

NOT REPORTABLE

CASE NO: LCA 89/2009

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

ANDREAS SHANJENKA

APPELLANT

and

TRANSNAMIB HOLDINGS LIMITED

RESPONDENT

CORAM: HOFF, J

Heard on: 08 June 2012

Delivered on: 15 June 2012

Reasons on: 21 June 2012

LABOUR JUDGMENT

HOFF, J: [1] On 15 June 2012 this Court gave the following orders:

1. The finding by the arbitrator on 1 October 2009 that the conduct of the respondent did not amount to unfair labour practice is set aside.
2. It is found that the respondent's conduct amounted to an unfair labour practice.
3. The respondent is ordered to pay the appellant an amount of N\$427 535.00 as compensation on or before 30 June 2012.
4. The respondent is ordered to pay the amount of N\$46 954.10 in respect of pension fund contributions on or before the 30th of June 2012.
5. The appellant is ordered to pay the amount of N\$24 878.88 in respect of pension fund contributions on or before the 30th of June 2012.

These are the reasons.

[2] This is an appeal against an arbitration award in which the arbitrator found on 1 October 2009 that the conduct of respondent did not amount to an unfair labour practice and as a result therefore dismissed the applicant's case.

[3] This reward was made pursuant to evidence being presented to the arbitrator.

Background

[4] The appellant was employed by the respondent as Assistant Manager: Loss Control from 1998. During the year 2003 there was a restructuring and a change from the Peromnes to the Patterson grading system. The appellant was a P8 grade in terms of the Peromnes grading system. The position of the appellant was declared redundant and he was offered a position of Business Process Advisor which was ungraded and not on the structure of the respondent. This position in terms of the Patterson system was graded at C4 which was a non-managerial position. The appellant accepted this position since the alternative would have been retrenchment. Although the appellant regarded this as a demotion, his salary and other benefits remained unchanged. The appellant stated that he later realized that he was worse off than some of his colleagues who had retained their managerial positions. The respondent had over a number of years offered the appellant different non-managerial positions on the structure but those positions were not acceptable to the appellant. The appellant took his dissatisfaction to management in

different forms and later launched a grievance procedure. There was no satisfactory solution. The position held by the appellant had subsequently been downgraded to a C2 level.

[5] On 4 February 2009 the appellant referred the dispute to the Labour Commissioner in terms of section 82(7) for conciliation. On 13 February 2009 the Labour Commissioner designated an arbitrator in terms of section 85(5) of Act 11 of 2007 and the matter was heard on 9 September 2009. The appellant was unsuccessful. The arbitrator found that the conduct of the respondent did not amount to an unfair labour practice. The appellant appealed against this finding.

[6] On 23 March 2012 this Court heard an condonation application lodged by the respondent for its failure to file a notice to oppose the appeal and its failure to set out the grounds of opposition. The condonation application was successful and this Court gave the following order:

“That the Respondent/Applicant files the notice to oppose and the grounds of opposition not later than 30th of March 2012. This matter is postponed to 8 June 2012 for argument on the merits of the appeal.”

[7] Mr Kamanja who appeared on behalf of the respondent in the condonation application informed this Court on 8 June 2012 that the respondent had not complied with the afore-mentioned Court Order. He could provide no explanation for this failure and readily admitted his remissness. He nevertheless sought permission to address this Court on the merits of the appeal, a request which was refused.

[8] Rule 6(8) of the Rules of this Court provides as follows:

“A respondent who does not deliver a notice of his or her intention to oppose within the time referred to in subrule 5(b) is not entitled to take part in the proceedings except ...”

The exceptions referred to are not applicable.

[9] This Court then dealt with the appeal on an unopposed basis. The appellant appealed against the arbitrator’s award on the following grounds:

1. the arbitrator erred in law/and or on the facts by failing to conciliate the dispute in terms of section 86(5) of the Labour Act, Act 11 of 2007 read with section 82 of the Act;
2. the arbitrator erred in law and/or on the facts in failing to find that the appellant was demoted;
3. the arbitrator erred in law and/or on the facts by attaching undue weight to the fact that the appellant retained the salary and benefits he enjoyed before his demotion/the restructuring;
4. the arbitrator erred in law and/or on the facts by finding that the respondent did not make itself guilty of unfair labour practices;
5. the arbitrator erred in law and/or on the facts by finding that the respondent did not unilaterally alter the basic conditions of employment of the appellant ;
6. the arbitrator erred in law and/or on the facts by finding that the appellant did not

contravene section 50(1)(d) of the Labour Act, 11 of 2007 and its corresponding provisions of Labour Act, 6 of 1992.

[10] Regarding the first ground of appeal:

Section 82(9) provides that the Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute *must* refer the dispute to a conciliator to attempt to resolve the dispute through conciliation and in terms of section 82(15) a conciliator *must* issue a certificate if a dispute is unresolved.

[11] Section 85(6) provides as follows:

“Unless the dispute has already been conciliated, the arbitrator must resolve the dispute through conciliation *before* beginning the arbitration.”

(Emphasis provided).

[12] The word “must” used by the Legislature is an indication that afore-mentioned provisions are peremptory and that there must be a process of conciliation prior to any arbitration proceedings. Mr Nederlof who appeared on behalf of the respondent submitted that the failure by the arbitrator to attempt to resolve the dispute first through conciliation rendered the entire arbitration proceedings a nullity.

[13] Regarding the second ground of appeal, it is not disputed that the appellant was transferred from a managerial position to a non-managerial position with the resultant reduction in status.

[14] In respect of the third ground of appeal it appears from the record that after the transfer from managerial to non-managerial level the increases in respect of appellant's remuneration and other benefits were less than those afforded to employees at management level. The arbitrator found that since the appellant retained his salary and benefits it was difficult to conclude that what transpired constituted a unilateral change of the appellant's conditions of employment. If one has regard to the fact that the increases in remuneration and other benefits afforded to the appellant were not the same as that of employees on managerial level it should be clear that in effect there was a unilateral change in conditions of employment.

[15] Regarding the other grounds of appeal.

Section 50(1)(e) of Act 11 of 2007 provides as follows:

"It is an unfair labour practice for an employer or employers' organisation -
to unilaterally alter any term or condition of employment."

[16] The annual increase of an employee's remuneration is a term or condition of employment.

[17] In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* [1998] 6 BLLR 616 (LC) at 619 the Labour Court found that benefits to which an employee is entitled form part of an employee's terms and conditions of employment and expressed itself as follows as per Revelas J:

“Any variation to an employer’s salary, irrespective of whether it is increased or decreased, amounts to a change in the basic terms and conditions of employment and cannot be effected unilaterally. The use of a motor vehicle by an employee granted by the employer is in my view a *quid pro quo* for work rendered and is a form of remuneration. It is, in fact, part of the employee’s salary, albeit on a somewhat different basis. One can well imagine that the motor vehicle benefit scheme offered by the respondent was and still is a serious consideration for several prospective employees when deciding whether or not to take up employment with respondent company. Any changes to this benefit have the result that the employee’s salary or remuneration package is potentially or in fact affected. Therefore it constitutes a change to the employee’s terms and conditions of employment.”

[18] In *Labour Law in Namibia*, the author Collins Parker stated the following at 31 to 32:

“Thus, once a contract has been concluded, the terms it contains are fixed and is not up to a party to vary them unilaterally: a party may do so if the contract provides for variation. But even then a party may not vary the terms unilaterally unless such was the understanding and in respect of certain matters.”

[19] The appellant’s annual increases prior to the restructuring were done in accordance with and on exactly the same terms and conditions as other management employees.

[20] The appellant was transferred to a non-managerial position on the basis that all benefits afforded to him prior to his transfer would remain unchanged after the transfer. However after the transfer the appellant received annual increases in accordance with the policy adopted by the respondent for non-management employees. The motor vehicle allowance remained unchanged.

[21] In *Phahlane v University of the North* [1997] 4 BLLR 475 (CCMA) at 2481 E the Commissioner determined that:

“the unilateral withdrawal of a benefit which was already conferred on the employee has financially prejudiced himself and the travel allowance should thus be re-instated with retrospective effect ...”

[22] During the arbitration proceedings the *quantum* was not disputed by the respondent. The appellant testified that the difference in annual salary increases between the management employees and the non-management employees amounted to N\$427 535.00. In respect of pension fund contributions the amounts were N\$24 878.88 in respect of contributions by the appellant and N\$46 954.10 in respect of contributions by the respondent.

[23] My finding afore-mentioned is that the respondent did unilaterally change the terms and conditions of employment of the respondent. It follows that respondent contravened section 50(1)(e) of Act 11 of 2007 and consequently made itself guilty of an unfair labour practice.

HOFF, J

ON BEHALF OF THE APPELLANT:

MR NEDERLOF

Instructed by:

NEDERLOF INC.

ON BEHALF OF THE RESPONDENT:

MR KAMANJA

Instructed by:

SISA NAMANDJE & CO. INC.