

REPUBLIC OF NAMIBIA

REPORTABLE



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00034

In the matter between:

ROSSING URANIUM LIMITED

APPELLANT

and

**C.GOSEB
RESPONDENT**

FIRST

**DIONYSIUS LOUW N.O.
RESPONDENT**

SECOND

Neutral citation: *Rossing Uranium Limited v Goseb* (HC-MD-LAB-APP-AAA-2018/00034) [2019] NALCMD 4 (7 February 2019)

Coram: PARKER AJ

Heard: 19 October 2018

Delivered: 7 February.2019

Flynote: Labour Law - Unfair dismissal – Arbitrator’s award – Appeal against – Time limit within which to refer dispute to Labour Commissioner expressed in calendar months, s 86(2) (a) of the Labour Act 11 of 2007 – Six ‘calendar months’ – Meaning of – Court interpreted the term ‘calendar month’ in our law.

Summary: Labour law – Unfair dismissal – Arbitrator’s award – Appeal against – Employee first respondent referred dispute that arose on 23 February 2017 to Labour Commissioner on 23 August 2017 – After interpreting the term ‘calendar month’ court found that the dispute was referred to Labour Commissioner within the six-month time limit.

Flynote: Labour law – Unfair dismissal – Arbitrator’s award – Appeal against – Court held that since appellant employer did not satisfy the substantive fairness requirement, it was otiose to consider the requirement of procedural fairness – Court considered the meaning of ‘valid’ reason and ‘fair’ reason, which constitute substantive fairness, to dismiss in terms of the Labour Act – Court finding no good reason to interfere with arbitrator’s decision that first respondent’s dismissal was substantively unfair and the arbitrator’s award of reinstatement of first respondent – Court held that in our law private persons cannot agree to take away a power granted to another person by statute – Any contrary contention is against public law – Consequently, a rule 20 (of the conciliation and arbitration rules) agreement made between an unfairly dismissed employee and an errant employer that excludes reinstatement as an appropriate remedy is invalid and of no force because it aims at whittling away the arbitrator’s power under the Labour Act to order reinstatement of the employee in a deserving case.

Summary: Labour Law – Unfair dismissal – Arbitrator’s award – Appeal against – Court upholding arbitrator’s decision that although appellant employer did prove that it had valid reason to dismiss it failed to prove that it had fair reason to dismiss –

Accordingly, court upheld arbitrator's decision that appellant did not satisfy the requirement of substantive fairness when it dismissed first respondent employee and arbitrator's award of reinstatement of first respondent.

ORDER

- (a) The appeal is dismissed.
 - (b) The cross-appeal is dismissed.
 - (c) The appellant must, on or before 1 March 2019, reinstate the first respondent in the position he held when he was unfairly dismissed.
 - (d) There is no order as to costs.
-

JUDGMENT

PARKER AJ;

[1] This is an appeal by the appellant employer from an arbitral award granted by second respondent, the arbitrator, on 17 May 2018 in the case number CRSW 108-17. First respondent was employed by appellant as a Foreman of the Processing Plant at the Rossing Mine until his dismissal on 2 February 2017. First respondent was charged with abandonment of employment and/or desertion. A first-instance internal disciplinary hearing body found first respondent guilty as charged and ordered his dismissal. He appealed to an internal appeal hearing body. At the end of the appeal hearing, the appeal body upheld the guilty finding and the sanction of dismissal on 23 February 2017. Thus, the dispute arose on that date, i.e. 23 February 2017; and that is the critical date. There is also filed at the court by first respondent a cross-appeal. I now proceed to consider the grounds of appeal.

Ground 1

[2] The first question of law and ground raised by appellant is that first respondent referred the dispute to the Labour Commissioner in terms of s 86 (2) (a) of the Labour Act 11 of 2007 out of the time limit prescribed by that provision.

[3] Appellant's position is that the dispute that first respondent referred to the Labour Commissioner was about dismissal which occurred on 23 February 2017 but first respondent referred the dispute to the Labour Commissioner on 23 August 2017, which, according to Mr Boltman, counsel for appellant, was outside the time limit. And he submitted that a dispute concerning dismissal must be referred within six months after the date of the dismissal, failing which it lapses. That being the case, so argued Mr Boltman, any arbitration proceedings held in respect of a dispute which has lapsed would amount to a nullity; and the proceedings and award made therein would be ultra vires the Act because the arbitrator had no jurisdiction to conduct the arbitration in question. Counsel referred the court to authorities from the court which would, if they are on point, bind this court, unless I find that they are wrong. See *Chombo v Minister of Safety and Security* (I 3883/2013) [2018] NAHCMD 37 (20 February 2018). I shall accept and apply those authorities that are of assistance on the points under consideration.

[4] What is the argument on the other side? Only this, as Mr Bangamwabo, counsel for first respondent, submitted:

'Appellant, despite being present at the arbitration proceedings, and despite the fact that appellant was represented by an admitted legal practitioner, it failed and/or refused to raise any issue or point regarding jurisdiction upon being informed of the date of filing of the dispute by the first respondent with the Office of the Labour Commissioner.'

[5] A similar argument by counsel in *Standard Bank v Grace* 2011 (1) NR 321 (LC) was rejected by the Labour Court. Muller AJ said there that such a point was clearly a legal point, which went to the root of the arbitrator's jurisdiction; and so, counsel was entitled to raise it in counsel's submission. In any case – and this is important – what in the instant proceedings strengthens appellant's case is that the point in issue was not raised for the first time in Mr Boltman's submission; it formed part of the question of law and grounds of appeal filed by appellant in compliance with the rules of court, read with the conciliation and arbitration rules (GN No.262 of 2008). I am, therefore, entitled to consider it, as I now proceed to do.

[6] The key to the determination of the question is the meaning of the term 'six calendar months'. The Interpretation of Laws Proclamation, 1920, provides that 'month' means a calendar month. What is a 'calendar month'? The term 'calendar month' is not defined in the Labour Act; and so, the term should be understood in its ordinary sense as defined in a reputable English Dictionary. See *International Underwater Sampling Ltd and Another v MEP Systems (Pty)* 2010 (2) NR 468 (HC) at pp 8-10.

[7] *The Shorter Oxford English Dictionary*, 6th edn. defines 'calendar month' as 'the period between the same dates in successive months'; that is to say, 'a period of time from a particular date in one month to the same date in the next one' (*Concise Oxford English Dictionary*, 11th edn.). That being the case, *Old Mutual Namibia v Festus Nakanyale* LCA 06/2009 (9 December 2009) referred to the court by Mr Boltman is clearly distinguishable. There, the court held that the ruling of the chairperson of the district labour court under the repealed Labour Act was wrong inasmuch as the chairperson relied on the interpretation and application of the word 'days' in order to come to the conclusion that the lodging of respondent's complaint was not out of time, and yet the applicable Act provided for months not days. Those are not the facts in the instant case.

[8] From the ordinary, dictionary meaning of 'calendar month' I decide as follows. One calendar month from 23 February 2017 is 23 March 2017; one calendar month

from 23 March 2017 is 23 April 2017; one calendar month from 23 April 2017 is 23 May 2017; one calendar month from 23 May 2017 is 23 June 2017; one calendar month from 23 June 2017 is 23 July 2017; and one calendar month from 23 July 2017 is 23 August 2017 (a Wednesday). First respondent referred the dispute, as I have found previously, on 23 August 2017. I hold, accordingly, that first respondent referred the dispute to the Labour Commissioner within the prescribed time limit, as Mr Bangamwabo submitted. Mr Boltman's argument is respectfully rejected as not valid and good. Having so held, I am satisfied that the arbitrator had jurisdiction to conduct the arbitration. Consequently, I reject ground 1. I now pass to consider ground 2.

Ground 2

[9] With the greatest deference to Mr Boltman, I fail to see how the mentioning by the arbitrator of *Sidumo & Others v Rustenberg Platinum Mines Ltd & Others (CC)* assists appellant's case. Yes, the arbitrator mentioned it. But he did so in the following terms:

'10. WAS THE DISMISSAL OF THE APPLICANT FAIR?

- (a) It is a trite legal principle that an Arbitrator cannot interfere with a sanction imposed by an employer unless the sanction is unfair and/or unreasonable. The same principle was enunciated in *Country Fair Foods (Pty) Ltd v CCMA & Others (1999) 20 ILJ 1701 (LAC)* at para 11 where the court stated that it remains part of our law that it lies within the province of the employer to determine sanctions in relation to noncompliance with standards set by the employer. The court further stated that interference with such sanctions is only justified in cases of unreasonableness and unfairness.
- (b) The court went on to state that interference would only be justified if the sanction is so excessive or lenient that in all good conscience it cannot be allowed to stand. Following the directive of the court in the aforementioned case, *in casu* I will interfere with the sanction imposed because I am of the view that the sanction is too excessive and that it cannot be allowed to stand in all good conscience.

(c) It is important to note here that the Constitutional Court of South Africa in *Sidumo & others v Rustenberg Platinum Mines Ltd & others* (CC) at paras 179-183 held that a Commissioner [an Arbitrator] may make a value judgment as to the fairness of a dismissal.'

[10] From the statements in subparas (a) and (b) of the above-quoted arbitrator's para 10, it is clear for all to see that the arbitrator had already decided, when he made the *Sidumo* statement, to apply *Country Fair Foods (Pty) Ltd*, which is in line with our law (see the recent case of *Reuter and Another v Namibia Breweries* (HC-MD-LAB-APP-AAA-2018/00008) [2018] NAHCMD 20/2018 (08 August 2018) at para28)). He, indeed, applied *Country Fair Foods (Pty) Ltd*. I do not find anything in the award tending to show that the arbitrator applied *Sidumo & Others*. I accept Mr Bangamwabo's submission that the arbitrator mentioned *Sidumo & Others* 'in passing'. It follows, therefore, that this ground fails, and I reject it as not good and valid. I proceed to consider ground 3 and ground 4.

Ground 3 and Ground 4

[11] The 'valid reason' requirement in s 33 (1) (a) (let's call it requirement '(a1)') demands establishment of justification, in the sense of proof of the guilt of the errant employee. The 'fair' reason' requirement (let's call it requirement '(a2)') demands establishment of reasonableness in the sense that, on the facts and in the circumstances, the decision to dismiss is one that a reasonable employer acting fairly would take. The two sub-requirements, i.e. '(a1)' and '(a2)' are separate and should be kept apart when considering the requirements in s 33 (1) (a) of the Labour Act because the fact that the employer has valid reason (i.e. requirement (a1)') to dismiss the employer does not by that fact alone lead to the conclusion that it is fair (requirement '(a2)') for the employer to dismiss. In sum, I make the point that the two disparate sub-requirements constitute the overall requirement of substantive fairness within the meaning of s 33 (1) (a) of the Labour Act. It means for the employer to succeed, he or she must satisfy the two requirements of substantive fairness, apart from the procedurally fair requirement in s 33 (1) (b) (i) of the Labour Act.

[12] In the instant proceeding, there is not much to be said about appellant's justification to dismiss first respondent. I accept the arbitrator's finding that appellant 'succeeded in proving on a balance of probabilities that it had a 'valid' reason to dismiss the Applicant (i.e. first respondent)'. Thus, requirement '(a1)' was satisfied by appellant. It is to the fairness of the dismissal (i.e. requirement '(a2)') that I now direct the enquiry.

[13] The arbitrator found that appellant did not have a fair reason to dismiss, that is, appellant failed to satisfy requirement '(a2)'. To the credit of the arbitrator, I note that the arbitrator considered all the facts and circumstances of the case and considered and applied the relevant authorities. Sitting in an appeal court, I come to the conclusion that since the arbitrator exercised his discretion on judicial grounds and for sound reasons that is, 'without caprice or bias or the application of a wrong principle', I should be very slow to interfere and substitute my own decision (see *Paweni and Another v Acting Attorney-General* 1985 (3) SA 720 (ZS)). *Paweni and Another* has been approved by the court since 1992 in *S v Kuzatjike* (1992 NR 70 HC); and has been applied in a number of labour cases, e.g. *Reuter and Another v Namibia Breweries*; and *Edgars Stores Namibia Ltd v Laurika Olivier and Labour Commissioner* Case No. LCA 67/2009. It follows that grounds 3 & 4 are not valid and good. They are, accordingly, rejected.

[14] In my judgment, appellant did not satisfy the substantive fairness requirement when he dismissed first respondent. Having so found, it is otiose to consider the requirement of procedural fairness, which is the subject matter of ground 4. I proceed to consider ground 5, which concerns remedies for unfair dismissal.

Ground 5

[15] With the greatest deference to Mr Boltman, I fail to see by what legal imagination, does counsel argue that the arbitrator erred in law in ordering reinstatement. Counsel says that because of the rule 20 agreement the arbitrator was not entitled to order

reinstatement and in the same breath, counsel submits, 'due to the conduct of the respondent (i.e. first respondent) and his culpability in his dismissal, the arbitrator was correct to exercise his discretion in not granting compensation'. Without beating about the bush, I should say, Mr Boltman's submission clearly offends the principle of *ubi ius ibi remedium*, which is at the core of our sense of justice, and which informs s 86 (15) of the Labour Act. Counsel is happy the arbitrator did not order compensation, and he is also unhappy that he ordered reinstatement. Counsel is, in effect, arguing against both reinstatement and compensation. The upshot is that counsel will be content with a no-remedy order.

[16] The only reason why, according to Mr Boltman, 'the arbitrator had faulted in reinstating the employee' is that 'the parties had limited the relief which the arbitrator was authorized to grant'. In our law private persons cannot agree to take away a power granted to another person by statute. Any contrary contention is against public law. See *Schierhout v Minister of Justice* 1925 AD 417 at 423-424. Consequently, a rule 20 (of the conciliation and arbitration rules) agreement made between an unfairly dismissed employee and an errant employer that apparently excludes reinstatement as an appropriate remedy is invalid and of no force because it aims at whittling away the arbitrator's power under the Labour Act to order reinstatement of the employee in a deserving case. The rule 20 of the conciliation and arbitration rules, which Mr Boltman is so much enamored with, could not permit appellant and first defendant to take away the power of the arbitrator in terms of s 86(15) of the Labour Act to order reinstatement. In any case, to the credit of the arbitrator, the arbitrator considered the product of the rule 20 conference (what Mr Boltman characterizes as rule 20 agreement), and he did not see that first respondent abandoned the remedy of reinstatement.

[16] What I see is that the arbitrator considered the question of reinstatement, which first respondent had prayed for in his written submission, and came to the conclusion that in all reasonableness, the employer could have continued with the employment relationship. I cannot fault the arbitrator's consideration of the issue of reinstatement

and his conclusion thereanent. I do not, therefore, feel entitled to interfere with his decision to order reinstatement. This conclusion leads me to the cross-appeal.

Cross-Appeal

[17] On the authority of *Paweni and Another*, I should dismiss the cross-appeal. I find that the arbitrator exercised his discretion on judicial grounds and for sound reasons when he made no order as to compensation. I should, therefore, not interfere with his decision and substitute it with mine. In any case, the granting of contractual damages as sought by first respondent in para (3) of the relief sought before the arbitrator is alien to the Labour Act.

Conclusion

[18] Based on these reasons, I should dismiss both the appeal and the counter appeal, which, I now do. I amend the formulation of the order respecting reinstatement in para (b) of the arbitrator's award. An order should be precise and clear so that persons who are to implement the order can do so without difficulty of comprehension.

[19] In the result, I order as follows.

- (a) The appeal is dismissed.
- (b) The cross-appeal is dismissed.
- (c) The appellant must, on or before 1 March 2019, reinstate the first respondent in the position he held when he was unfairly dismissed
- (d) There is no order as to costs.

C Parker
Acting Judge

APPEARANCES:

APPELLANT:

Mr J. Boltman
Of De Klerk & Coetzee Legal Practitioners
Windhoek

FIRST RESPONDENT:

Mr F. Bangamwabo
Of FB Law Chambers
Windhoek