

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 34/2016

In the matter between:

MINE WORKERS UNION OF NAMIBIA

APPELLANT

and

QKR NAMIBIA NAMVACHAB GOLD MINE

FIRST RESPONDENT

ONO ANGULA N.O.

SECOND RESPONDENT

THE LABOUR COMMISSIONER

THIRD RESPONDENT

Neutral citation: *Mine Workers Union of Namibia v QKR Namibia Namvachab Gold Mine (LCA 34/2016) [2017] NALCMD 15 (28 April 2017)*

Coram: PRINSLOO AJ

Heard: 03 and 31 March 2017

Delivered: 28 April 2017

Flynote: Labour Law – Labour Appeal – Appeal against the whole arbitration award - I hold that the appellant has not made out a case that the arbitrator ‘reached a decision which no reasonable tribunal on a proper appreciation of the evidence and the law could not have reached.

ORDER

1. The appeal is dismissed.
2. No order as to costs.

JUDGMENT

PRINSLOO AJ:

[1] This is an appeal against the whole of the arbitration award made by an arbitrator, under s 86(15) of the Labour Act, 2007, on 27 May 2016 holding as follows:

'(1) The parties were not of same mind when they signed the agreement: and

(2) The agreement remains as is accept clause 3 of the agreement and it is hereby ordered that it be referred back to the negotiation table for the parties to discuss and agree and be of the same mind'

[2] The background of the matter is briefly as follows: During 2015 QKR Navachab Gold Mine, first respondent, (herein after referred to as QKR) entered into a substantive agreement ('the agreement) with the Mine Workers Union of Namibia, the appellant, (herein after referred as MUN), which was signed on 11 March 2015.

[3] The agreement dealt with a number of topics which are not in issue. The clause material to the proceedings *in casu* is clause 3 under the heading 'HOUSING

ALLOWANCE'. The relevant portion of the said clause is important and necessitates repeating thereof and reads as follows:

'It is further agreed by both parties that the results of the housing investigation currently underway, be awaited and that if the results will not address the housing allowance requirement, parties will accept Union's proposal of 40% increase on housing allowance and such percentage shall reduce by 7%. This shall be after six (6) months from the date of this agreement.'

[4] MUN and QKR agreed during the negotiations that an increase of seven percent (7%) would be affected on the housing allowance and same would be enforced retrospectively to January 2015. The parties agreed that QKR would have six (6) months within which to complete a housing investigation. Upon signature of the agreement the parties recorded that the agreement constituted full and final settlement of the 2015 substantive negotiations.

[5] MUN sought specific performance of clause 3 of the agreement after the lapse of six (6) months. When it became evident that the QKR was unwilling to effect the said increase in the housing allowance, MUN approached the offices of the Labour Commissioner to file a dispute. The relief sought by MUN at the time was, as per paragraph 6.2 of the prayer¹ attached to the LC 21 form, which reads:

'that the said arbitrator order the respondent to repay 33% of the housing for 01 January 2015 to concern employees according to the agreement sign between the two parties on 11 March 2015'

[6] An arbitration hearing was held on 11 April 2016 in Karibib, during which one witness testified on behalf of the appellant and five witnesses testified on behalf of the first respondent.

¹ Page 298 of the Court Bundle.

[7] The single witness who testified during the arbitration proceedings on behalf of MUN, was Mr Alberto !Noariseb². He testified in his capacity as Acting Regional Chairperson of the Western Region of Mine Workers Union Namibia. He stated that QKR failed to honour clause 3 of the agreement which provided for an increase of thirty three percent (33%) in housing allowances after the lapse of 6 (six) months period agreed upon. Mr !Noariseb stated that a housing allocation survey was done but not a housing allowance survey as was expected by MUN. He stated that MUN's requirement regarding housing allowances was that it had to be market related, if same was compared with similar companies, like Rössing Uranium Mine. QKR's unwillingness to comply with the agreement caused the appellant to approach the office of the Labour Commissioner with regards to unfair labour practice.

[8] Five witnesses testified on behalf of QKR. Mr Linus Gwala³ was the chief negotiator on behalf of QKR during the 2015 substantive negotiations. He stated that negotiations regarding the housing allowance started off at a five percent (5%) increase but the negotiations were steering towards deadlock. Mr Gwala discussed the matter with his mandate givers and was mandated to offer an increase of up to seven percent (7%). The proposed increase was accepted and it was agreed that once the housing survey was completed the parties would come back to the table in six (6) months, to discuss the outcome of the survey and the Union's proposal of forty percent (40%) increase on housing allowances. The witness denied that there was ever an agreement on an increase of forty percent (40%) on housing allowances. He stated that once the draft of the agreement was done, it was circulated to the Union first to comment on it and when he received it, he noticed an insert in red on the agreement indicating the forty percent (40%). Mr Gwala confronted the MUN's representative, one Mr Happy, about the change on the agreement. Mr Gwala then corrected it and sent it through to HR to be finalised. When the document was signed subsequently by the parties he did not check the final agreement again and stated he signed the agreement in good faith. The forty percent (40%) increase was however inserted back into the agreement by an unknown person and Mr Gwala could not explain how it could have happened. He was adamant that he had no mandate to agree to an increase above seven percent

² Page 7 to 20 of transcribed record.

³ Page 26 to 71 of transcribed record.

(7%) and that clause 3 of agreement was not a true reflection of the negotiations between the parties. During re-examination of the witness the issue of the correct document was canvassed and an email document was apparently presented to the witness which he read into the record as follows⁴:

'It is further agreed by both parties that the results of the housing investigation currently underway be awaited and that if the results will not address the housing allowance requirements parties will assume discussions on the union's proposal of forty percent (40%) increase on housing allowance. This shall be after six (6) months from the date of this agreement. It was further agreed that should further discussions result into an agreed percentage increase on housing allowance such percentage increase shall be reduced by seven percent (7%)'

[9] The second witness was Ms Emily Tjikune⁵. She was part of the negotiation team on behalf of QKR. She stated that she could not recall what the housing allowance requirements were at the time but it was her understanding that the parties would reconvene and discuss the housing requirements once the housing survey/investigation was complete. If the outcome was not satisfactory the parties would negotiate the increase of forty percent (40%). Ms Tjikune signed the agreement as a witness but stated that she could not recall if the parties read through the agreement prior the signing thereof.

[10] The third witness was Mr Augustus Mutaka⁶, who was also part of the negotiation team. He corroborated the testimony of Mr Gwala and confirmed that the agreement reached during the negotiations was that the housing allowance would be increased by seven percent (7%) and that a housing survey would be completed by the first respondent. Once the housing survey was available the parties would return to the negotiation table to consider the options available to them and consider what option is more favourable for the employees. Mr Mutaka also signed the agreement as a witness and stated that to his recollection, they did not read through the document but it was signed in good faith.

⁴ Page 68 at 5-15 of the transcribed record.

⁵ Page 72 to 94 of transcribed record.

⁶ Page 97 to 112 of transcribed record.

[11] The fourth witness was Ms Maryke Khrone⁷. She was not involved in the negotiation process during 2015 and could not contribute anything regarding the actual negotiations and the agreement reached.

[12] The last witness was Mr Johannes Coetzee⁸, who was the managing director of QKR at the time. He did not form part of the negotiation team but confirmed that Mr Gwala acted under his mandate which Mr Coetzee in turn received from the owners of QKR. He indicated that the upper limit of the mandate given to Mr Gwala was seven percent (7%). Any increase in housing allowance beyond that would have been unauthorised and Mr Gwala had instructions that if no agreement can be reached in respect of the mandate given, that the issue of housing allowance should be taken off the table and be negotiated separately. At the conclusion of the negotiations, Mr Gwala apparently confirmed telephonically that the agreement was settled on the seven percent (7%). Mr Coetzee stated that he gave approval telephonically that the agreement can be signed on behalf of QKR. Mr Coetzee stated that the mine was operating on a deficit at the time and the owners of the mine intimated that the mine first had to be 'fixed' and then the issues relating to the housing allowance could be addressed. However, in the interim, QKR appointed one Mr Movirongo to do a survey on the housing issues and commissioned an independent market analyst to do a market analysis of Karibib's rental accommodation. Said results were made available to MUN. The witness submitted that the QKR met all the requirements of the agreement including the housing allowance issue.

[13] A number of exhibits were handed in during the arbitration proceedings, which include the substantive agreement⁹, the mandate document¹⁰, independent market assessment¹¹, meeting minutes¹² and correspondence¹³.

⁷ Page 113 to 155 of the transcribed record.

⁸ Page 155 to 215 of the transcribed record.

⁹ Page 222 to 225 of the court bundle.

¹⁰ Page 267 to 271 of the court bundle.

¹¹ Page 231 to 255 of the court bundle.

¹² Page 256 to 262 of the court bundle.

¹³ Page 264 to 266 of the court bundle.

Grounds of appeal:

[14] The grounds of appeal contained in the notice of appeal are three in total. In summary the grounds of appeal are:

14.1 *ad first ground*: that the arbitrator erred in finding upon analyses of the testimonies of the witnesses that the parties were not of same minds when they signed the agreement;

14.2 *ad second ground*: the arbitrator erred in instructing the parties to renegotiate an agreement binding in law and erred in law in relying on external evidence to determine the validity and purpose of the agreement between the parties;

14.3 *ad third ground*: that the arbitrator erred in law in finding that clause 3 of the agreement is severable from the remainder of the agreement.

Issues for determination:

[15] From the onset I must point out that the issues to be determined are intertwined, but in my view the issues that need to be determined in this appeal can be narrowed down to the following:

- a) If there was consensus between the parties at the time of signature of agreement;
- b) Did the arbitrator determine the validity and purpose of the agreement and if so, did he rely on extrinsic evidence to reach his decision and was he entitled to do so?

c) Did the arbitrator misdirect himself in instructing the parties to renegotiate the agreement?

d) Issue of severability.

Ad first ground of appeal: Consensus between the parties:

[16] As indicated above, MUN sought specific performance of clause 3 of the agreement. It was submitted on behalf of MUN that as QKR failed to complete the housing investigation within six (6) months from date of signature of agreement, the thirty three (33%) percent increase on the housing allowance became due. It was further argued on behalf of MUN that the evidence shows that the negotiations between the parties were aimed at providing more favourable outcome relating to housing allowances for the employees and in light of the said intention there was no mistake in the signing of the agreement.

[17] During the evidence of all the witnesses for QKR, except for that of Ms Khrone, it was stated that the agreement between the parties during the negotiation process was that the housing allowance will be increased by seven percent (7%) and that the parties will return the negotiation table after six months which was the time line for the completion of the housing investigation. The forty percent (40%) increase to the housing allowance was a proposal by MUN that would have been considered during subsequent negotiations.

[18] In deciding the dispute placed before him, the arbitrator had to rely on the evidence of the witnesses as he did not have the benefit of a transcription of the negotiation between the parties.

[19] The email correspondence containing the corrected clause 3 was read into the record by Mr Gwala, however it was for some odd reason not handed in as an exhibit during the arbitration procedure.

[20] It was argued on behalf of MUN that the canvassing of the e-mail document during re-examination was procedurally irregular as Mr !Noariseb did not have the opportunity to canvas the issue with Mr Gwala.

[21] Although important, the arbitrator made no mention of the document in his analyses of the evidence and from the record, it appears that he largely based his conclusions on the viva voce evidence and other documents that served before him¹⁴.

[22] The evidence of the witnesses for QKR stands largely unchallenged on the issue of the agreement reached at the conclusion of the negotiations. In spite of some contradictions between the witnesses, they corroborate each other on the material terms of the agreement, i.e. the percentage increase of seven (7%) on the housing allowance and that the parties would return to the negotiation table after conclusion of the housing investigation. In contrast herewith is the evidence of Mr !Noariseb standing in isolation as he was the only witness who testified on behalf of MUN. Mr !Noariseb was not the negotiator on behalf of MUN at the time and it does not appear from his evidence that he was present at the time of the negotiations.

[23] During cross-examination the gist of the negotiations and terms agreed upon were never put in dispute by Mr !Noariseb. His main issue was that there was no housing allowance survey done.

[24] The conclusion of the arbitrator is set out in par 5.6¹⁵ as follows:

¹⁴ Page 281 of the court bundle at par 5.6.

¹⁵ Page 281 of the court bundle.

'It is my analyses by gathering and evaluate the testimonies of the witnesses with the documentary evidence submitted that the parties were not of the same mind when signed the agreement. This is so taking into account the testimonies of Mrs Gwala and Ms Tjikune that they signed the agreement in good faith.'

Parol evidence rule

[25] By accepting the evidence of the witnesses of QKR, the arbitrator accepted extrinsic evidence and it is trite that when a contract was integrated into a single and complete written instrument, a party to the contract is not allowed to contradict, add to or modify the written instrument by reference to extrinsic evidence and in that way to redefine the terms of the contract¹⁶. The rule applicable is the parol evidence rule.

[26] In the matter of *Von Weidts v Goussard and Another*¹⁷ Damaseb JP discussed the rule applicable as follows:

*'[3] About such a clause, the law has been stated as follows in Lowrey v Steedman*¹⁸ *at 543:*

"The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence."

*And in National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel*¹⁹ *at 26B – C (quoting from Wigmore Evidence 3 ed vol 9 s 2425) as follows:*

"When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.'

¹⁶ *Johnston v Leal* 1980 (3) SA 927 (A) at 943B

¹⁷ 2016 (1) NR 169 (HC)

¹⁸ 1914 AD 532.

¹⁹ 1975 (3) SA 16 (A).

[4] Both these judgments were quoted by this court in *Mudge v Ulrich NO and Others*²⁰.

[5] *The rule as stated above is known as the 'integration' rule or the 'parol evidence' rule. The parol evidence rule does not apply if the contracting party, against whom it is sought to be applied, relies on misrepresentation, fraud, duress, undue influence, illegality, failure to comply with the terms of a statute, and mistake*²¹. *The onus rests on the party who seeks to rely on any of those defences*²².'

[27] It is not necessary to prove that the written agreement does not correctly reflect the oral agreement because of a mutual error or mistake. What is necessary is to prove that there was a prior common continuing intention which is not reflected in the agreement²³. It is not a prerequisite that there should be any ambiguity. The mistake may even be caused intentionally by one of the parties.²⁴

[28] The witnesses for QKR are all in agreement as to the terms of the agreement and are ad idem that clause 3, specifically in respect of the percentage increase in housing allowance, as contained in the substantive agreement, is not a true reflection of either the oral agreement or the intention between the parties. The witnesses also stated that it was agreed that the parties would return to the negotiation table to discuss the results of the housing investigation. According to Mr Gwala the 'mistake' in the agreement was intentionally caused by an unknown entity. By means of the undisputed evidence presented during the arbitration proceedings the first respondent discharged the onus that rested on it to show that the lack of animus between the parties.

[29] Under the circumstances, the parol evidence rule would not apply and the arbitrator was entitled to consider extrinsic evidence to reach a conclusion on the animus of the parties.

²⁰ 2006 (2) NR 616 (HC) at 621C and 622A – B.

²¹ Professor Christie in *The Law of Contract in South Africa* 5 ed at 194.

²² *Malherbe v Ackermann and Others* (2) 1944 OPD 91.

²³ *Benjamin v Gurewitz* 1973 (1) SA 418 (A); *Mouton v Hanekom* 1959 (3) SA 35 (A); *Brits v Van Heerden* 2001 (3) SA 257 (C) 267E to 269E.

²⁴ *Benjamin v Gurewitz* (supra) at 426A; *Mouton v Hanekom* (supra) at 39H.

Ad second ground of appeal

External evidence

[30] In support of the second ground of appeal, it was argued on behalf of the appellant that the arbitrator relied on external evidence to determine the validity and purpose of the agreement between the parties.

[31] The arbitrator was neither expected to make a finding on the validity or purpose of the agreement nor did he do so.

[32] One should not lose sight of the fact that it is not the validity of the substantive agreement that is in issue in this matter. The arbitrator's award only relates to the relevant portion of clause 3 of the agreement. This is clearly set out in the award which reads:

*'2. The agreement remains as is accept clause 3 of the agreement and it is hereby ordered that it be referred back to the negotiation table for the parties to discuss and agree and be of same mind.'*²⁵

Instructing the parties to renegotiate clause 3 in the agreement

[33] Detailed arguments were advanced regarding the housing investigation and/or housing allowance survey and/or housing allocation survey and these issues were also canvassed with the witnesses during the arbitration proceedings. However, the arbitrator had no duty to interpret clause 3 as to the meaning of the parties when the said clause refers to 'housing investigation underway'. The genesis

²⁵ Page 282 of the court bundle.

of that dispute lies in bad drafting and the interpretation need not be done at this stage by this Court.

[34] The arbitrator at no stage made a finding that clause 3 was invalid. He only found that “the parties were not of same mind when they signed the agreement” and in order to reach that finding the arbitrator indeed made use of external/extrinsic evidence as discussed earlier in this judgment.

[35] Based on his findings and empowered in terms of section 86(15) of the Labour Act²⁶ the arbitrator was within his rights to direct that the parties return to the negotiation table regarding the specific issue raised by clause 3 on the percentage increase of the housing allowance.

Severability

[36] The issue of severability was discussed by Shivute CJ in the matter of *Marot and others v Cottere!*²⁷ as follows:

‘[32] In order for a provision to be severed from an agreement to render the remaining part legal and enforceable, one has to consider, amongst others, whether the provision concerned embodies the main purpose of the transaction as a whole or whether the agreement is made up of several distinct provisions. The former would result in the entire contract being illegal as the said provision cannot be severed from the contract²⁸. If the illegal provision is merely an additional stipulation not going to the principal purpose of the contract, it is severable. The intention of the parties must also be considered. I respectfully agree with the proposition made by Prof Kerr that the crucial question is whether the parties would have entered into the agreement if the phrase in question had been expunged²⁹.’

²⁶ Act 11 of 2007.

²⁷ 2014 (2) NR340 (SC)

²⁸ See Kerr Principles of the Law of Contract 6 ed at 162 - 6.

²⁹ Op cit at 165

[37] The agreement between the parties did not specifically address the issue of severability and there is no indication that if clause 3 was not contained in the agreement that the parties would not have concluded the agreement. In fact, Mr Coetzee testified that if the parties did not reach an agreement on the issue of housing allowance it would have been removed from the table to be negotiated separately.

[38] Having regard to the substantive agreement, it is evident that clause 3 is one of a number of different issues that were the subject matter of the negotiations. None of the remaining clauses of the agreement either in its nature or substance are dependent on clause 3, as each one of these remaining clauses stand separate and apart from the other.

[39] I am thus satisfied that clause 3 is indeed severable from the substantive agreement without affecting the validity of the said agreement.

[40] Based on the foregoing analysis and conclusions, I hold that the appellant has not made out a case that the arbitrator 'reached a decision which no reasonable tribunal on a proper appreciation of the evidence and the law could not have reached'³⁰ and the appeal should therefore fail.

[41] In the result I make the following order:

1. The appeal is dismissed.
2. No order as to costs.

³⁰ Janse Van Rensburg V Wilderness Air Namibia (PTY) LTD 2016 (2) NR 554 (SC) at par [45]

J S Prinsloo
Acting Judge

APPEARANCES:

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OF:

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FOR THE FIRST RESPONDENT:

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