



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. LC 182/2013

In the matter between:

WILLIE PATRICK VAN WYK

APPLICANT

And

MINISTER OF LABOUR

FIRST RESPONDENT

LABOUR COMMISSIONER

SECOND RESPONDENT

PHILLIP MWANDINGI

THIRD RESPONDENT

JOHN NAMUSHESHE COMPANY

FOURTH RESPONDENT

Neutral citation: *Van Wyk v Ministry of Labour (LC 182-2013)[2014] NALCMD 48 (26 November 2014)*

Coram: **ANGULA, AJ**

Heard: 20 October 2014

Delivered: 26 November 2014

Flynote: Labour Law – Application to review and set aside arbitration award in terms of s 89 of the Act.

Labour Law – Application for recusal of the Arbitrator at the commencement of the arbitration proceedings following unsuccessful conciliation on the grounds

that the arbitrator committed gross irregularity during the conciliation proceedings.

Summary: The arbitrator telephoned the representative of the respondent employer in the presence of the dismissed employee, the applicant, and had a conversation not in the official language being English but in Oshiwambo language which is not understood by the applicant.

Held, that objectively viewed, the arbitrator's conduct militates against concept of transparency and raises a reasonable perception or doubt about his impartiality and thus constitutes a gross irregularity.

After the conciliation proceeding were adjourned to allow the parties to negotiate a settlement and if succeeded to take the settlement to the arbitrator. Thereafter the representative of the respondent employer took a letter with a settlement offer to the arbitrator without informing the dismissed employee. The arbitrator then telephoned the applicant to collect the letter from the arbitrator containing the settlement offer. The applicant rejected the offer whereupon the arbitrator remarked that if the applicant did not accept the offer he could get 50% or nothing after the conclusion of the arbitration proceedings.

Held, that it was highly inappropriate for the arbitrator to meet a party to the proceedings alone and in the absence of the other party to the proceedings; that objectively viewed such conduct raises a reasonable perception of impartiality on the arbitrator's part and as such constitutes a gross irregularity.

Held further that the remark by the arbitrator that if the applicant did not accept the respondent's offer the applicant could get 50% or nothing at the conclusion of the arbitration proceeding was highly inappropriate; that such remark demonstrates a degree of pre-judgment of the issues to be determined at the arbitration and it further conveys a sense of capriciousness and thus constitutes a gross irregularity.

ORDER

1. The arbitration proceedings which took place on 10 September 2013 before Mr. Philip Mwandingi under case number CRWK 442-13 including the award made by Mr Mwandingi on 19 September 2013 are hereby set aside.
2. The matter is referred back to the Labour Commissioner to be heard *de novo* before a different arbitrator.

JUDGEMENT

ANGULA, AJ:

Introduction

[1] The applicant in this matter is seeking an order to *inter alia*, set aside the arbitration proceedings presided over by the third respondent ('the arbitrator') acting as an arbitrator. The grounds on which the relief is based are that the arbitrator acted unfair and grossly irregular during the arbitration proceedings; that the applicant was dismissed unfairly by the fourth respondent and therefore an order re-instating the applicant in his previous employment position. The applicant is acting in person. The application is opposed by the fourth respondent. The Government Attorney appeared at the commencement of the proceedings on behalf of the first, second and third respondents and informed the court that its clients will not oppose the application and will abide by the result of the proceedings.

Background

[2] The Applicant was employed by the fourth respondent as a site agent. The dispute between the applicant and the fourth respondent started when the applicant employed temporary labourers without the consent of the fourth respondent and the applicant agreed to pay such labourers a daily wage without permission by the fourth respondent. It would appear that when the labourers were not paid their wages they demanded payment from the applicant and directed threats at the applicant. As a result of these threats, the applicant left the site for Windhoek on 28 February 2013 and remained in Windhoek until 13 March 2013. According to the fourth respondent, by leaving the site, the applicant absconded work and thus repudiated the employment contract with the fourth respondent. The fourth respondent points out that after the applicant absconded, his position was filled with another employee promoted from within the fourth respondent's employees.

[3] The applicant then filed a complaint with the Labour Commissioner claiming that he was unfairly dismissed and asking that he be re-instated. It is common cause that before the arbitration proceedings commenced, the arbitrator attempted to resolve the dispute through conciliation and that when the conciliation proceedings failed, the arbitrator commenced with the arbitration proceedings.

[4] The gist of the applicant's complaint is directed at the conducts of the arbitrator during the reconciliation proceedings. In a document dated 6 September 2013 titled: '*Case Statement in support of a request for representation at the arbitration hearing scheduled for 10 September 2013*' to which another document signed by the applicant, is attached, the applicant demanded the recusal of the arbitrator for the reasons that the arbitrator acted grossly irregular by allegedly conniving with the fourth respondent and furthermore that the arbitrator acted unprofessional during the proceedings and as such, was incompetent to preside over the dispute. The following is stated in the document referred to:

'The meeting was attended by Mr van Wyk Willy applicant. Miss Iyambo representative of the respondent John Musheshe's company and Mr Phillip Mwandingi as arbitrator.

At the meeting Mr Mwandingi enquired from me what my concerns were after I had submitted a detailed statement about the chronological sequence on the details of what has transpired at the work place. Mr Mwandingi tried to question me about whether I understand what constructive dismissal entailed and gave a fake description as to his interpretation of what constructive dismissal was all about and that there is a misunderstanding to the proper understanding thereof. Mr Mwandingi then asked me what I expected the outcome would be. I said that I would want to be reinstated in my position as Site Agent, whereafter he called the owner Mr Sacky Mbandeka who wasn't present at the meeting on his cell-phone. Their conversation was conducted in Oshiwambo language. I couldn't follow their exchange. The line got cut again they resumed their discussion and afterwards Mr Mwandingi told me that in terms of Mr Sacky Mbandeka they can't reinstate me in the same position because they already filled the position when they employed someone else. He told me that they are willing to employ me as a labourer instead. I objected and pointed out that it wasn't true what he was conveying to me. Miss Iyambo explained that a driver was employed, together with Mr Nakapela who is the site foreman and Hilma Nikanor are doing part of the other functions which I was employed for. Mr Mwandingi said that I should instead take what I am offered because both parties acted wrongly in the matter.

He advice that I should accept the offer of payment and look for another job. He calculated N\$45 000.00 for the 5 months until 31 July for which I haven't received payment and said that because of the time that I didn't work the amount to be halved which to his calculation was N\$22 500.00. I asked how that to be possible and not N\$45 000.00. He advised that the parties should negotiate a settlement and bring the agreement to him for signature purposes. The meeting adjourned afterwards. I send a proposal for a meeting through sms to Miss Iyambo and copied Mr Mwandingi in I didn't get any response thereafter I send another sms as follow up I didn't also receive any feedback. On 7 August 2014 I went to John Namusheshe's office for the meeting. But Miss Iyambo wasn't present at the office. Mr Sacky said that she had many things to do upon which I asked him to tell her that I was here and would like her to call me so that

we could set-up a meeting for the negotiations. I did not receive any call from her. Again I send her a sms registering my dismay on her silence. I also forwarded the same sms to Mr Mwandingi. The morning of 14 August 2013 I received a call from Mr Mwandingi at which he informed me about a letter which was delivered to him by Miss Iyambo about a N\$25 000 settlement offer. I asked him whether I can collect the letter and respond thereto, because as he knows I was trying to get hold of the respondent's and that they failed to meet me. He said that if I don't want to agree to the offer he would set up on arbitration hearing and that I should know that I could get 50 or zero after the arbitration hearing outcome. I said to him that if that is the way the case has to go then it should. On 27 August 2013 I went to Mr Mwandingi to enquire about the arbitration meeting schedule because I didn't receive any communication.

Dated at WINDHOEK ON THIS 5th day of SEPTEMBER 2013.'

[5] The arbitrator deals with the applicant's above statement in his award as follows:

'[8] The crux of his recusal request was that on the initial day of conciliation, I have contacted the Respondent's Representative who was not present telephonically. The medium of communication was Oshiwambo and he was not comfortable as he could not follow what we were discussing. He only learned what we were discussing after I briefed him what his employer was saying, which is the reason why they could not reinstate him was because they have already placed someone in his position, and if he was ready to take up another position then no problem. He did not agree or accept that offer, and nor did he raise any objection immediately regarding the medium of communication.

[9] I then explained that I understood his grievances, and that it was not intentional, my focus was a genuine effort to try and broker an agreement between him and his employer. I also asked him why he did not stop me right away as I could have placed the other person on loud speaker if he wanted to hear what he was saying. Secondly, I also explained that I was not aware who the person on the other side was and I did also not ask him whether he was conversant with English and this the Applicant could have provided me as information but he did not.

[10] *The Applicant then agreed, before the other party could comment that he was satisfied with the explanation I provided and that there was no need for the other party to comment as he was abandoning his recusal request. He instructed that I should continue to deal with the matter until its conclusion. This then brought us to the next issue’.*

Applicable legal principles

[6] Section 89 (5) (a) (ii) of the Labour Act, 2007 provides that an arbitrator’s award may be set aside where there has been a defect in the proceedings because the arbitrator has committed a gross irregularity. It has been held that gross irregularity will be found to exist when there has been a break of a rule of natural justice resulting in the aggrieved party not having his case fully and fairly determined.¹ I do not propose to deal with the definition of what constitute ‘gross irregularity’ as this has been repeatedly explained by this court in various cases.²

[7] In the matter of *Namura Mineral Resources (Pty) Ltd v Mwandingi*³, Schimming-Chase AJ dealing with almost similar facts where there was an application for recusal of the arbitrator quoted with approval what was stated in the matter of *S v Malindi and Others*, as follows:

[34] *The general rule as to the duty of a judicial officer was summed up as follows:*

“Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.”

¹ *Bester v Easygas (Pty) Ltd* 1993 (1) SA 30 (C), at 43. See also Parker, C.2012. *Labour Law in Namibia* 1st Edition. Windhoek: Unam Press, p. 212-215.

² See *Strauss v Namibia Institute of Mining & Technology* [LC 94-2012 [2013] NALCMD 38 (6 November 2013); *Namura Mineral Resources (Pty) Ltd v Mwandingi* (LC 51/2010 [2013] NALCMD4 (23 January 2013).

³ LC 51/2010[2013] NALCMD4(23 January 2013).

[36] I am in respectful agreement with the principles expounded in the above judgments. It is also trite that a judgment arriving from proceedings from which the presiding officer or officers ought to have recused himself is a nullity as the court would have lacked competence from the start.

[37] The concession by counsel for the second to fifth respondents is therefore correctly made as it is clear from the record and the undisputed facts that the applicant made out a clear case of a reasonable suspicion of bias on the part of the first respondent in the arbitration proceedings as a result of which the first respondent should have recused himself either once he remembered receiving the letter or subsequent to the application for his recusal. His refusal to do so thus rendered the proceedings a nullity.

[41] I reiterate the guidelines issued to arbitrators by Muller J in Roads Contractor Company v Nambahu and Others as follows:

“[32] An arbitrator, who conducts arbitration in terms of the Labour Act, should consider the following:

- a)
- b)
- c)
- d) The arbitrator should always remain independent and impartial and he/she cannot allow that any party gain the perception that he/she is not a neutral and impartial adjudicator. In this regard the arbitrator:
 - i)
 - ii)
 - iii)
 - iv)
 - v)
 - vi)
- e) The arbitrator should never refer to his/her personal circumstances or experience and thereby give an indication that he/she may be influenced by that in the decision he/she has to make.

- f) *Although the arbitrator sometimes is obliged to make rulings in respect of the conduct of witnesses, or specific matters during the hearing, he/she should always be cautious that no perception of partiality should be created that the parties, or any of them, will not receive a fair hearing.” ’*

[8] It is to be noted that the arbitrator does not dispute the facts set out in the applicant's statement. Whatever the motive or the good intention the arbitrator may have had, objectively viewed, it was inappropriate and gross irregular for him to have spoken to the representative of the fourth respondent in another language not understood by the applicant, other than the official language in front of the applicant. Justice must not only be done, it must be seen, to be done. The attempt by the arbitrator, as explained in the award, to shift the blame to the applicant namely why the applicant did not stop him so that he could put the phone on the speaker, is clearly disingenuous. As the applicant explained, he did not or could not have known to whom the arbitrator was talking. It was incumbent upon the arbitrator to be seen to act impartial, transparent and fair between the disputing parties. He should be aware of the guidelines set out in the case of *Roads Contractor Company matter*.⁴ As to the arbitrator's explanation that he 'was not aware who was on the other side [of the telephone line]'. This does not make sense either. He knew that he was speaking to the representative of the fourth respondent. It is to be noted that the arbitrator does not say that he spoke to someone else other than the representative of the fourth respondent. According to the applicant after the arbitrator finished with the telephone call, the arbitrator told him that he spoke to Sunday Mbandeka, 'the owner' of the fourth respondent and the latter told the arbitrator that they could not reinstate the applicant because they had already appointed somebody in his previous position.

[9] In my view, the applicant was reasonably justified to have harboured suspicion or to have felt aggrieved by the conduct of the arbitrator. It was improper for the arbitrator to have communicated with the fourth respondent's representative in the presence of the applicant in the language not understood by the applicant. Objectively viewed the arbitrator's conduct militates against the

⁴ 2011 (2) NR 707 (LC).

principle of transparency and raises a reasonable perception or suspicion about his impartiality and thus constitutes a gross irregularity. The arbitrator's conducts in this respect amounts to gross irregularity.

[10] According to the arbitrator (paragraph 10 of the award,) the applicant informed him that he was satisfied with the explanation provided and as a result the applicant abandoned his demand for recusal of the arbitrator. The arbitrator's explanation on this point is contradicted by the applicant in his supporting affidavit. According to the applicant, the arbitrator '*declined to withdraw from the meeting and ordered the proceedings to proceed*'. This is further borne out by the fact that the applicant is persisting with this ground in this application. It casts doubt on the veracity of the arbitrator's version set out by the arbitrator in the award. The arbitrator did not file an affidavit to dispute the applicant's version of events. I am thus bound to accept the applicant's version.

[11] The second ground for recusal was based on the fact that the applicant had received a call from the arbitrator informing him to collect a letter delivered to the arbitrator by a representative of the fourth respondent containing a settlement offer for payment of the sum of N\$25 000 and when the applicant refused to accept the offer contained in the letter, the arbitrator remarked that the applicant should know that '*he could get 50 or zero after the arbitration*'. The applicant's complaint in this respect is that the letter containing the offer should have been delivered to the applicant by the fourth respondent and not to the arbitrator. The applicant points out that he found it strange that the arbitrator dealt directly with the fourth respondent without him being present. The Applicant points out further that the fourth respondent did not respond to the sms message from the applicant concerning settlement offer from his side and that every sms he had sent to the fourth respondent's employee was copied to the arbitrator. The arbitrator must act in an impartial and transparent manner in dealing with the parties to the dispute. He cannot communicate with one party in the absence or to the exclusion of the other party to the dispute. I agree with the applicant that the arbitrator acted highly inappropriate to meet a party to the proceedings alone

in the absence of the other party; was highly inappropriate objectively viewed such conduct raises a reasonable perception of impartiality on the arbitrator's part and as such constitutes a gross irregularity.

[12] Furthermore, some of the remarks attributed to the arbitrator and not disputed clearly convey a sense of arbitrariness on the part of the arbitrator. How else can one understand the statement attributed to the arbitrator that the applicant could get '*50 or zero after the arbitration proceedings*'. In my view it demonstrates a degree of pre-judgment of the issues and further conveys a sense of capriciousness on the part of the arbitrator and thus constitutes a gross irregularity. According to the applicant, during the proceedings the arbitrator mentioned his previous experience in a matter he had arbitrated between a manager of a club and the board and how the manager lost his case. When the applicant questioned him about the relevance of such remark the arbitrator responded that he was just sharing information. This is clearly against the guide lines set out in the *Road Authority matter* above of which the arbitrator should be aware of and bound to abide by.

[13] According to the arbitrator even though the application for recusal was defective, he exercised his discretion and considered it. He should have realized that the applicant has lost trust and faith that he would receive a full and fair hearing from the arbitrator during the succeeding arbitration proceedings having regard to the applicant's complaint about the arbitrator's conduct during the conciliation proceedings. The arbitrator should have recused himself at that stage. I am satisfied on the facts of this matter that the applicant's case had not been fully and fairly determined by an impartial and open-minded arbitrator.

[14] I should point out that the name of the arbitrator who was the first respondent in the *Namura matter* is similar or identical to the name of the arbitrator in this matter. If the arbitrator in the *Namura matter* and this matter is the same person, then it raises a serious question about the sense of justice of such arbitrator; whether he is prepared to learn from his previous mistakes;

whether he is prepared to abide by the principles of natural justice and indeed whether he is fit and proper for the roll of an arbitrator. If these conducts persist, then the Labour Commissioner might have to consider deploying this arbitrator to the other areas in his office other than presiding over arbitration proceedings.

[15] It follows for all the reasons set out above and based on the authorities referred herein I have come to the conclusion that the arbitrator's conducts complained of by the applicant constituted gross irregularity within the meaning of the Act. The proceedings stand to be set aside.

[16] I accordingly make the following order:

1. The arbitration proceedings which took place on 10 September 2013 before Mr Philip Mwandingi under case number CRWK 442-13 including the award made by Mr Mwandingi on 19 September 2013 are hereby set aside.
2. The matter is referred back to the Labour Commissioner to be heard *de novo* before a different arbitrator.

ANGULA A.J

APPEARANCE

APPLICANT

IN PERSON

RESPONDENT
OFS NKIWANE
GOVERNMENT ATTORNEY