



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 37/2016

In the matter between:

**JOHN AND PENNY GROUP (PTY) LTD**

**APPELLANT**

And

**GERHARDUS GABRIEL**

**FIRST RESPONDENT**

**PETRUS MURPHY**

**SECOND RESPONDENT**

**PERCY HEITA**

**THIRD RESPONDENT**

**JOSEPH SEBASTIAN**

**FOURTH RESPONDENT**

**MILTON NAIBAB**

**FIFTH RESPONDENT**

**ABRAHAM AWALA**

**SIXTH RESPONDENT**

**Neutral citation:** *John and Penny Group (Pty) Ltd V Gerhardus Gabriel & 5 others*  
(LCA 37/2016) [2016] NALCMD 44 (18 November 2016)

**Coram:** E ANGULA AJ

**Heard:** 28 October 2016

**Delivered:** 18 November 2016

**Flynote: Labour law** — Severance pay — when payable — An employee employed on a fixed term contract, and whose contract terminates by effluxion of time is not entitled to severance pay — Dismissal as contemplated in section 35 (1) of the Labour Act 11 of 2007 ( the Act) does not mean termination of an employment contract.

**Labour law** — Dismissal — meaning of — Dismissal contemplates that the employer party to a contract of employment undertakes an action that leads to the termination of the contract, or an action undertaken ‘at the behest of the employer’ — Termination as used in the Labour Act refers to a generic word connoting the end of an employment contract — Termination is not necessarily dismissal as contemplated in section 35(1) of the Act.

**Labour law** — Non-compliance with rule 17 (16) of the Labour Court rules — Respondent is obliged to file a statement setting out the ground of opposition of appeal — Failure thereto —Consequence for not filing a statement may have fatal consequences for the respondents opposition — Condonation should be filed as soon as possible when the party becomes aware of the non-compliance.

**Summary:** The respondents were employed by the appellant on a fixed term contract as crew members on board of R/V !Anichab vessel. The appellant had won several tenders to operate the aforesaid vessel. The respondents were employed on a 3 year contract terminating at the end of each tender period. The appellant had at one point paid out severance to the employees at the end of one such term. During the employment term of 2009 to 2012, the appellant did not pay severance and encouraged the respondents to take up further employment on a new contract commencing in 2013 to 2016. At 31 January 2016, when the contract terminated, appellant did not pay severance on the basis that previous payments were made in error and that the respondents were not entitled to severance pay as they were not dismissed but that their contract terminated by effluxion of time. The Arbitrator held that section 35 (i) of the Labour Act can be interpreted to mean that the respondents were entitled to severance pay because termination is synonymous with dismissal. The appellant appealed against that finding

of the arbitrator.

*Held* that section 35 (i) of the Labour Act does not entitle an employee who has not been dismissed to payment of severance. An employee whose contract is terminated by effluxion of time is not dismissed as contemplated in section 35 (1) (b) of the Act, and is thus not entitled to severance pay.

*Held* that dismissal does not mean termination. Dismissal contemplates that the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiative undertaken by the employer must be established, which leads to the termination of the contract.

*Held* further that the respondents must within the time stipulated in the rule 17(16), unless condonation is granted, file a statement setting out the grounds for opposition, failing which; the opposition is defective and invalid. Held further that the respondents did not oppose the appeal due to non-compliance with rule 17(16).

---

### **ORDER**

---

1. The appeal succeeds;
2. The arbitrator's award granted on 16 June 2016, to the effect that the appellant must pay respondents severance pay, is set aside.
3. No order as to costs.

---

### **JUDGMENT**

---

E ANGULA, AJ

Introduction

[1] The appellant appeals against the award of the arbitrator in terms of which the respondents were determined to be entitled to severance pay despite the fact the respondents were employed on a fixed term contract, which contracts terminated on 31 January 2016 by effluxion of time.

**Background:**

[2] The six respondents were employed by the appellant on a fixed term contract for a period of three years terminating on 31 January 2016. Appellant had contracts with the Namibian Government that were awarded to it on tender to operate the R/V !Anichab vessel for a fixed period ( "the tender"). In 2003 to 2006, appellant won this tender, and employed some of the respondents on a fixed term contract. At the end of the contract, the employees were paid severance pay, more specifically first and second respondent, who were employed during the said contract period. It would appear that subsequent to this period, another company called Diverse Business Solution became the tender holder from 2006 to 2009 and it paid its fixed term employees severance pay.

[3] From 2009 to 2012, appellant was awarded the tender. Appellant did not pay severance to its employees at the end of the employment term ending 2012. The employees were rather encouraged to take up a further fixed term of employment as appellant was successful in securing the tender for the subsequent term commencing in 2013 and ending in 2016. Respondents contend that they were promised by the chairman of the appellant that severance pay shall not be paid at the end of 2012, but shall instead be paid out at the end of 2016. One of the employees who decided not to take up a new contract with appellant as proposed by appellant's chairman, was paid severance when the contract ended in 2012.

[4] During March 2015, appellant appointed a new Human Resource Manager, Ms Hendrina Kayuhwa, who was also the witness for the appellant at the arbitration hearing. Ms Kayuhwa acknowledged that in the past appellant made several mistakes due to the inexperience of the previous Human Resource Manager. When she came on board, she advised appellant that severance pay is not lawfully due to

employees employed on a fixed term contract. Upon enquiry by the employees, she advised them that according to her knowledge and understanding of the Labour Act, severance pay is not payable to fixed term contract employees and if it was paid out in the past, it was paid out in error. According to her, severance pay is only payable to an employee who is dismissed, or who has reached the retirement age of 65 or if retrenched. It is on that basis that she advised appellant, which advice appellant accepted, that fixed term contract employees are not entitled to severance pay.

[5] At the arbitration hearing, respondents' case was that they were entitled to severance pay upon proper interpretation of section 35 (1) of the Labour Act 11 of 2007 ("the Act"). The Arbitrator framed the issue to be decided as follows:

'I was requested to determine based on the provisions of the labour Act (Act 11 of 2007) whether the applicants are entitled to severance payment and should they be entitled to it to determine the matter accordingly.'

[6] The arbitrator held that the respondents were entitled to severance pay because 'severance pay must be paid to employees who has completed 12 months of continuous service in compliance with the provisions of section 35 (1) (a), subsection (3) and section 37 (1) (e) of the Labour (Act 11 of 2007). The synonym for dismissal refers to discharged, terminated, given notice and lay off.'

### **Grounds of appeal**

[7] The main ground of appeal is that the arbitrator erred in law when she interpreted dismissal to mean termination of employment contract by effluxion of time. Thus, appellant contends that the arbitrator erred in law in deciding that the respondents were dismissed and thus entitled to severance pay.

[8] The respondents opposed the appeal but did not file grounds of appeal as required by Rule 17 (6)(b) of the Labour Court Rules ("the rules"). Instead respondents filed extensive heads of arguments raising numerous legal points, which I would refer to later herein. Of importance, respondents concede that the arbitrator was wrong and admitted that they were not entitled to severance pay by virtue of section 35 (1)(a) of the Act. I quote the following extract from respondents' heads of argument:

'The Respondents appreciate the position held by the Appellant that the Respondents were employed on a fixed term employment contracts and that upon completion of the period, that their employment was terminated by effluxion of time

and not due to dismissal. If one has regard to the above, the Respondents are not entitled to severance pay.’

[9] Respondents in their heads of argument raised the following points.

1. The respondents had a legitimate expectation that they will receive severance pay at the end of the contract period.
2. Appellant is estopped from denying the representation made to respondents that at the end of the contract period of 2009 to 2012, severance would not be paid but would rather be paid at the end of 2016.

[10] It must be remembered that this is an appeal and the appeal court should proceed in its determination of the appeal on the basis of (a) the record of the arbitration proceedings, (b) the appellant's grounds of appeal and (c) the respondents' grounds for opposing the appeal. In the instant case, the issues of 'legitimate expectation' and 'estoppel' were never issues placed before the arbitrator and upon which the arbitrator adjudicated. Indeed, these issues did not form the basis of the arbitrator's decision. At arbitration, the statement by the Chairman of the appellant was raised in evidence to justify why respondents were entitled to severance and generally, to demonstrate that appellant acted inconsistently. Of significance, these legal points were not set out by respondents in a statement setting out grounds of opposition. No such statement was filed in these proceedings.

[11] In this respect, it is crucial to point out that such grounds are required by rule 17 (16)(b) to inform the arbitrator, the appellant and this court why the arbitration award is attacked by the appellant<sup>1</sup> and why the appeal is being opposed by the respondents<sup>2</sup>.

[12] From the record, I find that the arbitrator was requested to determine a legal issue, whether the respondents were entitled to severance pay. That much is obvious from the arbitrator's determination of the issues in dispute<sup>3</sup>. Significantly, respondents represented themselves at the arbitration hearing and requested the

---

<sup>1</sup> *Benz Building Suppliers v Stephus 2014 (1) NR 283 at 288, and*

<sup>2</sup> *Walvisbay Stevedoring Co (Pty) Lts v Ndjembela Alutumani (LCA 46/2014) [2016] NALCMD 17 (13 May 2016)*

<sup>3</sup> *Arbitration record at 25 "Ok, based on that, do you agree with that that I have to decide to see in terms of the Act whether they are entitled to it or not."*

arbitrator to determine 'if we are entitled to it<sup>4</sup>.' On the other hand, appellant submitted that the Act does not entitle fixed term contract employees to severance pay as they were not dismissed but their contracts terminated by effluxion of time<sup>5</sup>.

[13] Firstly, and for the foregoing reasons, I am of the view that I am not entitled to consider issues which were not properly canvassed or adjudicated upon by the arbitrator and, those issues not stated as grounds for opposing the appeal.

[14] Secondly, appellant raised a point *in limine* that respondent did not comply with Rule 17 (16)(b). Such compliance, so it was contended, renders respondents grounds of appeal, raised in their heads of argument, invalid. It is contended on behalf of the appellant that it has been prejudiced in its preparation for hearing as respondents' reasons for opposing the appeal was unknown until the respondents filed their heads or argument. The respondents never sought condonation for the non-compliance with the rules. In the result, the court is obliged to accept that there is no opposition to the appeal. In reply, respondents attempted to seek condonation from the bar through its legal representative. This condonation application was primarily based on the facts that respondents are entitled to be present at the hearing and to be heard by virtue of Rule 17 (6).

[15] I agree with Ms Shilongo on behalf of appellant that non-compliance with the rules of court has fatal consequences to a party's case, unless condonation is sought and granted by the court<sup>6</sup>. In the instant case, there was no application for condonation filed. Attempts by Ms Harases, on behalf of the respondents were did not come close to anything resembling a condonation application for consideration by the court. In this regard, I hold that the respondents' opposition to the appeal, if any, is dismissed for lack of compliance with rule 17(6)(b). I do so mindful that the respondents conceded that they were not entitled to severance pay as provided for in section 35 (1) of the Act.

---

<sup>4</sup> *Supra* at 21-24, "And we feel that if that is the case, we approached the Ministry of Labour to just help us if we are not entitled as our company tells us that we are not entitled because of this fixed contract. But we get help from there....."

<sup>5</sup> *Arbitration record* at 23, "us as the company felt that we weren't entitled to pay the severance pay based on the facts that they were employed on a fixed term contract and the contract ended. They were not dismissed but the contract ended."

<sup>6</sup> *Primedia Outdoor Namibia (Pty) Ltd v Kauluma (LCA 95-2011) [2014] NALCMD 41* (17 October 2014)

[16] I now return to the main ground of appeal, that the arbitrator erred in law in her finding that respondents, being fixed term contract employees, were entitled to severance pay at the end of their contract. The arbitrator based her finding on the meaning of dismissal, which she held to be synonymous with termination. I think no one would disagree with the arbitrator that termination and dismissal can be used interchangeably, but in this case, the arbitrator missed the issue altogether.

[17] The issue is whether an employee whose contract of employment terminated by effluxion of time is entitled to severance pay as provided in section 35 of the Act, which provides as follows:

‘an employer must pay severance pay to an employee who has completed 12 months of continuous service, if the employee-

- a. is dismissed;
- b. dies while employed or;
- c. resigns or retires on reaching the age of 65 years.’

[18] The Act used the word termination and many section under chapter 3 of the Act. The word is used in generic terms to describe the coming to an end of the employment relationship for whatever reasons. Section 33 of the Act deals with unfair dismissal and in that regard, dismissal is used specifically to insinuate a particular action taken by the employer against the employee. In the matter of *Ouwehand vs Hout Bay Fishing Industries*<sup>7</sup>, cited with approval by Justice Uietele in *Tow In Specialist CC vs Chistoph Urinavi*<sup>8</sup>, the court held that:

‘the employer party to a contract of employment undertakes an action that leads to the termination of the contract. In other words, some initiatives undertaken by the employer must be established which has the consequences of terminating the contract, whether or not the employer has given notice of an intention to do so’.

---

<sup>7</sup> (2004) 25 ILJ 731 (LC)

<sup>8</sup> (LCA 55-2014)[2016] NALCMD 3 (20 January 2016)



[19] In *Hailulu v The Council of the Municipality of Windhoek*<sup>9</sup>, Justice Silungwe held the following, in the context of allegations made by the appellant that they were dismissed after the fixed term employment contract ended:

‘Turning to the respondent’s decision not to retain the appellant for a further term at the expiry of the then subsisting one, it seems to me that an assertion that decision amount to dismissal is to do violence to the English language. The respondent had not only acted in conformity with section 27(3)(b)(i) of the Local Authority Act, but it had also exercised its discretion properly; and the appellant’s fixed statutory contract of service had come to an end by effluxion of time what else, one is constrained to ask, was the respondent reasonably expected to do in all the circumstances of the case’.

[20] It is common cause that both appellant and respondents agreed that the respondents were not dismissed. Respondents argued that they were entitled to severance pay by virtue of the provisions of section 35, read together with section 37 of the Act. If it is established that the respondents were not dismissed, it follows that they were not ‘entitled’ to severance pay. The arbitrator’s interpretation of section 35 is clearly wrong in law and cannot be sustained. The contract of employment terminated by virtue of effluxion of time and not by any act at the behest or initiative of the employer. I accordingly agree with Ms Shilongo that the arbitrator misdirected herself in law and in her interpretation of section 35 of the Act. Accordingly, the arbitration award cannot stand and is hereby set aside.

[21] The respondents alleged that there was an agreement between the appellant and themselves that appellant would pay severance pay at the end of the employment contract in 2016. This case was however not made out and is not apparent from the arbitration record. The case that was made out is that the appellant acted inconsistently in paying severance pay. The inconsistent action of the appellant was explained by the Human Resource Manager, when she testified that severance was paid out to employees in error and the error was picked up and

---

<sup>9</sup> 2002 NR 305 at 310

corrected. Accepting her evidence to be correct, as it was not disputed, it cannot be said that appellant acted inconsistently in paying severance pay in the past, and now is refusing to pay severance to employees. At the most, appellant acted wrongly. On that basis, the allegation that there was an agreement to pay severance cannot be entertained by the appeal court as this issue of inconsistency was not properly canvassed at the arbitration hearing.

[22] In this regard, I accordingly make the following order:

4. The appeal succeeds;
5. The arbitrator's award granted on 16 June 2016, to the effect that the appellant must pay respondents severance pay, is set aside.
6. No order as to costs.

---

E ANGULA  
Acting Judge

## **APPEARANCES**

**APPELLANT:**

**N Shilongo**  
On behalf of Sisa Namandje & Co

Windhoek

**RESPONDENTS:**

**Ms Harasess**

On behalf Kangueehi & Kavendji Inc  
Windhoek