REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA

MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2022/00009

In the matter between:

AB-INBEV NAMIBIA **APPELLANT**

and

ALECK BOTHA **1ST RESPONDENT**

NDATEELELA HAMUKWAYA **2ND RESPONDENT**

Neutral citation: *AB-Inbev Namibia v Botha* (HC-MD-LAB-APP-AAA-2022/00009) [2022] NALCMD 46 (23 August 2022)

Coram: RAKOW J

Heard: **22 July 2022**

Delivered: **23 August 2022**

Flynote: Labour Appeal – Labour Act 11 of 2007 – Appeal against refusal to rescind award by the arbitrator – Whether or not there was proper notification of the arbitration hearing date – Court's interference with an arbitrator's decision – Appeal dismissed.

Summary: The appellant filed an appeal against the decision of the second respondent, the Arbitrator in the Labour matter between the first respondent and the

appellant. When a ruling made in the matter came to their attention, the appellant applied to the Arbitrator to rescind the ruling as they did not participate in the hearing of the matter because they were absent as they were not informed of the date of the hearing.

Held: Section 86(4) of the Labour Act, 11 of 2007 requires the Labour Commissioner to inform the parties of the date and time of proceedings. To forward an email with this information to the representative of the appellant is found to be sufficient notification in terms of the Act.

Held: The requirement for the proof of service in terms of the Rules relating to the Conduct of Conciliation and Arbitration, is the completion of form LG36 but under rule 7*(c)* the Labour Commissioner may accept proof of service in a manner other than prescribed in this rule, as sufficient.

Held: The court cannot find that the finding of the second respondent is perverse. The court does not find that it is based on inadmissible or irrelevant evidence, nor that the decision fails to take into account all the relevant evidence or that it is against the weight of the evidence. The court, therefore, dismisses the appeal against the refusal of the arbitrator to rescind her decision of 23 September 2021.

ORDER

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

JUDGMENT

RAKOW J:

Introduction

[1] This is an appeal against the decision of the labour commissioner not to rescind an application by the appellants to set aside an award issued against them in favour of the first respondent on 21 September 2021. The respondents are not opposing this appeal.

The grounds of appeal and opposition to the appeal

[2] The appellant gave notice of an appeal to this court, pursuant to s 117(1)*(a)* (ii), read with Section 89(1)*(a)* of the Labour Act 11 of 2007 (herein referred to as the Act). Against the entire decision issued by the arbitrator, Ndateela N. Hamukwaya, dated 4 January 2002 in case number CRSW 854-20.

[3] The grounds upon which the appellant appeals are the following:

1. The arbitrator erred, in law, in finding that:
   1.1. the appellant was properly served with the notice of set down for the arbitration hearing on 31 March 2021.
   1.2. the appellant failed to show up without providing a reasonable ground for its absence.

2. The arbitrator erred, in law, in ordering that:
   2.1. The rescission application was denied, in that:
   2.2. The arbitrator failed to take into account that:
      2.2.1. The appellant was not served in the manner prescribed by section 129 of the Labour Act 11 of 2007. Therefore, the appellant did not wilfully absent itself from the arbitration hearing;
      2.2.2. The uncontested statement in the appellant's affidavit that Ms. Janet Nashandi sought a postponement when she was contacted telephonically on the day of the hearing. That it was indicated to the arbitrator that the appellant's representative was in Swakopmund and could not make it to the hearing on 16 April 2021. Therefore, the arbitrator unreasonably concluded that the appellant waived its right to attend the hearing;

2.2.3. The uncontested statement in the appellant's affidavit that the appellant's representative provided his details to accept service on behalf of the appellant;

2.2.4. The seriousness of the charges involved in the dispute referred;

2.2.5. The appellant enjoys prospects of success in the dispute which was referred. As stated in the appellant's affidavit the dispute relates to an issue of dishonesty, removal by respondent company stock which are alcoholic beverages during the government lockdown due to COVID-19, and charging it to a client without their consent. This version of the appellant is uncontested and demonstrates a substantive reason for dismissal of the respondent;

2.2.6. In addition, the appellant enjoys prospects of success in the dispute referred in that, in the absence of evidence the respondent was as a manager entitled to take the beers. The respondent has not demonstrated substantive unfairness to prove his case.

3. The appellant seeks the following order:

3.1. The appeal succeeds.

3.2. The decision of the arbitrator is set aside and the following order is substituted for that order:

1. The application for rescission is granted.

3.3. The matter is referred back to arbitration to start de novo before a different arbitrator.

Context

[5] The first respondent was employed by the appellant as a Team Leader for approximately four years and two months and was duly promoted to a Sales Manager position in March 2020. He was summoned to a disciplinary hearing on 18 June 2020 for the unauthorised removal of company stock between 27 March 2020 and 10 May 2020, dishonesty for providing false information, and gross negligence by taking stock during a Government sanctioned lockdown period. He was found guilty on the second charge of dishonesty alone and subsequently dismissed. He appealed against this finding internally but the appeal was dismissed. This dismissal

was then the basis on which he approached the office of the Labour Commissioner and complained that he was unfairly dismissed.

[6] The matter was set down for hearing on 6 October 2020 and was served on a certain Alexandre Basson and an email with the said notice was forwarded to a certain janet.nashandi@nm.ab-inbev.com, who is assumed to be the same person who eventually made the affidavit accompanying the rescission application to the second respondent. This email was sent on 4 September 2020, from the Office of the Labour Commissioner by a certain Webster M with the email address webliltd@gmail.com. This person forwarded all emails during the remainder of the proceedings before the Labour Commissioner. It was further sent to clerk1@whk-law.com and botha.aleck708@gmail.com, who is seemingly the first respondent. From the record provided to the court, it then seems that Ms Turck, a candidate legal practitioner at Dr. Weder, Kauta and Hoveka Inc. withdrew as the representative of record of the applicant on 28 September 2020 and she was then replaced by a certain Mr van Vuuren who then represented the respondent. The request to represent the first respondent on form LC29 together with the reasons for the request was then served on Ms Nashandi personally and emailed a copy to her at janet.nashandi@nm.ab-inbev.com, by Mr van Vuuren who filed a form LG 36 proof of service statement.

[7] The proceedings were then postponed to 16 December 2020 for a conciliation hearing, which was not successful. The notice of this postponement was again sent to Ms Nahandi's email and she and the representative of the appellant were present at the meeting on 16 December 2022. It seems that the matter was then postponed for an arbitration hearing on 16 April 2021. This notice of set down was emailed to janet.nashandi@nm.ab-inbev.com on 9 February 2021 and from the face of page 45 of the record, handed to a person at AB-Inbev on 31 March 2020 (which must be a mistake as the document is dated 21 January 2021) being a certain Alexandre Basson the Legal Corporate Secretary or Manager, who signed for the document on the face of it. This appears from the back of page 45 of the original record which was not scanned in as part of the record on the electronic case file.

[8] When the matter again appeared before the second respondent on 16 April 2021, no representative of the appellant was present. She proceeded to hear the matter and subsequently postponed it to 14 May 2021 for final arguments. She then prepared her findings and forward same to janet.nashandi@nm.ab-inbev.com as well as the first respondent via email on 23 September 2021. She found in favour of the first respondent.

[9] This correspondence seems to have found Ms Nashindi as she responded to this email and informed several persons, including Webster M that all future labour-related correspondences must be sent to Caroline Murangi in an email dated 4 November 2021. From the supplementary record, it then seems that the appellant filed an application for Rescission of Arbitrator's Award which is supported by an affidavit of Janet Nashandi dated 25 October 2021. It is not clear from the records before me when this application was filed with the Labour Commissioner's office.

[10] The affidavit of Ms Nashandi indicates that she is authorised to depose to the said affidavit in support of the rescission application which seeks to rescind the award against the appellant made on 23 September 2021 of which she was notified via email correspondence from the Office of the Labour Commissioner. She explained that the matter was initially scheduled for 16 April 2021 and no representative of the appellant was present on that day. She alleges that the notice of set down was forwarded to an unknown gmail account and as such was not received by her and therefore not diarized. She further explained that at the conciliation meeting it was agreed between the parties that all correspondence from the employee would be served on the representative of AB-Inbev and they exchanged contact details. This was a certain Mr Nawa and he received no notice of set down.

[11] She further explained that the applicant's representative was contacted on the date of the hearing but is stationed at Walvisbay/Swakopmund and had prior commitments. The second respondent was asked to postpone the matter and as such, they did not waive their right to be at the hearing. I must pause and say that I use the word apparently because there is no confirmatory or supporting affidavit from the said, Mr Nawa.

[12] This application was opposed by the first respondent who filed an opposing affidavit. He takes issue with the fact that the application was not filed within 30 days after the award came to the attention of the appellant as well as with Ms Nashandi's authority to make the affidavit in support of the said application. He further pointed out that Mr Nawa was one of several persons instructed to represent the appellant and on the day of the arbitration Mr Nawa was phoned by the second respondent and he informed her that he had no instructions to be present on the said date. The appellant was also contacted on the same day. The first respondent stated further that he served the notice of the date of the arbitration proceedings on the appellant.

The arbitrator's finding

[13] The arbitrator denied the rescission application based on two grounds. The first is that on the record it is clear that both parties were served with the notices of set down on 9 February 2021 and that Ms Nashandi confirmed receipt of the notice of set down on the same day. In addition to that, on 31 March 2021 the applicant (in the labour matter) served the respondent (in the labour matter) the same notice of set down which was received and signed by Mr (*sic*) Alexandre Basson a Legal Corporate Secretary/Manager of the respondent. The respondent was fully aware of the matter and failed to show up without providing reasonable grounds for their absences.

[14] The second reason she provided is that there was no agreement that all correspondence should be forwarded to the respondent's legal representative. The allegations advanced by the respondent are devoid of the truth and completely denied.

The argument

[15] On behalf of the appellant, it was argued that the arbitrator should have considered the granting of the postponement requested by the appellant's representative when she was contacted on 16 April 2021 or at least should have given them the opportunity to apply formally for a postponement. The appellant

never waived its right to attend the arbitration hearing. The appellant further argued that there was no proper service of the notice of set down as service was effectively defective.

[16] It was further argued that the notice of set down was served on a Mr Alexandre Basson but this person does not feature anywhere as an authorised person to represent the appellant in the proceedings and that Janet Nashandi and Libo Nawa acted on behalf of the appellant. The second respondent, therefore, erred in law when she refused the rescission application.

The legal principles applicable

[17] 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*[1] wherein the Supreme Court of Namibia points out what is understood regarding appeals that are limited on a question of law alone. O'Reagan AJA said:

'[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.

[1] *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (2) (33 of 2013) [2016] NASC 3 (11 April 2016).

[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 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).*'

[18] The Labour Court will only interfere with a finding if such a finding is perverse. In *Andima v Air Namibia (Pty) Limited and Another*[2] the court specifically dealt with the question as to when a finding is perverse, and it found that:

'that a finding is perverse if: (a) it is based on inadmissible or irrelevant evidence, (b) it fails to take into account all the relevant evidence, and (c) it is against the weight of the evidence in that it cannot be supported by the evidence on the record. Accordingly, the finding would not be perverse and appellate interference would not be justified just because, on the same facts, the superior tribunal could have come to a different conclusion.'

[19] The requirement in terms of the Labour Act 11 of 2007 regarding disputes and their service is found in s 38. It reads:

[2] *Andima v Air Namibia (Pty) Limited and Another* (SA 40 of 2015) [2017] NASC 15 (12 May 2017).

'(1) If there is a dispute about the non-compliance with, contravention, application or interpretation of this Chapter, any party to the dispute may refer the dispute in writing to the Labour Commissioner.
(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all other parties to the dispute.'

[20] Similarly, are the requirements of service found in s 82(2) of the Act dealing with referrals for conciliation and s 86 dealing with the resolving of disputes by arbitration. In both these instances, the requirement is to satisfy the Labour Commissioner that a copy of the referral has been served on all other parties. These provisions deals with initiating the processes provided for under s 82 and 86.

[21] Under s 86(4) dealing with the resolving of disputes by arbitration by the Labour Commissioner, the duties of the Labour Commissioner, when such a dispute has been raised, is set out as follows:

'(4) The Labour Commissioner must –
(a) refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration;
(b) determine the place, date and time of the arbitration hearing; and
(c) inform the parties to the dispute of the details contemplated in paragraphs (a) and (b).'

[22] In the current matter, it seems that this is exactly what the Office of the Labour Commissioner did with the emails it forwarded to the email address of Ms Nashandi.

[23] The Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner Government Notice 262 published in Government Gazette 4151 on 31 October 2008, rule 6 deals with the service of documents. Under 6(2)*(c)* service can be done by forwarding an email to the person chosen to received service, containing the said documentation. Such service, in the instance where service needs to be affected on a company or other body corporate, by handing a copy of a document to a responsible employee. Proof of service documents in terms of rule 7 will be by providing to the Labour Commissioner with an executed Form LG 36:

'(a) with a copy of proof of mailing of the document by registered post to the other party;
(b) with a copy of the telefax or email transmission report indicating the successful transmission to the other party of the whole document; or
(c) if a document was served by hand -
(i) with a copy of a receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or
(ii) with a statement confirming service signed by the person who delivered a copy of the document to the other party or left it at any premises.

(2) If proof of service in accordance with subrule (1) is provided, it is presumed, until the contrary is proved, that the party on whom it was served has knowledge of the contents of the document.

(3) The Labour Commissioner may accept proof of service in a manner other than prescribed in this rule, as sufficient.'

Conclusions

[24] In the current matter, there are two grounds of appeal, one being that the appellants did not waive their right to appear at the arbitration hearing and the second one that the appellants did not receive proper notice of the date of the hearing of the matter.

[25] From the record, the court accepts that there was indeed a notice of set down emailed to Ms Nashandi by the Office of the Labour Commissioner. In her affidavit supporting the rescission application, she indicated that this was sent to an unknown email address but does not provide this unknown email address. From my perusal of the record submitted to the court, I could not determine such an unknown email address but did note that all correspondence was forwarded to janet.nashandi@nm.ab-inbev.com, which indicates the name of Ms Nashandi in the email address as well as solicited a response from Ms Nashandi on 4 November 2021.

[26] The court finds that the requirement placed on the Labour Commissioner is only to inform the parties of the time and place of proceedings and not to serve these

notices on them. The email sent by the Office of the Labour Commissioner is in the opinion of the court, enough to fulfil the requirement under section 86(4) of the Labour Act. This is especially as the parties already attended the initial proceedings in the process, in this instance the conciliation proceeding, and the matter was postponed from thereon forward. It is not clear what was said at the postponement date of these proceedings from the record, and the court accepts that the next date for these proceedings might not have been conveyed at the proceedings, but it was conveyed via the email sent on 6 February 2021.

[27] The first respondent further went and handed the notice of set down over to a certain Ms. Alexandre Basson at the premises of the appellant. She was also the person who initially received the notice of Referral of Dispute to Conciliation in August 2020. This service however is not supported by a form LG36 affidavit as proof of service but from the ruling of the second defendant, it seems that she indeed regarded it as served on the appellant, as she is entitled to under rule 7*(c)* of the rules relating to the conduct of conciliation and arbitration.

[28] In light of the above discussion, the court cannot find that the finding of the second respondent is perverse. The court does not find that it is based on inadmissible or irrelevant evidence, nor that the decision fails to take into account all the relevant evidence or that it is against the weight of the evidence. The court, therefore, dismisses the appeal against the refusal of the arbitrator to rescind her decision of 23 September 2021.

[29] In the results, I make the following order:

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

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E Rakow

Judge

APPEARANCES

APPELLANT:	L Ihalwa assisted by (with her K Haraseb) Instructed by LorentzAngula Inc., Windhoek
FIRST RESPONDENT:	A Botha Self represented, Windhoek (watching brief)