



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 15/2016

In the matter between:

ADRIAAN PIETER VAN JAARVELD

APPELLANT

And

EXPEDITE AVIATION CC

1ST RESPONDENT

ALEXINA MAZINZA MATENGU, NO

2ND RESPONDENT

Neutral citation: *Van Jaarsveld v Expedite Aviation CC & Matengu* (LCA15/2016)
[2017] NALCMD 19 (20 June 2017)

Coram: UNENGU AJ

Heard: 10 March 2017

Delivered: 20 June 2017

Flynote: Labour Law – Appeal – appellant appealing an award issued in his absence – Failure by the arbitrator to first attempt to conciliate dispute – a serious misdirection in law, therefore, arbitrator acting ultra vires the provisions of the Labour Act –

Labour Law – supplementary heads of argument filed outside the time limit provided by the rules of the Labour Act – No condonation applied for the late filing of such heads of argument – Heads of argument not accepted by court – Court holding that the supplementary heads of argument raised new defence not raised in the statement of grounds opposing the appeal – Appeal upheld and the award by the arbitrator set aside.

Summary: The appellant had appealed the award issued against him by the arbitrator after the arbitration hearing conducted in his absence; on the grounds amongst others, that the arbitrator erred in law by not first attempting to conciliate the dispute before conducting the arbitration proceedings and further, that the arbitrator misdirected or erred in law by taking judicial notice of the exchange rate between the US dollar and Namibia dollar when she calculated the claim amount from US dollar into Namibia dollar without evidence to prove the exchange rate at the relevant time. The court *held*: that the arbitrator made a serious error in law for not first attempting to conciliate the dispute, therefore acted ultra vires the provisions of the Labour Act, rendering the proceedings conducted and the award following therefrom, a nullity ab initio.

Held: further, that the arbitrator erred in law for taking judicial notice of an exchange rate of a foreign currency, the US dollar and Namibia dollar when calculating the claim amount from the US dollar into Namibia dollar. Consequently, the appeal was upheld and set aside the award with costs.

ORDER

- (a) The appeal is upheld.
- (b) The award issued by arbitrator Alexina Mazinza Matengu dated 16 February 2016 is hereby set aside.
- (c) The first and second respondents are ordered to pay costs jointly and severally, one pays the other to be absolved, which costs to include cost of one instructing and one instructed counsel.

- (d) The first and second respondents ordered to pay the tendered wasted costs jointly and severally, one pays the other to be absolved.

JUDGMENT

UNENGU AJ:

Introduction

[1] Initially, the appellant appealed against the whole award issued by arbitrator Alexina Mazinza Matengu on 16 February 2016, under arbitration case number NRTS 72-15 which the appellant received on 18 February 2016 and attacks the award on the following questions of law:

(a) Whether the arbitrator erred in law in continuing with arbitration while she has not first attempted to resolve the dispute through conciliation before beginning the arbitration as compelled to do in Section 86(5) of the Labour Act, 2007 and in Rule 20(1) of the Rules relating to conciliation and arbitration before the Labour Commissioners?

(b) Whether the arbitrator was correct in law to assume that appellant is compelled to pay remuneration to the first respondent as employer after not giving notice of termination while the Section 30(3) Labour Act (sic) prescribes that an employee 'may' pay such remuneration?

(c) Whether the arbitrator was correct in law by using an exchange rate not applicable to the period related for which the compensation was awarded?

(d) Whether the arbitrator erred in law in including a housing benefit to be a part of remuneration in calculating the amount of compensation by including the housing benefit?'

[2] The said questions of law are supported by the following grounds of appeal:

- (a) The arbitrator erred in law by allowing the arbitration to continue without first attempting to conciliate the matter as compelled to do by

Section 86(5) of the Labour Act and in doing so may error in law or was misguided as to the law.

- (b) The arbitrator erred in law in interpreting and application of Section 30(3) of the Labour Act since no such compelling duty is place (sic) by this provision on appellant.
- (c) In awarding compensation the arbitrator use (sic) an unknown exchange rate or unknown formula to conciliate the amount of compensation in Namibian dollars while the salary of the appellant was for a specific period which is incorrect in law.
- (d) The arbitrator erred in law by calculating remuneration by including housing benefit to be part of the compensation due to first respondent by appellant.

[3] On the 4 October 2016, the first respondent filed the statement in terms of section 17(16)(b) of the Labour Act¹, stating the grounds upon which it opposed the appeal, after notice to oppose the appeal was filed on 5 September 2016 already. I shall revert to the issue of the notice to oppose later in the judgment.

[4] In paragraph 7 of the arbitration award, the arbitrator stated, amongst others, that in determining the matter, her findings were based solely on the evidence put before her by the applicant (respondent in the appeal), whether or not the respondent (appellant) resigned from his work and whether or not a proper notice was given by the respondent (appellant) and if not, what would be the appropriate remedy. The arbitrator concluded that the appellant failed to give notice to the applicant (respondent) and thus breached his contract of employment as provided for in Section 30(2) and 31(3) of the Act.

¹ Act 11 of 2007.

[5] Section 30 deals with termination of employment on notice while Section 31 deals with payment instead of notice. Section 31(3) provides as follows:

'Instead of giving an employment notice in terms of Section 30, an employee may pay the employer the remuneration the employer would have paid, if the employee had worked during the period of notice.'

[6] In conclusion the arbitrator stated that based on the fact that the respondent (appellant) failed to appear for the proceedings, she had made her decision solely on the applicant's (respondent) version. Further, that hence the failure to appear, the respondent (appellant) forfeited his chance to present his side of the case, she then accepted the version of the respondent as the probable truth of what happened and made the following award:

'AWARD

- 1. The respondent Adriaan Van Jaarveld must pay the applicant Expedite Aviation a total amount of (N\$198 000.00) one hundred and ninety eight thousand dollars in lieu of notice and accommodation.*
- 2. This amount is calculated as follows; N\$ 58 000.00 x 3 (three) months and N\$ 8000.00 x 3 (three) months in lieu of accommodation notice.*
- 3. This amount is payable or before the 10th of March 2016.*
- 4. Proof of payment must be served at the Ministry of Labour and Industrial Relations in Tsumeb.*
- 5. No order as to cost in the circumstances.'*

Background facts

[7] On or about 28 July 2014 at Tsumeb, the appellant acting in person and the first respondent duly represented by the second respondent in his capacity as the Chief Executive Officer of the first respondent, concluded a written employment in terms of which the appellant was appointed as Operation Manager, Safety Officer, Training Officer and commercial pilot of the first respondent for a fixed period of four (4) years starting from 1 June 2014 until 31 May 2018.

[8] It is a term of the agreement that the first respondent will pay the appellant a nett monthly salary of U\$ 3000.00 (three thousand US dollars) and provide him with rented accommodation to the value of N\$ 8000.00 per month with an annual escalation of 10%, effective from 2015 in return of service rendered to the first respondent by the appellant.

[9] Termination of the agreement was provided for in clause 15 of the agreement, namely three (3) months written notice prior to expiry of the forty eight (48) months duration of the agreement. The same applied also to both parties to express their intention in case they wished the contract to be extended. Clause 15 is but one of the many clauses of the agreement and I do not intend to re-write the whole agreement in my judgment.

[10] On 11 May 2015, the appellant wrote a letter addressed to Mr Arangies which he titled "Resignation" containing grounds for the resignation without notice as provided for in clause 15 of the agreement. On 10 August 2015, the respondent Expedite Aviation CC filed a referral of dispute for payment in lieu of notice and accommodation with the Office of the Labour Commissioner for conciliation and arbitration.

[11] Attached to the referral of the dispute, is a summary of the dispute containing, to a large extend, parts or terms and conditions of the written agreement of employment entered into between the appellant and the first respondent assisted by the second respondent, where the claim against the appellant was indicated as:

- '1. Payment in the sum of U\$ 9000.00;
2. Payment in the sum of N\$ 24000.00;
3. Interest a tempore mora at the rate of 20% per annum on the amounts mentioned in paragraph 1 and 2 above, as from the date of resignation namely 30 April 2015, to the date of final payment (both dates inclusive).
4. Costs of the conciliation and arbitration proceedings including legal costs, on a scale as between attorney and own client and;

5. Further and/or alternative relief.'

[12] On his part, however, the appellant (Adriaan Van Jaarsveld) on 7 September 2015, also filed a referral of a dispute for unfair dismissal in the form of constructive dismissal at the Office of the Labour Commissioner for conciliation and arbitration. The summary attached contains the same allegations which the appellant made in his letter of resignation.

[13] The Labour Commissioner designated Ms Alexina M. Matengu to conciliate the disputes. The two disputes were consolidated as one for purpose of conciliation and arbitration. Both parties requested and were granted permission to be represented by a legal practitioner of their own choice due to the complexity of the disputes referred for resolution.

[14] After the hearing was postponed many times for this or the other reason, the matter was finally set down for conciliation and arbitration on 1 February 2015. The parties, among themselves, attempted to settle the matter but without success. They, however, drafted a document detailing the purpose and objective of the discussions they were engaged in in order to curtail the duration of the proceedings without waiving their rights as provided for in the Act and the Labour Court Rules.

[15] On the 1 February 2015 the hearing did not take place though resulting in another postponement to 8 October 2015, which date was agreed to by all the parties in the matter. However, it turned out later that the date would not suit the appellant due to circumstances he did not foresee at the time when the matter was postponed.

[16] Realizing that he would not be able to be present at the hearing, the appellant on 8 September 2015 filed with the Office of the Labour Commissioner an application for a postponement of the matter to a later date on from LC 38 and also for the venue for conciliation to shift from Tsumeb to Windhoek.

[17] The hearing did not take place on the date as scheduled resulting in being postponed to other dates. On 18 January 2016 when the matter was called for hearing, appellant was absent from the proceedings. The arbitrator then put on record that she did receive an application for a postponement from the appellant which she refused and that she had informed the appellant about her decision on the 14 January 2016 already. Consequently, the hearing went ahead in the absence of the appellant and his legal representative even though in her own words² the arbitrator said the 18th January 2016 was supposed to be for conciliation of the matter which is an indication that she was aware that she has to conciliate the dispute first before proceeding with the actual hearing self.

[18] The arbitrator refused to grant a postponement applied for by the appellant – this was done, I assume, due to the fact that the matter was postponed eight times previously. But what she failed to consider is that not all eight postponements were done at the request and instance of the appellant. She forgot that she also took leave and was involved in an accident which both incidents necessitated postponements during the same period. In my view, the arbitrator acted arbitrary and unreasonable to refuse a postponement as the respondents would have suffered no prejudice if the matter was postponed. That said, the arbitrator proceeded with arbitration in the absence of the appellant and made an award against him.

Evidence

[19] Mr Arangies, the second respondent was sworn in and with the assistance of his legal representative, Ms Rossouw read into record of proceedings the contents of the summary of the dispute attached to the referral of the dispute. The summary as such was supplemented by hearsay and inadmissible evidence of information the respondent got from Mr Kaakunga, a captain in the Directorate Civil Aviation who was not called as a witness to testify. Ms Rossouw on her part as the person who drafted the agreement of employment between the appellant and the first respondent on the instruction of the latter, was also allowed by the arbitrator to testify about the

² Record of proceedings page 14.

content of some of the clauses in the agreement, for example, the remuneration of the appellant per month and the outstanding accommodation fees with interest on the outstanding amount. In fact, two thirds of the evidence presented before the arbitrator is evidence from Ms Rossouw, the legal representative of Mr Arangies and the first respondent, which evidence she did not give under oath but considered by the arbitrator in the issuance of the award. Similarly, no evidence, let alone credible and admissible evidence, was placed before her with regard the exchange rate at the time when the cause of action arose or on the date when the award was issued.

[20] In any event, Mr Arangies did not deny the allegations the appellant made in the summary of his dispute of constructive dismissal referred to the Labour Commissioner read with the letter of resignation, nor did the arbitrator deal with them in her award even though the two disputes were consolidated in one matter.

[21] Based on the evidence of Mr Arangies, the arbitrator issued the award set out before in favour of the first respondent which award the appellant is now appealing against on questions of law and on the grounds stated above.

Submissions

[22] On 10 March 2017 at the hearing of the appeal, the appellant was represented by Mr Van Vuuren on the instruction of De Beer Law Chambers and Mr Barnard for the first and second respondents instructed by Mr Horn.

[23] As pointed out before in the judgment, the notice to oppose the appeal and the statement with grounds of opposition were filed late by the first respondent. An application for condonation accompanying the late filing of the notice and the statement of grounds of opposition was not contested by the appellant who accepted the cost tendered by the respondents instead, which cost I ordered the respondents pay the appellant.

[24] In addition, on 8 March 2017 the first respondent filed supplementary heads of argument where the appealability of the award was raised for the first time. The

defence the first respondent wanted to introduce in the so called supplementary heads, was never raised in the grounds of the opposition to inform the appellant well in advance as one of the grounds the appeal will be opposed with for the appellant to reply to or rebut it.

[25] In that instance, Mr Van Vuuren, counsel for the appellant objected to the supplementary heads filed on the basis that the heads introduced or raised a further ground against the appeal as it dealt with the question as to whether the appellant should not have first brought an application for rescission of the award. Secondly, counsel submitted that the heads were not filed in terms of the provisions of Rule 17(23) of the rules of the Labour Act which provide for heads of argument to be filed 10 and 5 days before the hearing of the appeal excluding the first day and including the last day when calculating the days.

[26] Counsel again pointed out that the supplementary heads by the first respondent were filed contrary to the order of the court of 11 November 2016, paragraph 5 thereof, where I specifically ordered that additional heads of argument be filed by the parties according to the time periods provided in the Labour Court Rules. The first respondent also did not apply for condonation for non-compliance with the court order to explain the reason(s) for the non-compliance.

[27] I do not know the reason why that was not done. Mr Barnard, however, in an attempt to justify the late filling of the supplementary heads argued that the issues raised in the supplementary heads were already raised in the statement of opposition. I disagree. The supplementary heads had raised a new ground of opposition which is prejudicial to the appellant and was filed far out of time indicated in my order.

[28] Rule 17(23) of the rules of the Labour Court Rules is mandatory. It provides that both the appellant and the respondent, if represented by a legal practitioner not less than 10 days in the case of the appellant, *must* deliver a copy of the heads of argument which he or she intends to argue at the hearing as well as a list of

authorities to be relied on in support of each point to the other parties to the appeal and the other parties (respondents) must deliver similar heads of argument and list not less than five days before the said date to the appellant. Meanwhile, sub-rule (24) provides that the original and two copies of all such heads of argument and list *must* be filed with the registrar not later than 12 noon within the time referred to in sub-rule (23 Having said that and for reasons stated above, the supplementary heads of argument of the first respondent filed on 8 March 2017 are not accepted.). (Emphasis added).

[29] Both counsel submitted written heads of argument with supplementary heads of argument filed later which counsel for the appellant expanded on during the hearing of the appeal on 10 March 2017. Supplementary heads of argument of first respondent disallowed. In his submission, Mr Van Vuuren, counsel for the appellant abandoned parts of grounds one and two and four as a whole. With grounds two and four and part of ground one of the notice of appeal not persisted with, the appellant only relied on ground three and part of ground one.

[30] The portion of ground one the appellant did not abandon reads as follow:

‘1.1. The arbitrator erred in law by allowing the arbitration to continue with arbitration without first attempting to conciliate the matter as compelled to do so by Section 86(5) of the Labour Act and in doing so may error in law or was misguided as to the law.’

[31] In his heads of argument, after giving a history of what transpired before the arbitration hearing on 18 January 2016 and reasons why the appellant could not attend the conciliation proceedings scheduled for the date indicated above, Mr Van Vuuren argued that the arbitrator made a mistake in law to proceed with arbitration of the matter without first attempting to conciliate the dispute.

[32] Counsel contended that conciliation is a legal compliance issue in terms of Section 86(5) of the Labour Act and rule 20(1) of the Rules relating to conciliation and arbitration which the arbitrator failed to comply with. He said that the second respondent as an appointed arbitrator, was compelled to follow the provisions of

Section 86(5) which requires conciliation as a peremptory pre-condition which has to be met before any dispute would be allowed to proceed to arbitration.

[33] To bolster his argument on the point, counsel referred the court to the matter of *Nel v Shingudja N.O. & Others*³ where Geier J, amongst others, stated that the Labour Act 007 requires that arbitrators to whom an arbitration has been assigned under Part C of Chapter 8 of the Act, first attempt to resolve such disputes through conciliation and only once such conciliation attempt is unsuccessful, must the arbitrator begin the arbitration. Mr Barnard on his part, was of a different view. So he placed more emphasis on the content of the supplementary heads of argument which I have disallowed for already reasons set out above.

[34] In this appeal, it is common cause, not in dispute also that no attempt was made by the arbitrator to conciliate the dispute for purpose of resolving the matter. The appellant was not present when arbitration took place. By doing that, the arbitrator failed to comply with the provisions of sections 86(5) and (6), which are mandatory in nature in view of the word “must” used in both subsections. And such non-compliance has serious consequences on the outcome of the arbitration proceedings.

[35] Section 86(5) and (6) provides as follows:

(5) Unless the dispute has already been conciliated, the arbitrator *must* attempt to resolve the dispute through conciliation before beginning the arbitration.

(6) If the conciliation attempt is unsuccessful the arbitrator *must* begin the arbitration.’
(Emphasis added)

[36] What happened though is an attempt by the parties among themselves to resolve the dispute – which attempt did not succeed. This attempt to settle the disputes was done, as it is normally done in civil matters in terms of Rule 32(9) and (10), by the parties self without the involvement of the managing Judge.

³ NLLP 2014(8) 459 LCN paragraph 51 to 65.

[37] In labour disputes, however, the parties to a dispute do have a right to take reasonable steps to resolve or settle the dispute on their own without the involvement of the conciliator or arbitrator per section 82(9) of the Labour Act. This process has to take place before conciliation by the conciliator who must then conciliate the dispute taking into account the definition of conciliation in section 1(1) (b) of the Labour Act.

[38] In the present appeal, no attempt was made to conciliate the dispute as the arbitrator decided to go ahead to hear the first respondent's case in the absence of the appellant whose application for a postponement was refused. Little did she know, however, that acting against a provision of the Labour Act or any other law, statutory or otherwise, is ultra vires rendering the arbitration proceedings and the award following therefrom a nullity ab initio – ex nihilo nihil fit (out of nothing flows nothing). *Nedbank Namibia Ltd v Louw*⁴. The provisions of section 86(5) and (6) read with section 1(1) (b) (iii) of the Labour Act are mandatory. The arbitrator was obliged to first attempt to conciliate and only if the attempted conciliation was unsuccessful, could she then have proceeded with the arbitration. No discretion is given to conciliators/arbitrators by the Labour Act to evade conciliation.

[39] Similarly, in the matter of *Windhoek Tool Centre cc v Pitt*⁵, a matter with similar facts like the present appeal, where the appellants failed to attend a conciliation meeting on the day set down for conciliation of the dispute, like in the present appeal, the conciliator proceeded to conduct the arbitration in the absence of the appellant and made an award in favour of the respondent. On appeal, the Labour Court held that a conciliator has discretion under section 83(2) of the Labour Act to determine the matter in the absence of the party other than the party who referred the dispute to the Labour Commissioner who fails to attend the meeting but a conciliator has no power to turn a conciliation meeting into arbitration proceedings or dovetail an arbitration proceedings with a conciliation meeting at which no determination is made and make an award in terms of section 83(2)(a) of the Labour Act.

⁴ LC 66-2010 [2010] NALC 7 paragraph 10.

⁵ (LCA 21/2014) [2015] NALCMD2 (22 January 2015).

[40] The court further held that the clause 'determine' the matter if the other party fails to attend conciliation meeting in section 83(2) (b) of the Labour Act means determine the matter by conciliation, nothing more nothing less. The court found that failing to determine the matter by conciliation, the conciliator acted ultra vires section 83(2) (b) of the Labour Act. The court then concluded that the conciliator was wrong and misdirected herself very seriously on the law which could lead to the conclusion that there has been a failure of justice which the court could not overlook and set aside the award, as a result.

[41] As pointed above, the facts of the *Windhoek Tool Centre v Pitt* matter and those in the present appeal are identical. I am in agreement with the conclusion came to by the court in the above matter and will apply the principles laid therein to the appeal at hand and will set aside the award made by the arbitrator. Consequently, on this ground alone, the appeal succeeds and makes it unnecessary and academic to proceed with the second ground of appeal. Nonetheless, and for the sake of completeness, I decided to deal with the second ground in case I am mistaken with the conclusion arrived at in the first ground.

[42] Before jumping to the other ground of appeal, I wish to point out that, in view of the conclusion I have arrived above, the issue of whether the award was appealable or not or still could be revised through rescission procedure by the arbitrator self or that the award was not final in its effect, will not be considered.

Ground 3:

Whether the arbitrator erred in law by using an exchange rate not applicable to the period related for which the compensation was awarded?

[43] It is common cause between the parties that the employment agreement between the appellant and the first respondent provides for the remuneration of the appellant to be paid in US dollars, which is a foreign currency. Unlike the South Africa rand, which is one to one currency with the Namibia dollars, the rate of exchange between the US dollar and the Namibian dollar fluctuates from time to time which requires proof of the exchange rate to be provided.

[44] Mr Van Vuuren referred the court to the case of *Barclays Bank of Swaziland Ltd v Mnyeketi*⁶ where Stegmann J said the following:

'Mr Hershowitz informed from the bar that the letter 'E' identifies the currency unit of the Kingdom of Swaziland and it is a unit known as 'Emalangeni'. I consider that I can properly take judicial notice of that fact. Mr Hershowitz informed me further that the rate of exchange between Swazi Emalangeni and South African rand is and always has been, one to one. I consider that to be a matter of which I cannot properly take judicial notice. There may no doubt be reasons of policy which have in fact kept the rate of exchange between the two currencies at parity, but in the very nature of things market forces are liable to bring about changes of such policies relating to rates of exchange between the currencies of independent states. It seems to me that the rate of exchange between the rand and a foreign currency at any relevant time is not a matter for judicial notice, and that, *when necessary, the proof of that rate of exchange must be provided*' (emphasis added).

[45] In the present appeal, Mr Arangies is the only witness who testified for the first respondent in the arbitration proceedings. As already said before in the judgment, his evidence was limited to what is stated in the summary of the dispute. No evidence was tendered by the first respondent to prove the rate of exchange between the US dollar and the Namibia dollar at that relevant time. As it stands, it would seem that such proof of the rate of exchange was not provided – therefore the first respondent failed to discharge the burden of proving the rate of exchange the arbitrator used to convert the US dollars into Namibia dollars, as she did.

[46] If the arbitrator took judicial notice of the exchange rate prevailing at the time the award was issued, then a misdirection in law was committed to entitle the appellant in terms of section 89(1)(a) of the Act to appeal the award on a question of law. In any event, nowhere in her analysis of the evidence has the arbitrator indicated how and which rate of exchange she had used for purposes of the award.

⁶ 1992 (3) SA 425 (w) paragraph 427.

[47] In the matter between *Johannes Andima v Air Namibia (Pty) Limited and Another*⁷ the Supreme Court, at paragraph 5 of the judgment held that:

'It is settled law that a perverse finding of fact is appealable as a question of law under section 89(1) of the Labour Act: *Rumingo v Van Wyk* 1997 NR 102'.

[48] In paragraph 36 of the judgment the Supreme Court further held that:

'A finding will be perverse and therefore one no reasonable trier of fact would have reached if: (a) it is passed on inadmissible or irrelevant evidence; (b) it fails to take into account all relevant evidence; and (c) it is against the weight of the evidence in that it cannot be supported by the evidence on the record. That is, by no means exhaustive as each case must be considered on the facts....'

[49] It is therefore, if regard is had to what is stated in paragraphs 46 and 47 above, compared to the facts presented before the arbitrator by Mr Arangies during the arbitration proceedings in respect of the calculation of the amounts in Namibia dollars from the US, as she indicated in paragraphs 1 and 2 of the award, that finding is perverse which no reasonable trier of fact would have reached because it is totally against the weight of the evidence on record. The finding is also based on inadmissible or irrelevant evidence of copies of print outs of rates of exchange of currencies which have not been received through the correct procedure of the law of evidence.

[50] Accordingly, it is my view that the arbitrator erred in law with the rate of exchange used to calculate the amounts in Namibia dollars and which error has the effect of vacating the whole award appealed against by the appellant.

[51] The issue of cost was also argued by both counsel. Mr Barnard's argument that the fact that the appellant abandoned or conceded some grounds of appeal on the date when the appeal was to be heard was frivolous or vexatious therefore warranted a cost order, is rejected. In fact, I commend Mr Van Vuuren for doing what he did. If a cost order has to be granted in this matter, it will be a cost order against the respondents for filing additional heads of argument outside the time

⁷ Case No: AS 40/2015 delivered 12 May 2017 (Unreported).

stipulated in the court order and for raising and defending a new ground of opposition in the heads of argument causing annoyance to the appellant.

Order

[52] In the result the following order is made:

- (a) The appeal is upheld.
- (b) The award issued by arbitrator Alexina Mazinza Matengu dated 16 February 2016 is hereby set aside.
- (c) The first and second respondents are ordered to pay costs jointly and severally, one pays the other to be absolved, which costs to include cost of one instructing and one instructed counsel.
- (d) The first and second respondents ordered to pay the tendered wasted costs jointly and severally, one pays the other to be absolved.

E P UNENGU
Acting Judge

APPEARANCES

RESPONDENT/PLAINTIFF:

AS Van Vuuren

Instructed by De Beer Law

Chambers

1st APPLICANT/1st DEFENDANT:

P Barnard

Instructed by DHC Incorporate Legal
Practitioners