



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00029

In the matter between:

LA CROIX SUB HOLDINGS (PTY) LTD T/A TRUCK & CAB

APPELLANT

and

ALINA N. INDOMBO N.O.

FIRST RESPONDENT

RUBEN NATINDA

SECOND RESPONDENT

ANDREAS ANDREAS

THIRD RESPONDENT

Neutral citation: *La Croix Sub Holdings (Pty) Ltd T/A Truck & Cab v Indombo N.O*
(HC-MD-LAB-APP-AAA-2018/00029) [2018] NALCMD 29 (30
October 2018)

Coram: PARKER AJ

Heard: 9 October 2018

Delivered: 30 October 2018

Flynote: Labour Law – Arbitrator’s award – Appeal against – Appeal under Labour Act 11 of 2007, s 89 is an appeal in the ordinary sense entailing rehearing but limited to evidence or information on which the decision under appeal was given and in which the only determination is whether the decision was right or wrong - The notice of appeal must contain grounds within the meaning of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, rule 23 (2)(d) – They must not be conclusions drawn by the drafter of the notice of appeal – Such grounds must apprise the respondents as interested parties as fully as possible what is in issue – The issue in instant case was whether employees were entitled to disobey employer’s instructions to work overtime – Court held that in terms of the Labour Act 11 of 2007, s17 the law permits only contractual voluntary overtime work – Consequently, employee is entitled to disobey instructions to work overtime in the absence of a valid agreement between employer and employee binding employee to work overtime – An employer cannot stand on an illegality and charge the employee who refused to obey unlawful instructions with misconduct, convict him or her, and punish him – The court cannot support such travesty of justice – Court will not interfere with arbitration tribunal’s findings where no irregularity or misdirection is proved or apparent on the record – Where the arbitrator has exercised discretion on judicial grounds and for sound reasons without bias or caprice or without applying wrong principles the Labour Court will not interfere with arbitrator’s decision and substitute its decision for the arbitrator’s – Court is entitled to interfere where arbitrator has taken a decision not based on any principle and reason – Such decision is arbitrary.

Summary: Respondents instructed by their supervisor to carry out a task whose completion would have taken them into overtime hours – Without responding to the supervisor respondents left their workplace when their normal working hours ended without completing the task – Respondents charged with refusing to obey the instructions and consequentially insubordination - Respondents found guilty of the charges by appellant’s internal disciplinary hearing bodies and dismissed – Court found

the instructions to be illegal in terms of the Labour Act, s 17 – Consequently, court concluded

respondents were entitled to disobey the illegal instructions – Accordingly, court confirmed arbitrator's decision that respondents' dismissal was substantively unfair – But court varied the amount of compensation ordered by the arbitrator in favour of respondents because decision arbitrary, not based on any principle or reason.

ORDER

1. The appeal is dismissed, and para 1 of the order of the arbitrator is confirmed.
2. The appellants are not to be reinstated.
3. Paragraph 2 of the arbitrator's award on compensation is varied as follows:

Appellant must on or before 30 November 2018 –

- (a) pay to second respondent an amount equal to his four months' salary and severance pay in terms of the Labour Act, s35, and any other terminal benefits.
- (b) pay to third respondent an amount equal to his three months' salary and severance pay in terms of the Labour Act, s 35, and any other terminal benefits.

4. There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The appellant, represented by Mr Horn, appeals from the award in Case No. CRWK 614-17, dated 9 April 2018. Second and third respondents, represented by Mr Nambahu, oppose the appeal. Appellant has put forth four grounds of appeal on which they rely for the relief sought. I shall consider those grounds one by one, starting with Ground 2.1 and 2.2, for obvious reasons, which will become apparent shortly.

Grounds 2.1 and 2.2

[2] Grounds 2.1 and 2.2 are not grounds of appeal within the meaning of rule 23(2) (d) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (G.N. No. 262 of 2008) (‘the Conciliation and Arbitration Rules’). They are conclusions drawn by the draftsman (or draftswoman) of the notice of appeal without setting out the reasons or grounds therefor. See *S v Gey Pittius and Another* 1990 NR 35 (HC), per Strydom AJP. Grounds 2.1 and 2.2 do not inform the respondents of the case they are required to meet. See *S v Kakololo* 2004 NR 7 CHC, per Maritz J. These principles were enunciated in criminal proceedings, but I see no good reason why they should not apply with equal force to civil and labour proceedings.

[3] It follows inevitably that Grounds 2.1 and 2.2 are rejected as being no grounds within the meaning of rule 23 (2) (d) of the Conciliation and Arbitration Rules. I now proceed to consider Ground 2.3 and Ground 2.4.

Ground 2.3

[4] As respects this ground, the facts are simply that appellant sought, during closing arguments, to introduce certain document. The arbitrator (first respondent) refused to allow the introduction of the document at the late hour of the proceedings. That document was not part of the record. It would have become part of the record and capable of being relied on by appellant, if the document had been introduced through

any witness as an exhibit. (See *Thjihero v Kauari* (I 2845/2012) [2016] NAHCMD 187 (9June 2016).) The arbitrator was, accordingly, right when she ruled that appellant could not rely on the document as evidence. She did not err in law. Consequently, Ground 2.3 is rejected as being no good ground. I pass to consider Ground 2.4.

Ground 2.4

[5] Consideration of Ground 2.4 turns on a very short and narrow compass. It is based on two legal rules – at common law and in terms of statutory provisions, namely, s 17 of the Labour Act 11 of 2007.

[6] The undisputed facts that are relevant to the issue at hand is simply this. On 27 March 2017 appellant's Mr Johan Richter requested second and third respondents to work overtime, probably for a duration of around one hour in order to fit tyres on the trailer of a truck. Second respondent left the workplace upon the end of his daily working hours. Third respondent was left to carry out the task. Thus, this first occasion of alleged misconduct involved second respondent only. On 13 April 2017, second and third respondents were given a truck to repair. Richter instructed them to complete the task the same day because the owner wanted his truck returned to him that same day. Upon the end of their daily working hours, both second and third respondents left their workplace without completing the task.

[7] Concerning the conduct on 27 March 2017 (involving second respondent) and on 13 April 2017 (involving second and third respondents), although Richter did not request respondents in so many words to work overtime, it is clear to me that that is exactly what Richter had requested respondents to do, that is, to work overtime. For their failure to work overtime, second and third respondents were charged with –

(a) 'refusing or failing to obey lawful reasonable instruction'; and

(b) 'serious insubordination or disrespect'.

[8] Both respondents were found guilty on both charges by the internal disciplinary hearing body, and the appeal hearing body confirmed the following recommendations by the chairperson of the first-instant hearing body:

‘Accused employee’s service to be terminated with immediate effect. They (Their) final salary, overtime and leave (pay) to be paid out to them’.

[9] As I have said previously, the determination of the instant appeal involves consideration of (a) the common law rule that in an employment situation what binds an employee are lawful instructions, not every instruction imaginable. (*Namibia Tourism Board v Kankondi* (HC-MD-LAB-MOT-GEN- 2018/00084) [2018] NAHCMD 11 (12 June 2018), para 9)), and (b) the interpretation and application of s 17 of the Labour Act. Thus, if I find that the instruction to work overtime was unlawful, respondents were entitled to disobey them (charge 1) and their disobedience cannot amount to insubordination (charge2).

[10] The question that arises is this: Were the instructions to work overtime lawful? The answer to this query lies in the interpretation and application of s 17 of the Labour Act, which reads:

‘ (1) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee to work overtime except in accordance with an agreement, but, such an agreement must not require an employee to work more than 10 hours overtime a week, and in any case, not more than three hours’ overtime a day’.

[11] The width of the wording in ‘an employer must not require or permit an employee to work overtime except in accordance with an agreement’ is clear, unambiguous, peremptory, and complete, admitting no allowance. The law of the Labour Act permits only contractual voluntary overtime work. If there is no valid and enforceable agreement binding an employee to work overtime, any instruction by an employer to an employee to work overtime in any circumstances, as is in the instant matter, is plainly an illegality. An employer cannot stand on an illegality and charge an employee who refused to work

overtime with disobeying lawful instructions and insubordination, find him or her guilty, and punish him or her. That is clearly unlawful. Doubtless, the court cannot support such travesty of justice.

[12] Based on these reasons, I have no good reason to interfere with the decision of the arbitrator that the dismissal of the respondents is substantially unfair.

[13] It remains to consider the arbitrator's award in respect of compensation. I do so because appellant appeals against the award, not a part of it. The arbitrator did not consider the remedy of re-instatement and I do not think this court is entitled to consider it, in the absence of any information or evidence thereanent having being laid before the arbitrator.

[14] Concerning the award of compensation, I find that the arbitrator was concerned unduly and unacceptably with the interests of respondents only and overlooked the interests of appellant. I would say that the arbitrator failed to take into account the tenet that the arbitrator in such cases should do justice to both appellant and respondents. Fairness must not be looked at from the position of respondents (employees) only. No rational and objective basis was put forth by the arbitrator to justify the amount of compensation she ordered. That being the case, this court is entitled to interfere with the decision of the arbitrator on the amount of compensation because her decision was not based on any principle or reason. Her decision is arbitrary. (See *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720(ZS) at 724 H-I.)

[15] The following principles and factors should be taken into account when considering the amount of compensation in favour of an employee dismissed unfairly. First, the amount awarded should be such that it does not aim at punishing the employer. It should aim at redressing a labour injustice (*Pep Stores (Namibia)(Pty) Ltd v Iyambo and Others* 2001 NR 211 (LC)). What the court awards must be compensation and not gratuity, enriching the dismissed employee (*Condons Realty (Pty) Ltd and Another v Hart* (1993) 14 ILJ 1008 (LAC)). In the instant case, appellants have not

claimed an amount for loss of certain benefits, eg medical benefits. The arbitrator found that second respondent (Nantinda) earned a monthly salary of N\$9 424, and the third respondent (Andreas) N\$5 992. Second, a critical and important factor that the court should always take into account is the extent to which the employee's own conduct contributed to the dismissal (*Ferodo (Pty) Ltd v de Ruiter* (1993) ILJ 974 (LAC)). In the instant case, the appellants' uncaring attitude and their being disrespectfully quiescent and aloof towards Richter when he instructed them to complete the work that would take them into overtime hours contributed to a great extent to their dismissal. This conclusion must count heavily against the appellants, otherwise, the court might be seen to be encouraging such disrespectful behaviour and negative and centrifugal attitude among employees which in themselves are not conducive to sound industrial relations and promotion of efficiency and productivity at the workplace. The third factor is the length of service of the employee before his or her dismissal. In the present case, the second respondent had, before his dismissal, put in 19 years' service, and third respondent three years. The fourth factor is whether the dismissed employee has made any efforts to mitigate his losses. There is no evidence to indicate that respondents had made any such efforts. (See *Shilongo vs Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 33 (7 August 2014).)

[16] Based on all these reasons and taking into account the foregoing principles and factors, the appeal fails with regard to the arbitrator's decision that the dismissal of respondents was substantially unfair. However, for the reasons given previously, the amount of compensation cannot be allowed to stand; whereupon I order as follows:

1. The appeal is dismissed, and para 1 of the order of the arbitrator is confirmed.
2. The respondents are not to be reinstated.
3. Paragraph 2 of the arbitrator's award on compensation is varied as follows:

Appellant must on or before 30 November 2018 –

(a) pay to second respondent an amount equal to his four months' salary and severance pay in terms of the Labour Act, s35, and any other terminal benefits.

(b) pay to third respondent an amount equal to his three months' salary and severance pay in terms of the Labour Act, s 35, and any other terminal benefits.

4. There is no order as to costs.

C Parker
Acting Judge

APPEARANCES:

APPELLANT:

S. HORN

Of De Klerk Horn & Coetzee, Windhoek

SECOND AND THIRD

RESPONDENTS:

C.NAMBAHU

Of Nambahu & Associates