Celebrating 10 Years

SEENA

LEGAL CONSULT (PTY)LTD

ASSISTING THE BUSINESS OWNER

IN THIS EDITION

VOORWOORD

Seena 2008 – 2018

Ons tiende bestaansjaar is besig om vinnig tot 'n einde te kom. 2018 was weereens finansieel 'n moeilike jaar vir die meeste besighede in Namibië.

The big question is whether 2019 will prove to be the turning point for the Namibian Economy.

From Seena's point of view we are blessed that our Payroll product has grown substantially during 2018.

Ek wil vir al ons kliënte en in besonder die kliënte wat vir tien jaar 'n pad met Seena stap, 'n geseënde Kersfees en Voorspoedige 2019 toewens.

Happy Holidays!!!

JJ Barkhuizen

MANAGING DIRECTOR

Koos Barkhuizen bedank ons oudste Labour kliënt, Gerhard van der Merwe vir sy lojale ondersteuning sedert 2008.

OVERTIME ONLY TO BE WORKED IN ACCORDANCE WITH A CONTRACTUAL AGREEMENT AND GUIDELINES ON THE MANNER IN WHICH THE QUANTUM OF AN ARBITRATION AWARD IS TO BE DETERMINED

We are often asked the question as to how arbitrators go about in determining the quantum of an arbitration award. In the recent case of La Croix Sub Holdings (PTY) Ltd. t/a Truck & Cab v Alina N. Indombo N.O. & 2 others, Judge Parker sets out four factors that needs to be taken into account when determining the magnitude of an award, which may help in answering a question that can often be difficult to predict. Before discussing the aforementioned factors the merits of the matter warrants a brief discussion as it revolves around the subject matter of overtime and may proof useful to know.

On the first occasion two employees were instructed to fit tyres on a truck which would have required them to work overtime of approximately one hour. One employee stayed and performed the work, whilst the other left on completion of his ordinary working hours without explanation. Approximately two weeks later the same two employees were instructed to perform repair work to a truck, which would again have taken them into overtime hours. On this occasion both employees left on completion of their ordinary working hours without completing the assigned task.

During the disciplinary hearing that followed both employees were charges with:

(a) "refusing or failing to obey a lawful and reasonable instruction"; and

(b) "serious insubordination or disrespect".

Both were found guilty and their services were summarily terminated. The matter was referred to Arbitration, where the case was ruled in favour of the Employees. They were found to have been unfairly dismissed. It is against this ruling in its entirety that the employer has appealed to the Labour Court.

On evaluating the merits of the matter Judge Parker makes reference to both the common law and the provisions of section 17 of the Labour Act. Firstly the common law determines that an employee is obliged to obey any lawful instruction given to him. The emphasis is on "lawful", hence, according to

the Judge, an employees is under no obligation to obey *"every instruction imaginable"*. That bring us to the provisions of section 17 of the Act, which reads:

> *"(1) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee to work overtime except in accordance with an agreement, but, such an agreement must not require an employee to work more than 10 hours overtime a week, and in any case not more than three hours' overtime a day."*

Judge Parker interprets the above provisions to mean exactly what it says. In the absence of a contractual agreement to work overtime, any instruction by an employer to an employee to work overtime, under any circumstances, will be an illegality. As no evidence of the existence of such an agreement was proved it is ruled that the instruction given to the employees to work overtime was illegal. The employees were under no obligation to obey this unlawful instruction and therefor their dismissals are confirmed to have been fair.

As the arbitrator's award was appealed in its entirety the Judge now proceeds to consider the compensation order made by the Arbitrator. Although there is no mention made in the judgement of the magnitude of the award I can only assume that it was substantial. In evaluating the fairness of this award Judge Parker rules as follows:

> *"[14] Concerning the award of compensation, I find that the arbitrator was concerned unduly and unacceptably with the interests of respondents only and overlooked the interests of appellant. I would say that the arbitrator failed to take into account the tenet that the arbitrator in such cases should do justice to both appellant and respondents.*
>
> *Fairness must not be looked at from the position of respondents (employees) only. No rational and objective basis was put forth by the arbitrator to justify the amount of compensation she ordered. That being the case, this court is entitled to interfere with the decision of the arbitrator on the amount of compensation because her decision was not based on any principle or reason. Her decision is arbitrary."*

The Judge continues to identify four principles/factors that need to be taken into account when determining the quantum of any arbitration award. They are:

1. The award should not be aimed at punishing the Employer.
2. The extent to which the Employee's own conduct contributed to the dismissal. The judge emphasises this factor to be of critical importance. Applied to the merits of the matter, he rules that the employee's uncaring and disrespectful attitude at the time the instruction/s were communicated to them greatly contributed to their dismissals.
3. The length of service the employee had with the Employer prior to his/her dismissal. In this case the employees were employed for 19 years and 3 years respectively.
4. Whether or not the dismissed employee made any effort to mitigate his/her losses. No evidence of any such efforts were led in the matter at hand.

In applying the aforesaid criteria the Judge reduced the award. The Employee with 19 years of service was awarded compensation of 4 month's salary, whilst the other employee was awarded 3 months. Both employees are awarded severance payment in accordance with the provisions of section 35 of the Act, along with other terminal benefits that are not quantified.

Compiled by Nicky Smit

Case Ref: La Croix Sub Holdings (PTY) Ltd T/A Truck & Cab v Indombo N.O. (HC-MD-LAB-AOO-/0029) [2018] NALCMD 29 (30 October 2018)

MINIMUM WAGE FOR DOMESTIC WORKERS ADJUSTED

Effectively from 1 October 2018 the minimum wage for domestic workers has been increased to N$ 1 564.39 per month. This equates to:

Weekly Rate	N$ 361.29
Day Rate	N$ 72.25
Hourly Rate	N$ 9.03

Any domestic workers who works five hours or less per day, is entitled to a minimum payment of N$ 45.15 per day.

The normal stipulations of the Labour Act with regard to overtime work and work performed on Sundays and public holidays continues to apply.

For ease of reference:

OVERTIME RATE	
Per Hour Worked	N$ 13.55

SUNDAY/PUBLIC HOLIDAY RATE	
Per Hour Worked	N$ 18.06
Per Day	N$ 144.50

Employers are reminded that they have the option of either providing transport, alternatively are required to pay a transport allowance equivalent to the cost of a round trip on public transport as applicable to the area of residence. Employees who work in excess of 5 hours per day are also entitled to be provided with an adequate meal.

> *Please visit our website at www.seenalegal.com if you have missed any of our previous newsletters. You can also download labour related Acts, Regulations, Collective Agreements, Frameworks and Bills directly from this site.*

LEGAL REQUIREMENTS FOR A VALID PAY SLIP

Pay slips ensure that employees receive the correct pay and entitlements and allow employers to keep accurate and complete records. In terms of the Labour General Regulations: Labour Act, 2007, a written statement of particulars of monetary remuneration which must accompany payment of monetary remuneration to an employee, should contain the following information:

(a) the name and identity number of the employee;
(b) the name postal and business address of the employer;
(c) ordinary hourly, daily, weekly, fortnightly or monthly basic wage of employee of the employee;
(d) the period in respect of which payment of such basic wage is payable;
(e) the number of hours worked (by category) and the amount paid to the employee in respect of-
    (i) his or her basic wage;
    (ii) overtime;
    (iii) night work;
    (iv) work on Sundays;
    (v) work on public holidays; and
    (vi) any other remuneration or allowances;
(f) amount due for each part of remuneration in addition to basic wage (for example, pension contribution, medical insurance);
(g) the gross amount of remuneration payable to the employee;
(h) the particulars and amount of any deductions from the amount referred to in paragraph (g); and
(i) the nett amount of remuneration payable to the employee.

Furthermore, according to section 130 of the Labour Act, every employer must keep a record, current for the most recent five years, in the prescribed manner, containing the following information:

(a) the name, sex, age and occupation of each employee;
(b) the date on which each employee commenced employment;

(c) the date on which any contract of employment was terminated and the reasons for the termination;
(d) the remuneration payable to each employee;
(e) the remuneration paid to each employee;
(f) any period of absence, including annual leave, sick leave, compassionate leave or maternity leave, taken by an employee; and
(g) any other information that is prescribed or required by the Permanent Secretary in writing.

Every employer must also retain a record kept in terms of the above-mentioned for a period of five years after the termination of the employee concerned.

TRAINING COURSES FACILITATED AT YOUR COMPANY'S PREMISES

It's a familiar problem: you have employees who need training, but to send them all for a course in another town or at another premises may be impractical or financially prohibitive. Now there is a cost-effective alternative. You don't have to send your staff away for training – instead, we'll come to you.

SEENA Training's unique In-House Training service is ideal for companies and organisations who would like to invest in their employees by expanding their skills and knowledge but can't afford the additional costs associated with travelling.

If you choose this In-house option, a representative of SEENA's training team will conduct group training sessions (with a minimum of 5 and maximum of 15 delegates per day) at your company's premises. All you pay is SEENA's training fee. We will send a representative to your premises beforehand to ensure that your premises has an adequate venue (such as a boardroom) with tables, chairs and electrical ports for a projector. You are welcome to provide your employees with food and beverages during the day at your own expense.

Should you be interested please contact us for a booking. Our details are as follows:

Contact Person:	Sonja van der Merwe
Telephone:	061 309 260
Fax:	061 309 266
E-mail:	training@seenalegal.com

Your booking will only be confirmed once payment was received.

OUR TSUMEB OFFICE HAS MOVED

Our new address in Tsumeb is 419 Ndilimani Cultural Troupe Street (previously known as 3rd Street). As a result of the move, our Tsumeb office will be closed on the 29th and 30th of November 2018. Please call our call centre at (064) 462 117 if you have any queries during these 2 days or feel free to contact any of our other branches, the contact particulars of which you will find here below. We apologise for any inconvenience caused.

CONTACT US

Windhoek Office
Tel: (061) 309 260
Fax: (061) 309 266
Email: windhoek@seenalegal.com

Keetmanshoop Office
Tel: (063) 225 931
Fax: (063) 225 932
Email: keetmans@seenalegal.com

Otjiwarongo Office
Tel: (067) 304 915
Fax: (067) 304 809
Email: otjiwarongo@seenalegal.com

Swakopmund Office
Tel: (064) 416 100
Fax: (064) 461 000
Email: swakop@seenalegal.com

Tsumeb Office
Tel: (067) 222 900
Fax: (067) 222 500
Email: tsumeb@seenalegal.com