

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2017/00015

In the matter between:

NAMIBIA FOODS AND ALLIED WORKERS' UNION

APPELLANT

and

NOVANAM LIMITED

1ST RESPONDENT

JOSEPH WINDSTAAN

2ND RESPONDENT

Neutral Citation: Namibia Foods and Allied Workers' Union v Novanam Limited (HC-MD-LAB-APP-AAA-2017/00015) NAHCMD 24 (5 October 2018)

CORAM : MASUKU J

Heard : 06 April 2018

Delivered : 05 October 2018

Flynote – Labour Law – overtime in relation to fishers at sea – provisions of s. 17 and 18 of the Labour Act, 2007. Arbitral award – circumstances where the Labour Court may overturn same. Dispute of right versus dispute of interest. Judiciary – the need to properly and fully articulate reasons why a certain

decision in a judgment or award is made and not another – need to avoid arbitrariness.

Summary – the appellant, a Workers' Union referred a dispute to the Labour Commissioner regarding what they considered to be a unilateral imposition of a flat rate of overtime in respect of fishers by the 1st respondent, contrary to certain provisions of the Labour Act. The arbitrator found that there was no dispute between the parties and dismissed the claim as well as the relief sought.

Held – that the Labour Court is not at large to overturn an arbitral award simply on the basis that it holds a different view from the arbitrator. It may only do so where it is satisfied that the award is on all accounts, perverse.

Held further – that in the circumstances, the arbitrator failed to fully reason the award and to state reasons why he found for the 1st respondent. People sitting in judgment should ensure that they eschew perceptions of arbitrariness and whimsical judgment by providing reasons in the judgment or award as to why they held one way and not the other.

Held – that the issue arising was a dispute of right since it was alleged that the 1st respondent had unilaterally imposed terms and conditions contrary to legislative provisions.

Held further – that in view of the evidence led by the appellant and the version put by the 1st respondent, there was clearly a dispute between the parties and that the decision reached by the arbitrator that there was no dispute, was in the circumstances perverse and therefor permitted the court to overturn the award.

Held – that the matter should, for that reason, be remitted to the Labour Commissioner to commence *de novo* before another arbitrator.

ORDER

1. The arbitral award issued by the Arbitrator, Mr. Joseph Windstaan, is hereby set aside.
 2. The matter is referred back to the Labour Commissioner for allocation to another Arbitrator to commence the arbitration hearing *de novo*.
 3. There is no order as to costs.
 4. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J;

Introduction

[1] Serving before court is an appeal against the award issued by the Arbitrator, cited in these proceedings as the 2nd respondent. On 9 February 2017, the appellant, Namibia Public Workers' Union, referred a dispute to the Labour Commissioner regarding overtime claims for its members, who are seamen in the employ of the Respondent, Novanam Limited.

The parties

[2] The appellant is the Namibia Food and Allied Workers' Union (NAFAWU), a Union registered in terms of the provisions of ss. 57 and 58 of the Labour Act,¹ (The 'Act'). Its registered place of business is at Mungunda Street, Katutura, Windhoek.

[3] The 1st respondent is Novanam Limited, (Novanam), a company incorporated according to the Company Laws of this Republic and having its principal place of business situate in Luderitz, in this Republic. I will, for ease of reference, refer to the 1st respondent as such or as 'Novanam'. The 2nd

¹ Act No. 11 of 2007.

respondent, is Mr. Joseph Windstaan *N.O.* cited in these proceedings in his official capacity as an arbitrator appointed by the Labour Commissioner to preside over the dispute submitted to the Labour Commissioner as stated earlier.

The arbitration award

[4] The arbitration proceedings took place on 29 June 2017 before the arbitrator. According to the award, the issue in dispute was whether Novanam 'was to comply with the wage agreement and gazette variation'.² The appellant called two witnesses who testified on its behalf and were cross-examined by Novanam's representatives. In turn, Novanam called its Human Resources Manager as a witness. He was also cross-examined by the appellant's representative.

[5] After reviewing the evidence and the relevant law applicable to the matter, the arbitrator came to the conclusion that Novanam had not contravened the provisions of s. 51 and 70 of the Act. He accordingly dismissed the matter. Aggrieved by this finding entered by the arbitrator, the appellant appealed to this court as it was entitled to in terms of the law.

Grounds of appeal

[6] In its grounds of appeal, the appellant, in the main, contends that in determining whether the appellant had, on a balance of probability, made a case for Novanam having violated ss 17 and 20 of the Act, the arbitrator failed to consider the totality of the evidence adduced by the appellant, namely, that the employees worked more than five hours over time per day and accordingly worked more than 35 hours overtime per week and that the appellant's evidence confirmed the violation of ss 16, 17 and 20 of the Act by Novanam. It was the appellant's contention that the arbitrator jettisoned the appellant's evidence without any lawful basis.

² Page 145 of the record of proceedings.

Issues for determination

[7] There are principally three issues that need to be resolved. The first two are issues, which may properly be regarded as points of law *in limine* raised by Novanam. First it is alleged that the appellant lacks the *locus standi in judicio* to institute the current proceedings on behalf of the workers in the first instance. The second issue is that the arbitrator had no jurisdiction to deal with this dispute, as it is one of interest and not of right. The last issue, in the event the points of law raised above are not upheld, is the main issue, namely, to determine whether there is any merit in the ground of appeal raised by the appellant that the arbitrator erred in the award issued. I deal immediately with the points of law advanced above.

Locus standi in judicio

[8] I have decided to deal with this issue *ex abundanti cautela* (out of the abundance of caution). I have done so for the reason that Novanam does not appear, from reading its heads of argument, to persist in this issue and probably for good reason as I shall demonstrate below.

[9] I have read the heads of argument filed by Ms. Shilongo on behalf of the appellant and agree with her entirely, that the appellant does have the right at law, to bring the proceedings on behalf of the affected employees, who are the appellant's members or affiliates. I deal with the applicable law below.

[10] S. 59 (1) of the Act, reads as follows:

'Subject to any provision of this Act to the contrary, a registered trade union has the right –

- (a) to bring a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act;
- (b) of access to an employer's premises in terms of section 65;
- (c) to have union fees deducted on its behalf in terms of section 66;

- (d) to form a federation with other trade unions;
- (e) to affiliate to and to participate in the activities of federations formed with other trade unions;
- (f) to affiliate to and participate in the activities of any international workers' organisation and, subject to any laws governing exchange control –
 - (i) to make contributions to such an organisation;
 - (ii) to receive financial assistance from such an organisation;
- (g) in the case of a trade union recognised as an exclusive bargaining agent in terms of section 64 of this Act, to negotiate the terms of, and enter into, a collective agreement with an employer or a registered employer's organisation; and
- (h) to report to the Labour Commissioner any dispute which has arisen between any employer and that employer's employees who are members of the trade union.'

[12] Ms. Shilongo argued that the appellant clearly fits the bill when regard is had to the provisions of s. 59 (1) (a) and (h) quoted above. It is clear that the appellant first of all, reported a dispute with the Labour Commissioner regarding Novanam's employees. Secondly, the appellant instituted the present proceedings, having found no joy in the award issued by the arbitrator.

[13] I am of the considered view that both the appellant's actions taken as described above, are permitted and fall within the statutory powers imbued a trade union by the Act. It is accordingly incorrect to suggest that the appellant does not have the right to have instituted these proceedings. It is clear that the subscriptions that the employees pay to the appellant come in handy in circumstances such as this where it could be a tall order to have all the employees affected, to launch their separate proceedings. I am accordingly not surprised that Mr. Philander dropped this argument like a bad habit. It deserves no less.

[14] In this regard, I should add, there is no question or argument about the fact that the appellant is recognised in terms of s. 64 of the Act, as the exclusive bargaining unit for Novanam's employees. In this connection, part of

the documents relied upon include a recognition agreement between the appellant and Novanam. I accordingly come to what I consider the inexorable conclusion that the point of *locus standi* has no merit and must be dismissed as I hereby do.

Dispute of right v dispute of interest

[15] In this regard, and in view of Mr. Philander raising this issue, I find it necessary to deal with this issue albeit very briefly. In his work on labour law, Dr. Parker³ deals with this difference and referred to a judgment by Strydom JP in *Smit v Standard Bank of Namibia*,⁴ where the learned Judge President said where an employer has changed conditions of an employee's employment:

' . . . unilaterally or intimated his intention to do so unilaterally, the dispute between the parties would have fallen fair and square within the definition of "dispute of right" . . . But when employees negotiate for higher wages or better living conditions of employment the dispute in such a case is not one relating to rights but is one relating to interests . . .'

[16] What is the nature of the dispute that gives rise to the present imbroglio? What is plain, in my view, is that the appellant is not negotiating for higher or better wages for its members. If that had been its case, then, Novanam would be correct that in that event, the dispute would be one of interest. In the instant case, the appellant alleges that there are certain provisions stipulated in the law regarding payment of overtime that Novanam is not implementing and that the fishers are working more hours than those stipulated in the relevant statutory instruments. It is also alleged that the 1st respondent unilaterally imposed a flat rate of 2 hours overtime on its fishermen employees.

³

⁴ 1994 NR 366.

[17] In this regard, it would seem to me, the complaint falls squarely within the rubric of a dispute of right. It walks like one, quacks like one and must therefor be a dispute of right and not one of interest. To that extent, it appears to me that Mr. Philander, is barking the wrong tree. This is, accordingly a dispute that the arbitrator had every right of at law to bring his arbitration machinery to bear on. I accordingly find that there is no merit in this argument and that it is necessary to deal with the matter on the merits in the circumstances.

The propriety of the Arbitrator's decision

[18] Before I embark on dealing with the correctness of the arbitrator's decision, I need to make one very important comment. When one writes a ruling, decision, judgment or award, as the case may be, it is not only the order issued at the end thereof that is important. For one to know whether the order issued is correct, in all the circumstances of the case, one, in most cases, has to have regard to the reasons advanced therefor and therein lies the answer as to whether or not the said decision is correct.

[19] In the instant case, the award is very much impoverished when it comes to the reasoning. It is clear what conclusion the arbitrator came to but it is not equally clear why he came to the decision he did. No proper reasons are proffered as to why he agreed with the submissions made by the representatives of Novanam and contemporaneously discarded the appellant's argument.

[20] A generous quotation from the Act and relevant annexures does not, standing alone, serve as reasons as these must be discussed and a clear finding made as to why the one position is adopted and the other jettisoned. In a case like the present, where evidence was led by both parties, it is imperative for the arbiter to analyse the evidence and to make findings on the credibility of the witnesses and then come to a decision as to whose evidence is preferred and why. Where any provisions of the law are applicable, those provisions may then be applied on the facts as established by the trier of fact.

[21] An example in this connection would do. As indicated earlier, one of the issues, if not the main issue for determination, was whether Novanam had by its conduct, contravened the provisions of s. 51 and 70 of the Act. At para [46] of the award, the arbitrator comes to the bold and bald decision that ' . . . the arbitrator found that the respondent did not contravene section 51 and 70 of the Labour Act . . . '

[22] In reaching this far-reaching conclusion, there is no consideration of the relevant evidence led by both parties and the reasons why the version adduced by Novanam was accepted and the evidence adduced by the appellant's witnesses was rejected. In proceedings such as these, the courts and tribunals must not open themselves to being accused of acting in a despotic or dictatorial manner.

[23] Reasons behind decisions must be given in order to exclude allegations of arbitrariness and acting whimsically or capriciously on the part of courts and tribunals. This is very important for the observance of the rule of law and confidence in the courts and tribunals and their decisions. Parties may not agree with the decision but they have a right to know the reasons underlying the order issued. Awards without a proper analysis and exposition of the reasons for the decision, encourages needless appeals, for no other reason than that the party which feels hard done by the decision will naturally resort to an appeal, yet if the reasons had been fully ventilated, they may accept the fact of their loss with dignity.

[24] As it is, in the absence of a proper consideration and discussion of the respective cases argued by the parties, the work of this court is made the more difficult, if not impossible, short of the court in a sense re-hearing the matter and making its own decision based on the papers filed of record. In that case, that does not become an appeal and the matter becomes as good as being heard for the first time. Arbitrators' attention is specifically drawn to this aspect of the judgment so that this court can draw assistance from their

awards and accordingly assist in developing our labour law jurisprudence in the process.

[25] I now revert to deal with the case as pleaded by the appellant. The appellant argues that the award should be set aside because the arbitrator erred in the conclusion he reached. It was argued in this regard that the question to be determined was whether Novanam implemented the wage agreement that was signed by the parties and further whether Novanam implemented the variation gazetted on 14 October 2016.

[26] The relevant part of the agreement, marked Exhibit "A" reads as follows at clauses 7 and 9:

'Clause 7 – All terms and conditions of employment are not referred to in this agreement will remain in force for the period of validity of this agreement, provided that such terms are still in use on the Effective Date and not contradicting any of the terms as set out in this agreement.'

Clause 9 – This agreement shall be valid from date of signature until 31 October 2018 and/or shall endure until it is replaced by another substantive agreement.'

[27] On the other hand, the gazette in question dated 14 October 2016 reads as follows:

'Variation of Section 16 of the Act:

'Section 16 of the Act is varied in so far as it applies to fishers by substitution for subsection (1) (a)(i) of the following subsection:

(1) An employer must not require or permit a fisher to work more than –

(a) 54 hours a week, and in any case not more than –

(i) nine hours a day if a fisher works six or fewer days a week.

Variation of Section 17 of the Act

4. Section 17 of the Act is varied in so far as it applies to fishers by substitution for subsection (1) (a) (i) of the following subsection:

(1) An employer must not require or permit a fisher to work overtime except in accordance with an agreement, but such agreement may not require a fisher to work more than 35 hours of overtime in a week and in any case not more than five hours overtime in a day.

Variation of Section 20 of the Act

6. Section 20 is varied in so far as it applies to fishers by –

(a) The substitution for subsection (1) of the following subsection:

(1) No employer may require or permit a fisher to work a spread-over of more than 14 hours.'

[28] It is perhaps important to mention a few important aspects that the variation of the Government Gazette above wrought. In the first place, in terms of the variation of s. 16, fishers were not to be required or even allowed to work more than 54 hours in a week. Furthermore, fishers were not to work more than 9 hours in a day if the fisher worked for six or fewer days in a week.

[29] Second, and in respect to s. 17, fishers were not to be required, or permitted to work overtime, save if there is an agreement. In the case of an agreement, the fishers were in any event not to work more than 35 hours of overtime in a week and in any case, not more than five hours' overtime in a week. Third, the variation to s. 20 of the Act stipulated that no employer may require or permit a fisher to work a spread-over for more than 14 hours.

[30] It is, in this regard, important, in my view, to note that two scenarios arise which meet a prohibition, namely that a fisher may not be requested or ordered to work in excess of the hours or days stipulated. On the other hand, even if the fisher volunteers to work overtime, the employer should not permit him to work in excess of the hours stipulated in the variation of the named sections of the Act.

[31] The appellant's case is that the employees in Novanam's employ did not get the benefit that was wrought by the amendments stipulated above and that Novanam failed or neglected to implement these to the detriment of the fishers. In evidence, the appellant led Mr. Absalom who testified that he was a fisher. He testified further that the fishers in the 1st respondent's employ worked in the excess of 35 hours a week in overtime despite the variation of s. 17 of the Act. It was his evidence that there was no agreement reached by the parties on the overtime paid to the fishers. It was his further evidence, even under cross-examination that the fishers worked more than 14 hours a day in contravention of the variation referred to above.

[32] The appellant's witnesses also relied on some payslips marked Exhibit E-4 to prove that no overtime for a period in the excess of 54 hours was paid and that employees on leave were not paid. Mr. Absalom further testified that those who are paid overtime do not get the overtime stipulated in the law and in cases where they are entitled to 5 hours overtime, they are paid for only two hours per day.

[33] The second appellant's witness, Mr. Imene testified that he works at sea and works more than 55 hours a week. It was also his evidence that he works for more than 9 hours a day contrary to the provisions referred to earlier. He further stated in evidence that they work for more than 14 hours in a day, starting at 6 o'clock in the morning and at times rest for only two hours.

[34] Novanam, on the other hand, called Mr. Kavana who in part, testified that his company fixed the overtime at 2 hours in terms of recommendations found in Exhibit "H". This, recommendation, he testified, was predicated on the peculiarity of working at sea, which is markedly different from working on land. It was his evidence that the Ministry of Labour proposed that overtime be agreed on a flat rate of 2 hours per day, which equals 52 hours overtime per month spent at sea. It was Novanam's further case that they reduced the fish commission in terms of the Memorandum of Understanding to make provisions for the variations.

The appellant's case

[35] The appellant argued, and quite forcefully too, that the arbitrator misdirected himself in law in finding that there was no dispute between the parties. This, it was argued, is so in the light of the evidence of the appellant's witnesses, which was not successfully gainsaid. It was also argued that the variations of the various provisions of the Act came into force and are binding on the parties, save where an agreement is reached between the parties.

Novanam's case

[36] In his argument, Mr. Philander, for Novanam, argued that the arbitrator was eminently correct in reaching the decision he did. It was argued on behalf of Novanam that the Ministry of Labour, on 11 November 2015, settled a memorandum of understanding with the Confederation of Namibia Fishing Associations and with various unions, which would govern matters pertaining to the fishing industry. This, it was submitted, was done pursuant to the powers vested in the Minister by s. 139 of the Act and it was on that basis, it was further argued, that the variation of s. 17 of the Act, referred to above, came into being.

[37] Mr. Philander also argued that the appellant's case should fail for the reason that no admissible and sufficient evidence was led by the appellant in respect of any particular day and the actual period worked by the fishers in question, beyond the ordinary hours stipulated.

The determination

[38] I have thought long and hard about the proper approach to this matter, particularly in the light of the comments made earlier, namely, that the arbitrator literally abdicated his responsibility and never dealt with the case to any meaningful degree. He merely pronounced with finality that there was no

dispute between the parties and then proceeded to decree that the respondent did not contravene the provisions of s. 51 and 70 of the Act. No reason and/or analysis for this finding, is provided by the arbitrator, save him regurgitating what Novanam submitted before him during the arbitration.

[39] Mr. Philander attacks the appellant's case on the basis that it failed to provide exact computations of overtime due. He argued that there was no exact or reasonably exact computations properly substantiated and tendered into evidence save the mere *ipse dixit* (say so) of Mr. Imene. For this reason, so the argument ran, the appeal must be dismissed and that the arbitrator was correct in dismissing the dispute.

[40] I should, in this regard, mention that Ms. Shilongo did properly concede, as she was bound to, being a responsible office of this court, that the documentary evidence produced by the appellant at the arbitration proceedings, did not meet legal muster. This is because the documents produced by the appellant's witnesses does not reflect the names of the employees nor were they supported by the evidence of the employees in question. To this extent, I am of the view that no proper reliance could have been placed on this documentary evidence produced to the arbitrator.

[41] There is also the issue relating to the agreement alleged between the parties regarding the payment of overtime. The arbitrator, in dealing with this issue, found that there were consultations between the parties on the matter. The question, in my view, should not be whether there were indeed consultations between the parties but rather whether, if there was to be any departure from the stipulated hours, there was an agreement of the payment of overtime within permissible limits.

[42] Mr. Philander argued, with reference to case law, that the facts do not disclose a case where it can be said that the arbitrator's decision was perverse. In this regard, the court was referred to the cases of *Swart vTube-*

O-Flex Namibia and Another;⁵ *Springbok Patrols v Jacobs And Others*⁶ and *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd.*⁷

[43] The refrain, in the cases quoted above, appears to have been consistent, namely, whether the decision of the arbitrator is perverse. In this regard, it was held that this court is not at large to interfere with the decision of the arbitrator merely because it could have reached a markedly different decision based on the record of proceedings. It was further and more importantly held that the court is at large to interfere only where the decision reached by the arbitrator is 'one that no reasonable decision-maker could have reached'.

[44] The question that now confronts this court is whether the threshold or Rubicon mentioned above has been reached in the present circumstances. As earlier mentioned, the main problem with the award is that no proper and full intelligible reasons are provided. In this regard, it is clear that the Legislature stipulated legislation that was to provide a compass regarding the issue of overtime. This was not adhered to by the 1st respondent and this appears common cause. The position advocated to by the 1st respondent of the 2 hour flat rate, does not have any basis in any law but appears to have been arbitrary and in particular, was not the offshoot of an agreement between the parties.

[45] I am of the considered view, in the circumstances, that one has the legal basis to find that no reasonable arbitrator would have found, as did the 2nd respondent, that there was no dispute between the parties regarding the issue of overtime. The dispute was live and awaiting determination as I have attempted to show from the evidence adduced by both parties.

[46] Sadly, and in what appears to have been a cop-out and an avoidance to grapple with the serious and contested disputes at play, the arbitrator

⁵ (SA 70/2013) [2016] NASC 15 (25 July 2016).

⁶ (LCA 702/2012) [2013] NALCMD 17 (31 May 2013).

⁷ (SA 33/2013) [2016] NASC 3 (11 April 2016).

chose the easy way out – namely to pronounce that there is no dispute, when the dispute was evident, extant and real. It is clear that the appellant adduced *viva voce* (oral) evidence on the very issue that was at variance with that adduced the 1st respondent on the every issue of overtime payable to the fishers. It is clearly surprising how the arbitrator could, in those circumstances, reach the conclusion he did.

[47] This is, in my considered view, a perverse finding having regard, as one should, to all the attendant circumstances of this case. Abdication of arbitration responsibility appears to have commended itself to the arbitrator in this matter and this provides sufficient basis to find that the arbitrator's decision cannot, in the circumstances, be sustained.

[48] The next question for determination is – what is the appropriate order in the circumstances? Is this a proper case in which this court should substitute the decision of the arbitrator and issue its own? Or is it preferable, particularly in view of the criticisms levelled at the conduct of the arbitration and particularly its findings, that the matter be referred to another arbitrator who will to a very large extent, hear the parties afresh and consider all the issues before issuing an award?

[49] I am of the considered view that the finding to the effect that there was no dispute is, for reasons advanced above, perverse. I am accordingly of the considered view that it would be beneficial for the matter to be remitted for consideration before another arbitrator.

[50] I would, for purposes of the order I will issue, wish to suggest particular directions that may serve to expedite the hearing. It may be useful for the parties, in dealing with the issue in dispute, to set out parameters for the decision. I say so for the reason that if a formal and fastidious arbitration process is to be followed, it might be very much involved with every employee affected having to come and give evidence in relation to his peculiar position, which might be a time-consuming and very laborious process.

[51] This may serve to affect the 1st respondent's business as well as the fishermen might have to leave work at some stage to attend the arbitration proceedings and to adduce oral evidence. It would otherwise be unacceptable, in the absence of an agreement that evidence pertaining to one or two employees should be applied to many others whose cases were not particularly pleaded and with no evidence thereto anent adduced by them.

[52] To this end, the parties may, with advice, chart a way that would take care of bringing the case of the various fishermen before the tribunal in a full manner but not one that would require all the individual employees to be present but which would also not be open to attack, as in the present case, that there is no proper evidence to make a finding.

Conclusion

[53] Having regard to all the foregoing, I am of the considered view that the decision reached by the arbitrator was in all the circumstances perverse and that the matter should be remitted to the Labour Commissioner to allocate same to another arbitrator. Some of the suggestions contained in this judgment, particularly regarding the evidence in support of the claim, may be adopted, if they commend themselves to the new arbitrator, in order to conduce to a more equitable and less laborious process, which will lead to the just and fair determination of the matter.

Order

[54] In the premises, I am of the considered view that the following order is condign in all the circumstances of the case:

1. The arbitral award issued by the Arbitrator, Mr. Joseph Windstaan, is hereby set aside.
2. The matter is referred back to the Labour Commissioner for allocation to another Arbitrator to commence the arbitration hearing *de novo*.
3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

TS Masuku
Judge

APPEARANCE:

APPLICANT:

N. Shilongo of
Of Sisa Namandje & Co. Inc., Windhoek

1ST RESPONDENT:

R. Philander of
Of EnsAfrica|Namibia, Windhoek