REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK
JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2021/00023

In the matter between:

ROBERT MOIR **APPELLANT**

and

DUNDEE PRECIOUS METALS TSUMEB (PTY) LTD **FIRST RESPONDENT**
ALEXINA MATENGU N.O. **SECOND RESPONDENT**
THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Moir v Dundee Precious Metals Tsumeb (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00023) [2022] NALCMD 19 (13 April 2022)

Coram: PRINSLOO J
Heard: **21 January 2022**
Delivered: **13 April 2022**

Flynote: Labour Appeal – Labour Act 11 of 2007 – Appeal against the award issued by the arbitrator – arbitrator to determine on the evidence presented whether there was a dismissal and whether the dismissal was unfair- no termination of appellants employment - only the issue of his work visa of the appellant that needed to be resolved - arbitrator thoroughly analysed the evidence- in conclusion appellant was not dismissed - appellant's appeal is dismissed.

Summary: The appellant filed a Notice of Appeal on an arbitration award made by the Arbitrator on 18 February 2021. The appellant was employed on a fixed-term contract as an Electrical Manager with Quant, effective from 1 May 2017 to 31 December 2019. As a non-Namibian employee, the appellant's employer was responsible for assisting the appellant in applying for a visa and/or work permit to allow him to work in Namibia. The appellant's visa expired on 31 December 2018 and the first respondent did not provide the appellant with any information regarding his employment status despite various requests for such information, as a result of which the appellant was unable to return to Namibia. Having received no communication from the first respondent regarding his employment status and his visa, the appellant assumed that he was dismissed due to the fact that his leave had been paid out to him by the respondent with his December 2018 salary without any communication.

Since the date of filing the appeal, the appellant changed tack and indicated in his heads of argument that the appellant no longer relies on unfair labour practice. The appeal is now only limited to whether the arbitrator erred in law in finding that the appellant was not unfairly dismissed.

Held that in the arbitration award, the arbitrator gave the issues before her proper consideration, and she proceeded to analyse the evidence presented to her. The arbitrator specifically considered the letter dated 21 August 2018.

Held that the arbitrator thoroughly analysed the evidence, and therefore the arbitrator cannot be faulted in her analysis of the facts.

Held further that the arbitrator acted reasonably in arriving in her conclusions and in making the award that she did. This is not a matter which warrants the interference of the Labour Court and the appellant's appeal must fail.

ORDER

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1. The arbitral award issued by the arbitrator and dated 18 February 2021 is upheld.

2. The appellant’s appeal is dismissed
3. No order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

PRINSLOO, J:

Introduction

[1] The appeal before this court is an appeal against an arbitration award made on 18 February 2021 under case number NRTS 8-19 by Ms Alexina Matengu regarding a dispute referred to the Labour Commissioner for unfair dismissal and unfair labour practice. The relief sought by the appellant in his dispute was twelve months compensation for the period January 2019 to December 2019, being the loss of income as well as bonus pay that the appellant was due to receive in March 2019.

The parties

[2] The appellant in the matter is Robert Moir, an adult male and, from the record, a foreign national currently resident in South Africa.

[3] The first respondent is Dundee Precious Metal Tsumeb (Pty) Ltd, a company duly incorporated in accordance with the company laws of this Republic. Its main place of business is situated at Tsumeb.

[4] The second and third respondents did not oppose the appeal, and therefore when I refer to the respondent in the context of this judgment, I am referring to the first respondent.

Background

[5] The appellant was employed on a fixed-term contract as an Electrical Manager with Quant, effective from 1 May 2017 to 31 December 2019. As a non-Namibian employee, the appellant's employer was responsible for assisting the appellant in applying for a visa and/or work permit to allow him to work in Namibia.

[6] The first visa application was made on behalf of the appellant in March 2017 and was for three months. This application was facilitated by Quant and supported by the respondent. A visa was issued on 27 June 2017 in favour of the appellant, with an expiry date being 26 September 2017. On 19 July 2017 an application was made for an employment permit for a period of two years. However, the Ministry of Home Affairs and Immigration (the Ministry) only granted a one-year visa, valid until 30 September 2018.

[7] In August 2017 the respondent took over the maintenance service contract of Quant, effective from 1 September 2017 and in the process also agreed to take over all the employees who Quant engaged in the performance of these services. The respondent also took the appellant over as an employee, and all rights and obligations under the employment agreement with Quant were transferred and ceded to the respondent.

[8] At the time of the appellant's appointment, an arrangement was in place with the Ministry that allowed the respondent to apply for permits without re-advertising the position for the period until the expansion project was completed.

[9] In 2018 when the visas of the non-Namibian employees came up for renewal, one Ms Stark took steps to commence the renewal process under the hand of the respondent's management. However, the respondent changed agents and had to work through the Chamber of Mines to make the necessary arrangements. In the process, Ms Stark determined that the respondent followed the wrong process previously by simply submitting the applications to Home Affairs and getting approvals for work permits. The process that was due to be followed was that the position had to be re-advertised, an interview process had to be conducted, the renewal documents had to be submitted with three unsuccessful candidates' curriculum vitae as well as a motivation letter as to why the non-Namibian's visa needs to be renewed. It was also determined that a progress report for the understudy to the non-Namibian employee should be submitted.

[10] The new process, as clarified by the Chamber of Mines, was brought to the attention of the management, and it was during this process that followed that the issues between the appellant and the respondent came to the fore, eventually giving rise to the appellant approaching the Offices of the Labour Commissioner with his dispute.

Summary of evidence

[11] To contextualize the judgment, it is necessary to briefly consider the evidence adduced on behalf of both parties. From the appeal record I will summarise the evidence as follows and will attempt to keep it as far as possible in chronological order:

[12] Two witnesses testified on behalf of the appellant, ie: the appellant Robert Moir and Ms Lizana Stark (Personal Assistant at respondent's executive). Several witnesses testified on behalf of the respondent, ie: Mr Edison Veii (Human Resource Manager Business Partner), Mr Mwapole Gwala (Human Resource Director), Mr Silas Shalauda (Human Resource Business Partner- Asset Management), Mr Kamwi Simasuku (Human Resource Business Partner) and Mr Nokokure Katjiuongua (Director of Asset Management).

[13] The appellant's visa was about to expire. After inquiries made by the appellant, Ms Stark arranged for a meeting on 6 August 2018 between the appellant and Messrs Katjiuongua and Kamwi to discuss the renewal of his visa and work permit. Ms Stark was not present during the meeting.

[14] According to the appellant, during the meeting, Mr Katjiuongua[1] asked Mr Kamwi if the appellant had a contract with the respondent, whereafter Mr Kamwi informed Mr Katjiuongua that the appellant had a contract with Quant previously. Mr Katjiuongua then enquired from the appellant when his visa was expiring. When the appellant told him that the expiry date was 30 September 2018, Mr Katjiuongua informed the appellant that' that would be his last day'. According to the appellant he told Mr Katjiuongua that he was obliged to give three months' notice in respect of the

[1] Referred to in arbitrator's summary as Mr Nokokure.

house he was renting to which Mr Katjiuongua replied that it was a personal issue of the appellant to resolve.

[15] Messrs Katjiuongua and Kamwi disagreed with the appellant's version of what transpired during the meeting. According to these witnesses, the discussion on 6 August 2018 was to sensitise the appellant to the renewal process that had to be followed and the possible risks. The witnesses confirmed that the appellant's position had to be re-advertised to comply with the work permit application requirements. There were risks involved as the respondent had to motivate why it must appoint a foreign national if Namibians were available who would be suitable for the position. The respondents insisted that that was the primary discussion of the meeting. At first, the appellant denied this was the gist of the meeting but, during cross-examination, conceded that Messrs Katjiuongua and Kamwi were truthful regarding the nature of the discussion but still maintained that is not precisely what happened during the meeting.

[16] On 7 August 2018 Mr Kamwi drafted a letter, which Mr Katjiuongua signed, wherein he recorded the meeting of 6 August 2018 and the discussion between the parties. In the letter, Mr Kamwi reiterated that the expiry of the appellant's work visa would impact his continued employment with the respondent for reasons as set out above. Mr Kamwi further advised the appellant that it would be advisable that he acted proactively by putting in place plans for either outcome. The appellant did not want to accept the letter, and as a result, Mr Kamwi caused the letter to be served on the appellant on 10 August 2018.

[17] The appellant left the meeting on 6 August 2018 aggrieved and immediately proceeded to seek legal advice, and on 15 August 2018, he proceeded to lodge a dispute with the Office of the Labour Commissioner for unfair labour practice[2]. On the very same day, he was contacted by Ms Stark to come and sign the renewal application of his visa. However, the renewal was for three months only.

[2]The appellant withdrew the dispute filed on 15 August 2018 with the Office of the Labour Commissioner after the appellant's work visa renewal. The withdrawal of the dispute was done during November 2018.

[18] Ms Stark testified that on the instructions of Mr Kamwi, she proceeded to draft a letter to the Ministry of Home Affairs regarding the extension of the work visa of the appellant.

[19] The 21 August 2018 letter directed to the Ministry of Home Affairs was drafted in the following terms[3]:

'RE: APPLICATION FOR 3-MONTH MULTIPLE ENTRY WORK VISA: MR ROBERT MOIR AND WIFE

Mr Moir is currently employed as Electrical Manager, providing specialised electrical support to the productions Plant. The Smelter plant is one of only a few in the world which consist of the Ausmelt furnace and the Pierce Smith converters. The electrical support to the plants require highly specialised skills which are not readily available in the Namibia market.

His current work permit (W13759/2017-14/2/11-5143/2017) expires 30 September 2018. This motivation is in support for the extension of Mr Moir and his wife's current work permit with three (3) months, until 31 December 2018, as this marks the end of his employment contract with us.

We shall appreciate your assistance in facilitating the approval of the application.

For Dundee Precious Metals Tsumeb.

Yours faithfully

Isai Nekundi'

[20] According to Ms Stark, she drafted the letter on the instructions of Mr Kamwi, and she confirmed the contents with Mr Katjiuongua. Both Mr Kamwi and Katjiuongua denied that either of them said anything about the contract that would expire on 31 December 2018 and testified that their reason for the three month extension period was to allow them to complete the recruitment process. Mr Katjiuongua confirmed that the extension should be three months and confirmed that they still needed to go through the recruitment process.

[21] On 25 September 2018 the respondent received a letter from the Ministry of Home Affairs, which was dated 6 September 2018, regarding the application of the appellant, with the following decision/resolution:

'YOUR WORK VISA APPLICATION HAS BEEN APPROVED UNTIL 31.12.2018 (END OF CONTRACT) TO WORK AT DUNDEE PRECIOUS METALS- ONLY-'

[3] Annexure AE to the appeal record.

[22] In October 2018 the appellant also contacted Mr Silas Shalauda, requesting a letter setting out his contract's start and end date as it was required to export his vehicles back to South Africa. Mr Shalauda issued the appellant a reference letter indicating the start date of his employment but was not prepared to issue a letter with an end date of the contract.

[23] In July 2018, the appellant also sent an email to Mr Shalauda enquiring when his contract would end, and he was informed by return email that the end date was 31 December 2019.

[24] On 16 November 2018, Mr Kamwi directed a letter to the appellant inviting him to apply for the position of SENIOR ENGINEER: ELECTRICAL AND INSTRUMENTATION by stating as follows:

> 'As Manager: Electrical, we advise you to apply for the above position. We wish to clarify that the designations change from Manager: Electrical to Senior Engineer: Electrical and Instrumentation is effective from 01 January 2019. The designation changes to Senior Engineer shall be applicable to all positions that reports to Director: Asset Management of which you position is one.'

[25] On 23 November 2018, the appellant contacted Ms Adri Hanekom via email to arrange an exit medical and requested that she book the medicals for him. He indicated that his last day would be 18 December 2018. Ms Hanekom directed the appellant to Ms Anna Nekundi, who proceeded to book the exit medical for the 7th of December 2018, and the appellant attended the said exit medical.

[26] It is the evidence on behalf of the respondent that Mr Shalauda, the HR Business Partner responsible for arranging exit medicals, was not approached to make the necessary arrangements.

[27] According to Mr Shalauda's evidence, he did not facilitate the appellant's exit medicals, as an exit medical is only conducted when the services of an employee are terminated. However, he did not get a termination request or instructions to terminate the appellant's services.

[28] Mr Shalauda testified that if an employee's services had been terminated and he does not do exit medical such employee would not be paid any money due to him or her.

[29] Mr Kamwi also testified regarding the appellant's actions to initiate an exit medical. He was adamant that the respondent did not terminate the appellant's employment and that they were unaware of the arrangements made by the appellant. Mr Kamwi further testified that the Human Resource Department would initiate the exit medical process under normal circumstances and book the medical with the occupational medical practitioner. The HR business partner will inform the employee once the medical is booked. The HR Business Partner would inform the Remuneration Center once the medical is done and provide it with the relevant documents to process the necessary payments. The Remuneration Center would then investigate whether all the company equipment is returned and whether the employee is indebted to the company regarding a loan or extra leave days taken.

[30] Mr Kamwi testified that the appellant's actions could lead to a qualified audit. The witness could not explain how the appellant managed to arrange his own exit medical and how final payment was made to the appellant at the end of December 2018, which included his accrued leave, despite the unapproved procedure followed by the appellant.

[31] On a question as to the procedure when an employee's visa expires, Mr Kamwi testified that the employee would still receive his salary for that month, even if he or she does not do exit medicals. According to Mr Kamwi, there was thus no need for the appellant to arrange for exit medical to get his salary for December 2018. Mr Kamwi also testified that the appellant took leave from 18 December 2018 to 31 December 2018, and an employee on notice would not be able to go on leave in his termination month.

[32] The appellant confirmed that he went to South Africa for his leave period in December 2018. He testified that before leaving, he enquired from Mr Kamwi as to what was supposed to happen next and was informed that he would be kept informed. On 27 December 2018 the appellant sent an email communication to Mr

Kamwi informing him that he could not return to Namibia because his visa was expiring on 31 December 2018 but received no response from Mr Kamwi.

[33] In response to this complaint, Mr Kamwi testified that he was on leave in Caprivi and neither saw the email nor did he have any new feedback on the issue. However, on 10 January 2019, without any indication that the appellant's contract had been terminated, the appellant declared a dispute for unfair dismissal.

Common cause facts

[34] From the evidence, the following appears to be common cause:

a) Mr Kamwi and Mr Katjiuongua did not inform the appellant that his contract was terminated with effect from the end of December 2018;

b) The letter dated 7 August 2018 did not inform the appellant that his services would be terminated on 31 December 2018;

c) The appellant was not required to apply for the extension of his work visa by himself;

d) The letter dated 16 November 2018 did not terminate the contract of the appellant, and the appellant was aware of the Affirmative Action legislation in Namibia and was further aware of what the recruitment process entailed to identify a Namibian candidate;

e) The appellant initiated his own exit medical without the intervention of the HR Resource Department;

f) The appellant received payment of his salary at the end of December 2018 as well his accrued leave;

g) Mr Shalauda confirmed the termination date of the appellant’s contract as 31 December 2019;

h) The appellant was on leave from 18 December 2019;

i)The work visa of the appellant was not extended beyond 31 December 2018.

The award

[35] Having heard the extensive evidence, the second respondent, Ms Alexina Matengu, issued an award on 18 February 2021, dismissing the appellant's claim for unfair dismissal and unfair labour practice in the following terms:

'1. That the applicant's case of unfair dismissal and unfair labour practice is dismissed.

2. That the respondent pay the applicant the total amount of N$ 55 626.74 for bonus as the respondent created expectation for the applicant to receive such payment.

3. This amount is payable on or before the 15th of March 2021 and proof of payment must be served with the Office of the Labour Commissioner in Tsumeb.'

The appeal

[36] Aggrieved by the arbitrator's decision the appellant noted an appeal against part of the award. Initially, the appellant relied on two questions of law and fact in his notice of appeal, being:

'1. Whether the Arbitrator erred in law in finding that the applicant had not endured unfair labour practice and was not unfairly dismissed.

2. Whether the Arbitrator erred in fact when she found that the first Respondent's conduct did not amount to an intentional termination of the appellant's employment.'

[37] The first respondent did not note a counter appeal in respect of the award for payment of the bonus.

[38] Since the date of filing the appeal, the appellant changed tack and indicated in his heads of argument that the appellant no longer relies on unfair labour practice. The second ground of the appeal in the notice of appeal is also abandoned. It was also indicated in the heads of argument that the appeal is now only limited to whether the arbitrator erred in law in finding that the appellant was not unfairly dismissed.

[39] The appellant continued in his heads of argument to concede that the arbitrator's findings on the facts were correct. Still, the appellant contends that the conclusion drawn by the arbitrator that the letter of 21 August 2018, Annexure 'AE' as set out in para [19] above, submitted during the arbitration was not just a human

error and accordingly that there was no unfair dismissal is a misdirection by the arbitrator.

[40] The appellant essentially contends that no reasonable arbitrator could reach the same conclusion upon the facts found.

Opposition

[41] The respondent opposes the appeal on the following grounds:

‘1.1 the onus was on the appellant to prove that a dismissal indeed took place;

1.2 the appellant was informed by Mr Shalauda upon enquiry that his contract was ending in December 2019 as per his Contract of Employment, yet the appellant still proceeded to initiate his medical exit;

1.3 without termination of employment, there can never be a dismissal;

1.4 the appellant’s services were not terminated by the respondent;

1.5 the fact that the motivation letter to the Ministry of Home Affairs contained the date of 31 December 2018 instead of 31 December 2019 was caused by human error and was not intentional;

1.6 the appellant was informed that he was still in the employ of the respondent, that there was no termination of his employment and that it was only the issue of his work visa that needed to be resolved;

1.7 a party alleging unfair labour practice must mention the particular paragraph of Section 50(1) of the Labour Act, 11 of 2007, in which the conduct complained of falls, and failure to do so is fatal.’

<u>Arguments advanced on behalf of the parties</u>

[42] Ms du Plessis submitted on behalf of the appellant that the respondent deliberately applied for a final renewal of the appellant's visa, knowing that it would terminate the appellant's contract. Ms du Plessis submitted that Ms Stark testified under oath that the 21 August 2018 letter was drafted on the instruction of her superiors and according to their directions. Therefore, Ms du Plessis argued that the arbitrator misdirected herself when she found that the date of the end of the contract,

which is indicated as 2018 instead of 2019, was a human error and that there was no unfair dismissal.

[43] Ms du Plessis further submitted that the appellant was indirectly dismissed by way of the respondent's conduct, which caused an end to the employment relationship between the parties. It is not the appellant's case that he was constructively dismissed, and Ms du Plessis confirmed it during her oral submissions.

[44] Upon enquiry by this court as to the meaning of 'indirectly dismissed', Ms du Plessis conceded that 'indirect dismissal' is not a term used in our law but that it refers to actions of the respondent's employees that indirectly resulted in the dismissal of the appellant. Counsel concedes that it is common cause that the appellant did not attend a disciplinary hearing that resulted in his dismissal but submits the conduct of the respondent's employees caused the appellant to be dismissed. The respondent's employees' actions (or inactivity) resulted in an impossibility of performance as the appellant could not return to work as his visa expired.

[45] In response, Ms Bassingthwaighte urged the court to consider the appeal in the context of the grounds upon which the appellant referred his dispute to the Labour Commissioner, and more specifically on the appellant's contention that he was indirectly dismissed, whilst the respondent at all times disputed a dismissal or termination of employment at its instance.

[46] Ms Bassingthwaighte, on behalf of the respondent, argued that the appellant evolved his case continuously to the point where the appeal is now premised, for the most part, on the contents of the letter dated 21 August 2018. Ms Bassingthwaighte submitted that when the appellant referred his dispute to the Labour Commissioner, he was unaware of the letter dated 21 August 2018. To re-enforce her point, counsel referred the court to the appellant's dispute, which was aptly summarised in the respondent's heads of arguments, and which are as follows:

'13.1. The respondent allowed the appellant's visa to expire on 31 December 2018 without renewing it and without providing the appellant with any information regarding his

employment status despite various requests for such information, as a result of which the appellant was unable to return to Namibia.

13.2. The last renewal of the visa was for a period of three months from 1 October 2018 to 31 December 2018, which renewal was indicated as final on the letter from the Ministry of Home Affairs and the appellant was not privy to any communication during the renewal process, nor informed by respondent the reasons for the final renewal nor what the respondent intended to do about this fact.

13.3. It was at all relevant times the respondent's duty to renew the visa and the respondent should have from the onset applied for a work permit which would have been valid for the entire duration of the employment contract, which it failed to do and which resulted in the position that the appellant is unable to return to work.

13.4. Respondent changed the terms of the appellant's employment contract unilaterally by way of its conduct without informing him, which resulted in the expiry of his work visa.

13.5. Having received no communication from the respondent regarding his employment status, the appellant assumed that he was dismissed due to the fact that his leave had been paid out to him by the respondent with his December 2018 salary without any communication.'

[47] Ms Bassingthwaighte pointed out that the letter central to the dispute does not form part of the complaint. There is no reference to the 21 August 2018 letter at all. Ms Bassingthwaighte pointed out that the appellant says in his dispute referral that he was not privy to the communication during the renewal process, nor was he informed of the reason for the final renewal or what the respondent intended to do about it.

[48] Ms Bassingthwaighte further argued that the initial dispute referral by the appellant on 15 August 2018 was because the appellant thought at the time that the respondent would not apply for a renewal of his permit. This dispute referral was withdrawn in November 2018, well after the 21 August 2018 letter. As a result, counsel raised the question of why the appellant then withdrew that initial dispute if he was aware of the 21 August letter as he professed to be.

[49] Ms Bassingthwaighte contended that the grounds of dispute in the January 2019 dispute referral as set out in para [46] related to something completely different and had nothing to do with the 21 August 2018 letter. On appeal, however, the appellant says he maintains that he was dismissed unilaterally because the letter from Home Affairs indicates that the renewal was final because the contract is coming to an end.

[50] Ms Bassingthwaighte submitted that the reference to indirect dismissal is not very clear. She initially thought that the appellant relied on constructive dismissal and, as such, the onus rest on the appellant to prove constructive dismissal.

[51] The next issue addressed by Ms Bassingthwaighte is how the court should approach the appeal before her in light of the concession by the appellant that the arbitrator was correct in her findings of fact. Ms Bassingthwaighte submitted that the finding by the arbitrator that the letter to the Ministry of Home Affairs of 21 August 2018 stating that the contract was coming to an end was a human error, is a finding of fact. Counsel argued that it was a finding regarding a secondary fact based on inferences that the arbitrator drew from the primary facts established by the parties. The court was referred to *Bertha v BTR Sarmcol*[4] wherein the court held that:

> 'The limitation on this Court's ordinary appellate jurisdiction in cases of this nature applies not only to the LAC's findings in relation to primary facts, i.e those which are directly established by evidence, but also to secondary facts, i.e those which are established by inference from the primary facts. The reason is that the drawing of an inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact.'[5]

[52] Counsel submitted that this court could only interfere with a finding of fact, whether it is a finding of primary facts or a finding of secondary facts, if it is a finding that no court could reasonably have made. For the court to interfere with that finding of fact, the appellant has to show that there was no evidence that could reasonably support a finding such as the one made by the arbitrator in relation to the letter of 21

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[4] *Bertha v BTR Sarmcol* 1998 (3) SA 349 (SCA).
[5] Also referred to in *Swarts v Tube-O-Flex Namibia (Pty) Ltd and another* NLLP 2014 (8) 44 LCN at 51.

August 2018 or that a proper evaluation of the evidence leads inevitably to the conclusion that no reasonable arbitrator could have made that finding. In this regard counsel submitted that the arbitrator analysed the evidence and correctly found that the letter to Home Affairs was a mere human error.

Onus

[53] In *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena*[6] Masuku J held as follows:

'[19] It has become trite learning that in labour matters where an employee has been dismissed, he or she only has to prove the dismissal. Once that is done, the onus is on the employer to prove to the satisfaction of the arbitral tribunal that the dismissal was both procedurally and substantively fair.'

[54] In the context where an employee claims unfair dismissal and the employer denies the unfair dismissal, the onus rests upon the employee to prove that there was actual dismissal.

[55] When the allegation is one of constructive dismissal, then the onus remains on the employee to prove that the resignation constitutes a constructive dismissal.

[56] Ms du Plessis coined a new phrase by referring to 'indirect dismissal', which she referred to for convenience's sake, but the fact is that the appellant is alleging he was unfairly dismissed. Constructive dismissal does not apply to the facts because the appellant did not resign.

[57] The bottom line remains that the onus remains on the appellant to prove that he was dismissed as the respondent all along disputed any dismissal at its instance.

Applicable legal principles

[6] *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena* (LCA 3/2016) [2022] NALCMD 8 (3 March 2022).

[58] When dealing with determining questions of law on appeal in labour matters, the court can do no better than to refer to the matter of *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd)*[7] wherein the Supreme Court points out what is understood regarding appeals limited to a question of law alone. O'Reagan AJA state as follows:

'[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached.

[46] Where an arbitrator's decision relates to a determination as to whether something is fair, then the first question to be asked is whether the question raised is one that may lawfully admit of different results. It is sometimes said that 'fairness' is a value judgment upon which reasonable people may always disagree, but that assertion is an overstatement. In some cases, a determination of fairness is something upon which decision-makers may reasonably disagree but often it is not. Affording an employee an opportunity to be heard before disciplinary sanctions are imposed is a matter of fairness, but in nearly all cases where an employee is not afforded that right, the process will be unfair, and there will be no room for reasonable disagreement with that conclusion. An arbitration award that concludes that it was fair not to afford a hearing to an employee, when the law would clearly require such a hearing, will be subject to appeal to the Labour Court under s 89(1)(a) and liable to be overturned on the basis that it is wrong in law. On the other hand, what will constitute a fair hearing in any particular case may give rise to reasonable disagreement. The question will then be susceptible to appeal under s 89(1) (a) as to whether the approach adopted by the arbitrator is one that a reasonable arbitrator could have adopted.

[47] In summary, in relation to a decision on a question of fairness, there will be times where what is fair in the circumstances is, as a matter of law, recognised to be a decision that affords reasonable disagreement, and then an appeal will only lie where the decision of the arbitrator is one that could not reasonably have been reached. Where, however, the

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[7] *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (SA 33/2013) [2016] NASC 3 (11 April 2016).

question of fairness is one where the law requires only one answer, but the arbitrator has erred in that respect, an appeal will lie against that decision, as it raises a question of law.

[48] Finally, when the arbitrator makes a decision as to the proper formulation of a legal test or rule, and a party considers that decision to be wrong in law, then an appeal against that decision will constitute an appeal on a question of law, and the Labour Court must determine whether the decision of the arbitrator was correct or not.

[49] The advantage of the approach outlined above is that it seeks to accommodate the legislative goal of the expeditious and inexpensive resolution of employment disputes, without abandoning the constitutional principle of the rule of law that requires labour disputes to be determined in a manner that is not arbitrary or perverse. It limits the appellate jurisdiction of the Labour Court by restricting its jurisdiction in relation to appeals on fact and on those questions of fairness that admit of more than one lawful outcome to the question whether the decision of the arbitrator is one that a reasonable arbitrator could have reached. Other appeals may be determined by the Labour Court on the basis of correctness. In outline, then, this is the approach that should be adopted in determining the scope of appeals against arbitration awards in terms of s 89(1) (a).'

[59] It seems as if the appellant wishes to argue that the inferences drawn by the arbitrator from the primary facts presented to the court should be regarded as a question of law and not a question of fact. Ms du Plessis argues that the conclusion drawn by the arbitrator is a misdirection and that the arbitrator erred in law by finding that there was no unfair dismissal, which is a question of law. I must disagree with Ms du Plessis because before there can be a consideration of unfair dismissal, the appellant must first cross the hurdle of whether there was a dismissal to begin with. In my view the conclusions drawn by the arbitrator in this regard was based on the primary facts established by the parties and this court should be careful not to interfere with the decision of the arbitrator unless it is patently clear that it was perverse. I will deal with the arbitrator's findings further here under.

Dismissal

[60] In *Tow in Specialist CC v Urinavi,* Ueitele[8] J discussed what dismissal means in terms of the Labour Act in the following terms:

[8] *Tow in Specialist CC v Urinavi* (LCA 55-2014) [2016] NALCMD 3 (20 January 2016)

'[20] The Labour Act, 2007 does, however, not define the term 'dismissal'; it follows that I have to turn to the common law or other legal instruments defining dismissal to ascertain the meaning of the term 'dismissal'. At common law dismissal is equated with the termination of the contract of employment by the employer with or without notice. *Grogan*[9] thus argues that at common law a 'dismissal' is deemed to have taken place if the employer gave the required notice; the employee would however have no legal remedy if the termination was by notice, because one of the implied terms of common-law contracts of service is that such a contract may be terminated by either party on agreed notice. In the matter *Meintjies v Joe Gross t/a Joe's Beerhouse*[10] this court held that the word 'dismiss', where it is used in ss 45 and 46 of the Act, 7 means the termination of a contract of employment by or at the behest of an employer. In *Benz Building Suppliers*[11] (supra) Parker AJ stated that 'at somebody's behest' means because somebody has ordered or requested an act or a thing. Thus 'behest' as a noun means 'command' and so, a thing done at the behest of someone would mean that that someone commanded, requested or ordered the act.'

[61] Ueitele J goes further in the *Urinavi* matter[12] and discusses the *Newton v Glyn Marais Inc*[13] matter at para 22 of his judgment. In the *Newton* matter the court considers dismissal or mutual agreement to terminate services as follows:

'[22]. . . It appears from the editor of the law reports' summary that the applicant employee left the respondent's services after being accused of not doing her work properly. She claimed that she had been unfairly dismissed. The respondent claimed that she had left her employment voluntarily. The commissioner noted that, to establish that she had been dismissed the applicant employee had to prove that the respondent performed some overt act which signified an intention to terminate the contract. However, to establish that the termination was consensual, the respondent had to prove not only that there was an agreement to terminate, but also the specific terms of the agreement. He held that while the parties had discussed the possibility of a severance agreement, they had not reached agreement on its terms. The commissioner further noted that, while the fact that the applicant had packed her belongings and left the office might indicate an intention to resign, she had never communicated that intention to the respondent. He accordingly found that the applicant had not resigned and that the respondent had dismissed the applicant.

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[9] John Grogan: Dismissal, Discrimination & Unfair Labour Practices 2nd Ed, 2007 Juta at 180.

[10] *Meintjies v Joe Gross t/a Joe's Beerhouse* 2003 NR 221 (LC) (NLLP 2004 (4) 227 NLC).

[11] *Benz Building Suppliers v Stephanus and Others* 2014 (1) NR 283 (LC)

[12] Supra at footnote 8.

[13] *Newton v Glyn Marais Inc* [2009] 1 BALR 48 (CCMA).

[23] In considering whether there had been a dismissal or a mutual agreement that the employee should leave the commissioner stated as follows (at p7 –p8):

"Dismissal or mutual agreement?

42. A contract of employment may end in various ways; some consensual, other unilateral. Consensual would be, for instance, by way of an agreed termination agreement or even by way of a pre-determined termination date such as found in so-called "fixed-term agreements". Section 186(1)(a) of the . . . [LRA] reflects what the common law understands by a dismissal: the repudiation of the contract by the employer, or the employer's acceptance of the employee's repudiation. The only requirement that must be satisfied for this form of dismissal is that the contract must be terminated at the instance of the employer.

43. Just as the consensus of the parties brings the employment contract into existence, so too consensus may end a contract or may alter its basic terms. For a contract to be terminated by mutual agreement, the agreement of both parties must be genuine. Once there is genuine agreement, neither party can unilaterally change his or her mind; the employment contract ends and along with it the employment relationship. If the employment relationship is terminated by mutual agreement, the termination does not constitute a dismissal for purposes of the common law or the LRA. A dismissal occurs only if the employer performs some clear and unequivocal act that indicates that it no longer intends fulfilling its contractual commitments (see *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another H* (2002) 23 ILJ 358 (LAC); Jones v Retail Apparel [2002] 6 BLLR 676 (LC)).

44. In most cases, informing the employee that the contract has come to an end effects a dismissal in the sense as contemplated in s 186. Cases frequently arise in which the employee claims to have been dismissed, but the employer claims that the employee resigned. *Ouwehand v Hout Bay Fishing Industries [2004] 8 BLLR 815 (LC)* serves as an example. In that case, the employer claimed that the termination was consensual as the employee had abandoned his employment voluntarily, and that the employer had accepted this. The court held that in such circumstances, the employee is required to prove some overt act by the employer that is the proximate cause of the termination of employment. Where an employer pleads that the termination of the employee's employment was effected in terms of an agreement, the employer bears the onus to prove not only the parties' common intention to enter

> into the agreement, but also its specific terms. In a case such as this where an employee effectively signs away her rights, it must be absolutely clear what the terms are, especially the amount involved. The employee effectively sells her rights for an amount. . . . (I)t is simply a case of the money (see *Springbok Trading (Pty) Ltd v Zondani and Others (2004) 25 ILJ 1681 (LAC) and Stocks Civil Engineering (Pty) Ltd v Rip NO and Another (2002) 23 ILJ 358 (LAC)*). The employer discharged this onus in the *Stocks Civil Engineering* case. The court found that an employee's acceptance of a proposal that he would leave the employer's service if he was paid a severance package, constituted a consensual termination even though the parties had not agreed on the amount of severance pay. The employer failed to discharge the onus in the *Springbok Trading* case."'

Discussion and application of the legal principles to the facts

[62] From the common cause facts it is clear that none of the respondent's employees ever told the appellant that he was either dismissed or that his contract was terminated. The fact that he was made alive to the fact that the re-advertising of his position carries certain risks does not mean the appellant was dismissed. The appellant focused on the letter of 21 August 2018 only, and despite Ms du Plessis's argument that the appellant was aware of the said letter, the facts tell a different tale.

[63] I fully agree with the respondent's counsel that it raises several questions if the appellant knew of the letter that he now so heavily relies on. Firstly, why did he withdraw his initial dispute referral and not proceed to prosecute it to the fullest and secondly, why not mention it in the current dispute referral? In the latter dispute referral, the appellant takes issue with several facts as discussed in para [46] above but takes issue with the letter dated 21 August 2018. Yet, now during the appeal, it is the spill around which the appeal revolves.

[64] Given the facts of this matter I now understand why Ms du Plessis had to refer to the appellant's status as an 'indirect dismissal' because his dispute does not fall within my understanding of dismissal as defined and discussed in the *Urinavi* case, nor does it fall within constructive dismissal.

[65] In my view the mere fact that the appellant's work visa expired by end of December 2018 did not mean that the services of the appellant was terminated. He and all the relevant employees of the respondent knew that his contract was valid until 2019. Mr Kamwi made it clear that even if the appellant's visa expired he would still be paid his salary at the end of December 2018. I also agree with Ms Bassingthwaighte that the provisions of the Immigration Act[14] does not automatically terminate the employment contract itself. The fact that his visa expired made the performance of the contract impossible on a temporary basis in this instance, until such time that a new permit was obtained. In this regard the evidence of Mr Katjiuongua was that the recruitment process had to commence and that is why the appellant's visa was extended for three months as that was the time required. It is therefore premature to say that the expiry of the appellant's visa caused his contract to be terminated.

[66] The appellant conceded that he was never told that his contract expired on 31 December 2018, not even when the opportunity arose, when the appellant asked Mr Shalauda when his contract terminated.

[67] Dismissal as discussed above is at the behest of the employer, yet the respondent did nothing to terminate the contract of the appellant. I note from the appeal record that there was some communication between the appellant and some of the Human Resource Partners regarding moving the appellant's furniture and quotations, etc. however one should not read much into that as the appellant was informed in the letter by Mr Kamwi dated 7 August 2018 that the appellant should prepare for the possible eventualities when his position is re-advertised in compliance with the visa renewal application.

[68] In addition thereto there was clearly no intervention by the Human Resource Partners regarding in initiating the exit medical process. It is clear that there are firm policies in place to regulate same and with good reason. The appellant must have known that an exit medical means exiting the employment of the respondent all together.

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[14] S 24(b) and 30 (1)(iii) of the Immigration Act, 7 of 1993.

[69] If the appellant was dismissed all the arrangements would have been in place to have the relevant examinations done and for the Remuneration Office to do their enquiries. It is clear that the appellant was able to do this on his own still baffles Messrs Shalauda and Kamwi.

[70] I am convinced that the appellant was over hasty in how he went about doing things and he clearly drew inferences that were incorrect.

The arbitrator's analyses

[71] The arbitrator had to determine on the evidence presented to her a) whether there was a dismissal and b) whether the dismissal was unfair. However, it was not necessary for the arbitrator to consider the fairness of dismissal as the issue of dismissal failed to get out of the starting blocks.

[72] In the arbitration award, the arbitrator gave the issues before her proper consideration, and she proceeded to analyse the evidence presented to her. The arbitrator specifically considered the letter dated 21 August 2018, and her analysis thereof was as follows:

> 'As such the Applicant was unfairly dismissed due to the Respondent's conduct, act and omission, in stating in writing in its correspondence to Home Affairs that it was the end of the Applicant's contract and the visa renewal was final. And thereafter failing to do anything to rectify their alleged mistake.
>
> On this issue it was my view and analysis that the(sic) was indeed human error in that the letter submitted to Home Affairs, as on the applicant's application also indicated the same date and if the respondent intended to terminate the applicant's services the company would have begun the termination process. The applicant in this matter was informed by Mr Shalauda upon enquiry that the contract was ending in December 2019 accordingly as per his contract of employment and even then he still proceeded to initiate the medical exit. It was in my view that with such information communicated to him, the applicant would have relied on the said communiqué with the respondent's officials who informed him that there was no termination in December 2018 but contract was ending December 2019. It is further my view that the applicant was hest (sic) in his decision as he insisted there was termination. It is common cause that without termination of employment there can never be dismissal, in

my view and analysis that based on what was communicated to the applicant, the applicant's services were not terminated by the respondent as the applicant left on his own.

It is very clear from the evidence adduced in arbitration that the applicant went and initiated his own medical exit. The applicant was informed that he was still in employment and there was no termination as it was only the issue of his visa that needed to be resolved?'

[73] As indicated earlier, the arbitrator thoroughly analysed the evidence, and in my view, the arbitrator cannot be faulted in her analysis of the facts. The arbitrator does not merely pluck a finding from thin air. She indicates in her reasoning why she concluded that the appellant was not dismissed. However, can it be argued that the arbitrator's reasoning was perverse and that no reasonable arbitrator would reach a similar conclusion?

[74] I am of the view that that is not the case. I am further of the view that Ms Matengu acted reasonably in arriving in her conclusions and in making the award that she did.

[75] This is not a matter which warrants the interference of the Labour Court and the appellant's appeal must fail.

_____

JS Prinsloo

Judge

Appearances:

For the appellant:	M du Plessis Of Maronel du Plessis Legal Practitioners Tsumeb
For the respondent:	N Bassingthwaighte Instructed by Köpplinger Boltman Legal Practitioners Windhoek