



NOT REPORTABLE

CASE NO: SA 49/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ADCON CC

Appellant

and

LEONI VON WIELLIGH

First Respondent

SACKEY N. IPINGE

Second Respondent

Coram: MAINGA JA, Hoff JA and FRANK AJA

Heard: 19 June 2019

Delivered: 14 November 2019

Summary: Interpretation of an award given by an arbitrator, where the arbitrator did not express his award in the clearest possible terms. Where more than one interpretation was possible, one which resulted in an award being effective was to be preferred to one which renders it meaningless.

Where an employee was dismissed unlawfully, an arbitrator has the authority to make an award, including an order of reinstatement of an employee as well as an award of compensation. The arbitrator ordered reinstatement of the first respondent but did not

specifically make an award of compensation – instead using the words ‘reinstatement retrospectively from date of dismissal, with all full benefits applicable prior to her termination of service’.

In the interpretation of a document, consideration must be given to the language used in the light of the ordinary rules of grammar, syntax and in the context, the language was used. It is axiomatic that a legal meaning must be given to the words in a legal document (the award), in so far as it is possible, and the quoted words cannot just be ignored.

On appeal held that the words by the arbitrator, within the context used, meant the reinstatement of the employee, as well as compensation to the employee.

The appeal is dismissed with costs.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and FRANK AJA concurring):

[1] This appeal lies against the entire judgment and order handed down by the Labour Court on 7 July 2017 where the court *a quo* ordered that:

- ‘1. The applicant’s application is dismissed.
2. It is hereby declared that the respondent is entitled to all the remuneration and benefits as directed by the arbitrator, effective from the date (ie 1 July 2014) of her unlawful dismissal by applicant to the date on which her services were terminated by the applicant namely 1 December 2015.
3. There shall be no order as to costs.’

[2] The grounds of appeal are as follows:

- '1. The court a quo erred in law and/or fact when it found that the appellant terminated first respondent's services on 1 December 2015, as opposed to finding that first respondent refused to be reinstated;
2. The court a quo erred in law and/or fact when it found that the arbitration award – upon its interpretation – included an order that the appellant had to pay the respondent remuneration for the months of July 2014 to April 2015, or put differently that it sounded in money.'

Background

[3] The first respondent was employed by the appellant from 17 September 2012, as an operations co-ordinator, until 9 July 2014 when she was dismissed following a disciplinary hearing at which she was found guilty of fraud, dishonesty and being absent from work without leave. Her internal appeal against her dismissal was unsuccessful.

[4] The first respondent, subsequently in terms of the provisions of the Labour Act 11 of 2007 (the Act), referred a dispute of unfair dismissal to the labour commissioner who designated the second respondent as the arbitrator. At the conclusion of the arbitration proceedings on 16 March 2015, the second respondent handed down the following ruling:

- '60.1 The chairperson of the disciplinary hearing in this matter, has erred in finding the applicant/employee guilty of fraud and dishonesty.

- 60.2 That the respondent's decision to dismiss the applicant in this matter was unfair as there was no valid and substantive reason to that effect.
- 60.3 That the applicant be reinstated into her previous position retrospectively from date of dismissal, with all full benefits applicable prior to her termination of service.'

[5] On 24 April 2015, the first respondent's legal practitioners of record addressed a letter to the appellant's erstwhile representative (Mr Mostert of *NAM-LA-BOUR-IE*) requesting payment of first respondent's salary and benefits retrospectively from the date of her unfair dismissal and for the reinstatement of first respondent. The letter concluded as follows:

'Please inform us when our client can commence duty as reinstatement has been ordered.

We await your urgent reply herein.'

[6] On the same day, Mr Mostert responded by electronic mail addressed to first respondent's legal practitioner stating the following, (verbatim):

'Kindly take note that the award as been given by the Arbitrator will be appealed and will the said been sent to Advocate Mostert for the necessary actions.

Adv. Mostert will be in touch with your offices.'

[7] On the basis of this communication, the first respondent's legal practitioner advised her that the appellant has 30 days within which to appeal the arbitrator's award, that thereafter a court date has to be obtained and as a result everything will come to a standstill until the court of appeal has pronounced itself.

[8] It is common cause that the appellant had instructed its legal representative to launch an appeal against the arbitration award and to apply for a stay of the execution of the award, pending the finalisation of the appeal. The appeal was set down for hearing on 2 October 2015. The application to stay the execution of the arbitration award was launched, but never set down for hearing.

[9] On 2 October 2015, the appellant's appeal against the arbitration award was struck from the roll. The appellant thereafter instructed Mr Robin Raines of Labour Dynamics CC to assist in resolving the matter. On 2 November 2015, Mr Raines and the first respondent met at Mr Raines' offices in order to resolve the dispute. The parties provided conflicting versions as to what the outcome of the meeting was.

[10] After the meeting and on the same day, Mr Raines sent a letter to Mr Andima, the first respondent's legal representative, stating that the first respondent would not be returning to work as she was only interested in being compensated. Mr Raines also indicated that he had informed the first respondent that the appellant's interpretation of the arbitration award was that no monetary award had been made – only an order of reinstatement.

[11] On 5 November 2015, Mr Raines followed up the letter with a telephonic discussion with Mr Andima indicating that he would seek advice from counsel on the interpretation of clause 60.3 of the award in para [4] above. Subsequently, further correspondence between the parties ensued and on 25 November 2015 Ms Scholtz, personal assistant to Mr Andima, responded to an email sent by Mr Raines on

12 November 2015, stating that since no solution could be found to the dispute of the arbitration award, that their client (first respondent) had been advised to report for duty on 26 November 2015 as per the arbitration order.

[12] Mr Raines responded per email on the same day, recording that the first respondent had failed to comply with the arbitration award on numerous occasions.

[13] In an exchange between the first respondent and the appellant's Ms Kleynhans (appellant's human resources manager), the first respondent indicated that she would report for duty on 1 December 2015, to which Ms Kleynhans responded that her position had already been filled due to the delay. The first respondent by means of a short message service (sms) responded and denied that she refused to be reinstated and maintained that her tender to return to work had been consistently rejected by the appellant.

[14] On 20 May 2016, first respondent's legal practitioners addressed a letter of demand informing the appellant that the arbitration award, had in terms of the provisions of the Act, been filed with the High Court and had been made an order of the Labour Court. The first respondent demanded payment of N\$566 859,22. The appellant responded on 6 June 2016 and stated that the first respondent had repeatedly stated that she was not interested in returning to work, only to being paid an amount of money.

[15] On 14 July 2016, the first respondent's legal practitioner in terms of rule 104(1), issued out of the office of the registrar a writ of execution for the amount of N\$566 859,22 in respect of the arbitration award dated 16 March 2015. On 12 August 2016, the deputy sheriff attached certain movable properties belonging to the appellant and as a result of the attachment of its immovable property, the appellant on 21 October 2016 launched an application in which it sought the following declaratory relief:

- '(a) That the order of court under case no. LC 80/2016 is an order for reinstatement only and not an order for payment of an amount of money.
- (b) That the respondent is not entitled to reinstatement in terms of the order of court under case no. LC 80/2016 due to her refusal to be so reinstated.'

[16] In the alternative, the appellant sought an order declaring that the order of court under case no. LC 80/2016 is vague and unclear to the extent that no effect could be given to it, or if the Labour Court finds that the order under case no. LC 80/2016 is to the effect that the appellant is to pay an amount of money to the first respondent, that such amount is limited to the benefits the first respondent would have been entitled to from the date of her dismissal, 1 July 2014, to the date of the award by the amount of N\$156 419,80. The appellant also sought an order for costs against the first respondent.

[17] Having considered the submissions made on appeal by the respective parties, the judge *a quo* made the order as reflected in para [1] of this judgment.

Issues on appeal

[18] It is clear from the grounds of appeal that there is no appeal against the merits of the award of the arbitrator *per se*, but the appeal lies against the *interpretation* of the arbitration award by the court *a quo*. The appeal lies against the interpretation of para 60.3 of the arbitrator's award. The other ground of appeal in my view relates to a factual finding by the court *a quo*, namely that the first respondent did not refuse to be reinstated.¹

I shall first deal with this first ground of appeal and shall thereafter consider the issue of the interpretation of the arbitrator's award.

The first ground of appeal

[19] Mr Ravenscroft-Jones, who appeared on behalf of the appellant, submitted that the court *a quo* erred in finding that the first respondent truly tendered her services, especially in the absence of evidence that the first respondent actually physically reported for work.

[20] It was submitted that for the first respondent to make two written tenders, seven months apart and nothing more, is not a *bona fide* attempt at enforcing her rights in terms of the award.

¹ See first ground of appeal.

[21] It was further submitted that the court *a quo* did not have sufficient regard to Mr Raines' email of 2 November 2015 wherein it was alluded that: the first respondent in her submissions at the arbitration seemingly sought reinstatement, alternatively 'financial payment'; a recordal of the meeting between himself and Mr Andima and their subsequent conversations; Mr Raines had informed the first respondent that it would serve no purpose for her not to return to work; the first respondent believed that appellant was liable to pay her a huge sum of money; that Mr Raines testimony was that the first respondent had told him on numerous occasions that she would not return to work and that the appellant was to pay the compensation instead.

[22] It was submitted that in these circumstances the appellant had no other option other than to accept that the first respondent refused to return to work and that this was essentially her election, especially in view of the fact that the award operated at all times in the first respondent's favour and was never stayed. It was concluded that the first respondent repudiated the award.

[23] The statement that the first respondent had informed Mr Raines that she would not return to work is denied by the first respondent.

According to the first respondent at the meeting on 2 November 2015, Mr Raines told her that it would probably not be nice for her to go back to work to which she replied: 'it will not be nice because they will look for reasons to get rid of me and make my life difficult, but if I could I will go back'. Thereafter Mr Raines said he would take the matter up with first respondent's legal practitioner and that she could go. In response

to an sms by Ms Kleynhans that first respondent's position at work had been filled, because she had consistently refused to be re-employed, the first respondent responded by denying that she had refused to report for duty alleging instead that she had been constantly rejected by the appellant.

[24] Mr Ravenscroft-Jones submitted that there was indeed a dispute of fact between the parties on the issue of re-employment (in spite of the fact that the court *a quo* found that there was no real dispute of fact), but conceded that on the *Plascon Evans*² approach the version of the first respondent is not so untenable or far-fetched as to be rejected on the papers as such.

[25] The appellant sought declaratory relief on application in terms of the provisions of the Labour Act.³

[26] Mr Jacobs on behalf of the first respondent submitted that the argument on behalf of the appellant ignored the *Plascon-Evans* approach by wrongly including as 'facts' certain allegations deposed to by the appellant which were not admitted by the first respondent (and which were not facts).

[27] The court *a quo* referred to the matter of *National Director of Public Prosecutions v Zuma*⁴ where it was held that motion proceedings:

² *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

³ Section 117(1)(d) of the Labour Act provides: The Labour Court has exclusive jurisdiction to . . . (d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought.

⁴ 2009 (2) SA 277 (SCA) para 26.

' . . . unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'⁵

[28] The court *a quo* analysed the evidence presented by the litigants, including those issues raised in para [21] (*supra*) and concluded that on 24 April 2015, first respondent's legal practitioner tendered her services which tender was not accepted, but met with a reply that the arbitration award would be appealed against and that an application to stay the execution of the award would be made; that after the appeal was struck from the roll on 2 October 2015, first respondent was not summoned to return to work but to attend a meeting with Mr Raines; the tender for services by the first respondent was repeated on 25 November 2015 which was again not accepted; and that first respondent herself indicated to Ms Kheynhans that she would report for work on 1 December 2015, to which Ms Kheynhans responded that first respondent's position had already been filled.

⁵ Footnotes omitted.

[29] The court *a quo* stated that the first respondent had tendered her services and that the appellant had no intention to reinstate her, and then found that the first respondent did not refuse to be reinstated.

[30] The submission on behalf of the appellant that the first respondent did not take any serious and proactive steps to enforce her right to employment must, in my view, be seen against the background that she was legally represented and acted on the advice of her legal representative.

[31] The first respondent in her answering affidavit referred to an email received from her legal representative in which she was advised that the appellant had 30 days to appeal, that a date for the appeal had to be obtained, and that 'everything will stand still until then'. First respondent stated that throughout she was under the impression that she could not go back to work until the appeal had been finalised, and that it was only during the preparation of her answering affidavit that she had been advised by her legal practitioner that the appeal did in fact not suspend the operation of the award as she had thought.

[32] The appellant in its replying affidavit stated that since first respondent had been legally represented she could not have been under any misapprehension of the legal position. The appellant, however, is in no position to deny that the first respondent indeed laboured under such misapprehension. The first respondent referred to an email received from her legal representative which formed the basis for her erroneous belief and the appellant does not deny that she received the said

email. I am of the view that in the circumstances the first respondent's misapprehension was reasonable and should be accepted as an explanation for her inaction to enforce the arbitration award.

[33] I am further of the view that the finding by the court *a quo* (if the *Plascon-Evans* principle is applied) that the first respondent did not refuse to be reinstated, cannot be faulted.

[34] I shall now turn to the second ground of appeal, ie the interpretation of para 60.3 of the arbitration award by the court *a quo*.

The second ground of appeal

[35] Para 60.3 of the arbitrator's award (delivered on 16 March 2015) reads as follows:

'That the appellant be reinstated into her previous position retrospectively from date of dismissal, with all full benefits prior to her termination of service.'

[36] The court *a quo* (in its judgment delivered on 7 July 2017 and reasons on 26 July 2017) found that the first respondent's services were terminated on 30 November 2015 and that she was in terms of the arbitration award entitled to be paid remuneration up to that date and ordered that the first respondent was 'entitled to all the remuneration and benefits as directed by the arbitrator . . . '.

[37] It should be apparent that the word 'remuneration' is absent from the award made by the arbitrator.

[38] It was submitted by Mr Ravenscroft-Jones that the award of the arbitrator is not an order sounding in money, ie no order that the first respondent was entitled to or had to be paid compensation as contemplated in the Act, was made.

[39] In respect of the order of the court *a quo* Mr Ravenscroft-Jones submitted that in the construction of the award the court *a quo* was bound to give a meaning to it that would render it conclusive (as the award is by no means a model of clarity), but instead made an order that what must be paid to the first respondent is what the arbitrator said must be paid, which is unhelpful.

[40] It was further submitted that the Namibian labour law does not recognise the concept of 'retrospective reinstatement' and that retrospective reinstatement does not without anything further equate as an award for compensation.

[41] The argument was expanded to the effect that damages suffered by an employee need to be proved and quantified based on sufficient evidence placed before the arbitrator. Furthermore, at common law, an employee is enjoined to take reasonable steps to mitigate the losses he or she suffers as a result of an unfair dismissal.

[42] It was further submitted that it would seem that no evidence was presented to the arbitrator by the first respondent which deals with her damages, and that in the

analysis of the evidence, the arbitrator did not deal with the issue of compensation (or damages) or the quantification of any monetary award.

[43] It then must follow, it was submitted, that the arbitrator's award at para 60.3 is untenable, and as such so is the court *a quo's* finding in as far as it sounds in money.

[44] Lastly it was submitted that at common law, with reference to the principle stated in *Boyd v Stuttford & Co*,⁶ an employee is not entitled to remuneration for services not actually rendered. Applying the said principle, it was pointed out, that the non-performance of the services by the first respondent arose from factors over which she had control and was thus not entitled to such remuneration.

[45] In reply to a question by the court, Mr Ravenscroft-Jones conceded that the issue of mitigation of damages by the first respondent, was an issue which should have been raised on appeal to the Labour Court had the appeal been prosecuted.

[46] Mr Ravenscroft-Jones submitted that in interpreting the word 'benefits' as used by the arbitrator, should include the *salary* earned by the first respondent.

[47] The question, in the interpretation of para 60.3 of the arbitrator's award, is whether or not that order is one sounding in money.

[48] The approach to interpretation of a document was considered by this court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*⁷ where

⁶ 1910 AD 101.

⁷ 2015 (3) NR 733 (SC).

O'Regan J advised⁸ that 'consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; that where more than one meaning is possible, . . . a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results . . .'; and that interpretation is 'a matter of law, and not of fact, and accordingly, . . . a matter for the court and not for witnesses'.

[49] In *Intercity Property Referrals CC v Sage Computing (Pty) Ltd & another*,⁹ it was held that even if the arbitrator did not express his award in the clearest possible terms, that 'where more than one interpretation was possible, the one which resulted in an award being effective was to be preferred to one which rendered it meaningless'.¹⁰

[50] It was submitted that the word 'reinstatement' refers to putting the employee back in his or her former position at work and since the arbitrator has the authority to order reinstatement as well as compensation, but did not order compensation, the award is not one sounding in money.

[51] Mr Ravenscroft-Jones finds support for his submissions in *Paulo v Shoprite Namibia (Pty) Ltd & others*¹¹ where Damaseb JP refers with approval to McNally JA in *Chegutu Municipality v Manyora*¹² where the following was said:

⁸ At para 18.

⁹ 1995 (3) SA 723 (WLD).

¹⁰ 727I-728A paraphrased.

¹¹ 2013 (1) NR 78 (LC) paras 8-10.

¹² 1997 (1) SA 662 (ZS) at 665H.

'I conclude therefore that reinstatement in the employment context means no more than putting a person again into his previous job. You cannot put him into his job yesterday or last year. You can only do it with immediate effect or from some future date. You can, however, remedy the effect of previous injustice by awarding backpay or compensation. But mere reinstatement does not necessarily imply that backpay and/or compensation automatically follows.'

[52] I agree that interpreting s 86(15)(d) of the Act – an order of reinstatement *per se* does not mean that an employee who has been unfairly dismissed, is automatically entitled to back-pay and/or compensation, in the absence of an award in terms of s 86(15)(e) of the Act – ie an award of compensation.

[53] The arbitrator in the present matter did not *only* order that the first respondent should be reinstated, but ordered reinstatement '*retrospectively from the date of dismissal with all full benefits . . .*'.¹³ These words quoted in my view qualifies the word 'reinstated' and this court must in the interpretation of para 60.3 of the award, give effect to those words by the arbitrator in order to render the award meaningful and effective. In my view, the quoted words should be interpreted to mean that the arbitrator intended that the first respondent be compensated. If para 60.3 is to be interpreted to mean only reinstatement, one would be ignoring and not giving a meaning to the quoted words.

[54] It is axiomatic that words in any legal document must be given a legal meaning (to the extent that it is possible), therefore by giving the meaning ascribed to (*supra*),

¹³ Emphasis provided.

namely, that those words meant 'compensation', would be compatible within the complete context of para 60.3.

[55] The nature of compensation was explained in *Pep Stores (Namibia) (Pty) Ltd v Iyambo & others*¹⁴ with reference to *Jacobs v Otis Elevator Co Ltd* 1997 1 CCMA 7.1.108 where the court observed the following at 16:

'Compensation awarded in labour disputes cannot be equated with civil or delictual damages. The purpose of compensation is not only to provide for the positive or negative interest of the injured party. There is an element of *solatium* present aimed at redressing a labour injustice.'

and at p 222-223 the following appears:

'It is common cause that the respondents had all been in the appellant's employment. The question of what the appellant paid the respondents was not in issue. It was a circumstance which could easily be ascertained without the need of formal evidence from the respondents as it lay exclusively within the purview of the appellant's domain.'

[56] In the present instance, the first respondent's salary is common cause and the other benefits received by the first respondent is not disputed – therefore there was no need to formally prove what back-pay the first respondent was entitled to.

[57] It appears from the record, as well as the judgment of the court *a quo*, that an alternative declaratory relief (to the main declaratory relief as reflected in para 15)

¹⁴ 2001 NR 211 (LC) at 223.

was that if the court *a quo* should find that the applicant was to pay an amount to the first respondent, that such amount is limited to the benefits first respondent would have been entitled to from date of dismissal, 1 July 2014 to date of the award of the arbitrator under case no. CRWK 796-14 on 16 March 2015, namely the amount of N\$156,419,80¹⁵ – this, as the court *a quo* stated in its judgment, was one of the issues which had to be determined. In this appeal, the appellant tendered the aforementioned amount to be paid to the first respondent in the event that the appeal is dismissed.

[58] I do not agree with the order of the court *a quo* that the first respondent is entitled to remuneration and benefits as directed by the arbitrator from 1 July 2014 (date of unlawful dismissal) until 1 December 2015 (date of termination of services by appellant) for the following reasons:

- (a) The arbitration award was made an order of court;
- (b) The court *a quo* sat as a court of appeal;
- (c) In terms of the provisions of s 117(1)(d) the Labour Court has exclusive jurisdiction *inter alia* to grant a declaratory order provided that the declaratory order is the only relief sought;
- (d) The court *a quo* dismissed the main declaratory relief sought;
- (e) Therefore the arbitrator's award (and subsequent court order) stands and must be given effect to;

¹⁵ This was spelt out in para 1.4 of the notice of motion.

- (f) This court order (award) directed the appellant to pay 'full benefits' from date of dismissal prior to her termination of service;
- (g) The award was issued on 16 March 2015 – *this* was the award (court order) which was before the court *a quo* which had to be interpreted;
- (h) Importantly, the court *a quo* did not set aside the previous court order – the court *a quo* in any event does not have the authority to set aside (directly or indirectly) its own previous court order – the order given in para 2 of the judgment is in effect a new order substituting the previous court order;
- (i) The court *a quo* also did not in its judgment specifically deal with the alternative declaratory relief sought.

[59] Having regard to the aforementioned points enumerated, in my view, the period for which back-pay must be calculated was from 1 July 2014 (date of dismissal) until 16 March 2015 (date of award given in favour of first respondent).

[60] In conclusion: the court *a quo* did not err in law and/or fact or misdirect itself by refusing the main declaratory relief sought by the appellant. In my view however, the court *a quo* erred by extending the period during which back-pay had to be calculated. This was unnecessary as it was not an issue before the court *a quo*. The court *a quo* should have granted the alternative declaratory relief (the tender by the appellant).

[61] In the result the following order is made:

- (a) The appeal is dismissed with costs, including the costs of one instructing and one instructed legal practitioner.
- (b) Para 2 of the order of the court *a quo* which reads ‘. . . effective from the date (ie 1 July 2014) of her unlawful dismissal by applicant to the date on which her services were terminated by the applicant namely 1 December 2015’, is set aside and substituted with the following:

‘. . . effective from the date of her unlawful dismissal, ie 1 July 2014, until 16 March 2015 (the date of the award given in favour of the first respondent by the arbitrator), and the appellant is hereby ordered to pay the first respondent the amount of N\$156,419.80 in respect of the benefits due to the first respondent on or before 30 November 2019.’

HOFF JA

MAINGA JA

FRANK AJA

APPEARANCES

APPELLANT:

J P Ravenscroft-Jones

Instructed by ENSAfrica | Namibia

(Inc. as LorentzAngula Inc.), Windhoek

FIRST RESPONDENT:

S J Jacobs

Instructed by PD Theron & Associates,

Windhoek