in this matter. It is further Mr Raines argument that exhibit "F" indicates that the applicant was on duty and responsible for the machine when the incident happened.

[27] The arbitrator, after giving a background history of the dispute and the sequence of the events preceding the hearing, states that on 21 April 2015, the day the arbitration proceedings were supposed to start, it emerged that the applicant was not ready to proceed, due to the fact that his witness relocated to Rosh Pinah and would not be possible to get him to testify. This despite the fact that the witness was subpoenaed in advance to be present at the hearing.

[28] The first respondent was ready and wanted to proceed with the hearing, and because of the circumstances which prevailed at that time, the arbitrator suggested to the representatives of the applicant and the first respondent to submit evidence in writing and submissions which he would then consider if they would agree with the suggestion.

[29] The representatives accepted the suggestion and a time-table for the filing of statements and submissions was proposed and agreed upon.

[30] As already pointed out before, these statements and submissions or heads of argument as they have been termed by the parties, were used and considered by the arbitrator to resolve the dispute referred to the Office of the Labour Commissioner by the applicant. The award was also issued by the arbitrator solely on the basis of the heads of argument filed, subject to compliance with the rules of natural justice by being fair to the parties.

[31] Now, before dealing with the notice of motion for review, I wish to point out that there is a difference between a review and an appeal in terms of the Labour Act. An appeal is lodged in terms of *section 89(1)(a) of the Labour Act* – on questions of law alone. Whereas review applications are launched in terms of *section 89(4)* read

with *subsection (5)*. Therefore, to succeed in his application for review, the applicant must allege gross irregularities or defects in the conduct of the arbitrator.

[32] Moreover, in appeal proceedings, the notice of motion must contain and set out clearly and specifically the grounds (reasons) upon which the appellant relies why the award should be set aside. While in review proceedings, grounds are set out in the affidavit attached to the notice of motion.

[33] It is trite law that in review applications, the test is not whether the decision arrived at under review is correct or not, but whether the arbitrator had exercised his or her powers and discretion honestly and properly – whereas in the case of an appeal, a re-hearing of the merits, *albeit* limited to the evidence on information on which the decision under appeal was given, is determined whether that decision was right or wrong,<sup>5</sup> ( *See also Commercial Staff (Cape Town) v Minister of Labour and Another*, 1946 page 632 at 638-641).

[34] In the unreported judgement of *Shoprите Namibia (Pty), LTD v Faustino Moses Paulo*,<sup>6</sup> Parker, J said:

‘It is trite that a notice of appeal must specify the grounds of appeal and the notice must be carefully framed for an appellant has no right in the hearing of the matter to rely on any grounds of appeal not specified in the notice of appeal.’

He further stated that:

‘precision in specifying grounds of appeal is not a matter of form but a matter of substance – necessary to enable appeals to be justly disposed of.’

[35] Similarly, Strydom, AJP (as he then was) in *S v Gey van Pittius and Another* said the following with regard grounds of appeal:<sup>7</sup>

‘The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues’

[36] I agree with both Parker, J and Strydom, AJP. It is also my view that the principles laid down in the decisions above do not only apply to appeals but to review applications as well.

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<sup>5</sup> *Tickly and Others v Johannes NO and Others* 1963(2) SA 588(T)

<sup>6</sup> Case No. LCA 02/2010

<sup>7</sup> 1990 NR 35 at 36H



[37] Clear and specific grounds which are properly formulated, whether contained in the notice of motion for purpose of appeal, or in an affidavit for the purpose of review, will not only apprise the interested parties which part of the judgement is being attacked, but also for the aggrieved party to decide whether to appeal or to go on review. Strydom, AJA indicated in the *S v Grey Van Pittius* case, that the parties will be bound to those issues specified in the grounds. Laxity in formulating clear and specific grounds for either an appeal or review, is grotesque – not helpful to litigants themselves and the Court.

[38] In this matter, the applicant has set out in the notice of motion, in paragraphs 1, 2 and 3 the decisions or proceedings he seeks to be reviewed and set aside. He says the following in his notice of motion:

‘The proceedings which the applicant seeks to have reviewed and set aside the arbitration hearing of the dispute registered between the first respondent and the applicant in the arbitration Case number CRWK 824/15 before the second respondent as the private arbitrator.’

[39] This is incorrect and misleading, because the dispute between the applicant and the first respondent was not referred to a private arbitrator, but to the Office of the Labour Commissioner who designated the second respondent.

[40] Again, in the following paragraph he stated:

‘The decisions which the applicant seeks to have reviewed are the following decisions in the award of the second respondent namely: The decision that the first respondent disciplinary hearing outcome be upheld without the evidence on the basis of evidence law (sic) and matter be proceeded without statutory process of conciliation and or arbitration.’

[41] What does the applicant want to tell the other interested parties with this and who is this second respondent? Is it the “Private Arbitrator” or someone else? Everything contained in paragraph 1 of the notice of motion does not make sense at all.

[42] The same applies to the contents of paragraphs 2 and 3 of the notice of motion. The issue of procedural fairness, or otherwise, was not in dispute between the applicant and the first respondent. It has been resolved between them, the only issue in dispute, was the issue of substantive fairness.

[43] As already said, the arbitrator has to decide the dispute on a stated case, not on evidence under oath by witnesses called by the parties. I do not know which evidence the applicant is referring to in paragraph 3 of the notice of motion. It is not that the applicant does not know the dispute; he had referred to the Labour Commissioner. This is clear from his summary of the dispute – but why do the facts in the summary of the dispute and those contained in the notice of motion not say the same thing? It is because the pleadings were not drafted carefully and clearly.

[44] The applicant was charged with gross negligence, alternatively negligence, and was found guilty of gross negligence at the disciplinary hearing and dismissed as a result. The verdict of guilty of gross negligence and the dismissal aggrieved him and as a result he went to the Labour Commissioner's Office for help.

[45] In my review, Mr Raines presented a comprehensive summary of what happened in the disciplinary hearing and the basis for the disciplinary – i.e. why the applicant was charged with gross negligence. The same cannot be said about the case of the applicant. As pointed out time and time again, the notice of motion is vague and the information contained therein is sketchy. The grounds in the affidavit supporting the decisions to be reviewed are equally vague and confusing. They are referred to as "questions of law on review against in (sic) the arbitrators awards." Review applications are provided for in *section 89 (4)* read with *section 89(5)*, which subsections do not deal with questions of law. *Section 89(1)(a)* does, but that is in respect of appeals.

[46] The arbitrator issued a detailed award comprising nine pages. He divided his award in sequence of details of hearing and representation where he stated who the parties are and by whom were they represented, followed by the background to the dispute and the sequence of events leading up to the hearing. Again, the arbitrator gave a comprehensive account of the events leading up to the arbitration, covering two typed pages numbered from (a) to (m). In paragraph 3 of the award, he dealt

with issues to be decided and arguments raised by the applicant and the first respondent respectively. According to him the issue he has to decide on was whether the dismissal of the applicant based on the evidence and or arguments presented by the parties was not unfair.

[49] After analysis of the evidence, the arbitrator found that the first respondent had a valid reason (the applicant having been grossly negligent) to dismiss the applicant and that such dismissal was procedurally fair (as agreed to) as well as substantively fair, followed by a ruling which reads:

'I hereby order that:

- (a) The dismissal of the appellant was fair and that the outcome of the disciplinary hearing be upheld;
- (b) No order of costs;
- (c) The matter be dismissed.'

[47] That being the case, I totally disagree with the submissions by Ms Harases, counsel for the applicant, that the arbitrator in the matter was biased. The fact that he had accepted the version of the first respondent that the applicant is the person who switched off the machine on all occasions, cannot make him bias. The arbitrator never descended into the arena as there was no trial before him. Similarly, no oral submissions were made by the representatives of the applicant and the first respondent. Therefore, a reference to the Supreme Court case of *Atlantic Chicken Company (Pty) Ltd v Phillip Mwandingi* delivered on 1 July 2014, is misplaced. The facts of these two matters are dissimilar.

[48] *Section 33(1)(a) of the Labour Act*, also cannot be of assistance to the applicant. The mere fact that the version of the applicant that he did not switch off the machine was rejected by the arbitrator, and found him guilty of gross negligence for switching off the machine, cannot make the proceedings reviewable. The best remedy would have been to lodge an appeal against the ruling. Counsel for the applicant conceded that the correct procedure was to appeal the award. Why it was not done, according to her, is because their firm came late on board, which is a lame excuse from counsel.

[49] Mr Kruger, counsel for the first respondent did not take kind with the late filing of the heads of argument by counsel for the applicant. However, in view of the failure on his side also to file notice of opposition for condonation, I condoned the late submission of the heads of argument as no prejudice was caused to the first respondent.

[50] Pertinent in Mr Kruger's submission is that grounds are directive in determining whether to follow review or appeal process. He also emphasized the importance why grounds must be clearly and concisely set out by the appellant or applicant. He submitted that the applicant followed a wrong process of review instead of an appeal.

[51] I agree with Mr Kruger again. The applicant failed to prove any misconduct or irregularity on the part of the arbitrator in the performance of his duty as the arbitrator, as provided for in *section 89(4) and (5) of the Labour Act*.

[52] Therefore, taking into account the submissions made by both counsel, the facts at hand and the circumstances of the matter with the authorities referred to, I conclude that the finding made by the arbitrator is the correct finding – and, for these reasons, the award issued cannot be vacated.

[56] Accordingly the following order is made:

- (iv) The application is dismissed;
- (v) The relief sought in terms of the notice of motion is refused;
- (vi) No costs order made.

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E P UNENGU  
Acting Judge

APPEARANCES

APPLICANT :

T Harases  
Of Kangueehi & Kavenjdii-Inc.  
Windhoek

1<sup>ST</sup> RESPONDENT:

H Krüger  
Of Krüger, Van Vuuren & Co.  
Windhoek