REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-LAB-APP-AAA-2022/00031

In the matter between:

NEVILLE UANDARA	**1ST APPELLANT**
DORIS PEYA NANGOLO	**2ND APPELLANT**

and

WINDHOEK VOCATIONAL TRAINING CENTRE	**1ST RESPONDENT**
IMMANUEL HELAO HEITA N.O.	**2ND RESPONDENT**
THE OFFICE OF THE LABOUR COMMISSIONER	**3RD RESPONDENT**

Neutral citation: *Uandara & Another v Windhoek Vocational Training Centre & Others* (HC-MD-LAB-APP-AAA-2022/00031) [2022] NALCMD 79 (16 December 2022)

CORAM: SIBEYA J
HEARD: **28 OCTOBER 2022**
DELIVERED: **16 DECEMBER 2022**

Flynote: Labour law – Attachments and Appointments discussed – Appointments cannot be read into content of letters of attachments as it is foreign to the language and terms contained in the letters.

Labour law – Probation - The purpose of the probation is to evaluate a person's character and ability towards a desired result, suitable position, or permanent employment, etc.

Labour law – Appeal – Question of law – An enquiry into a factual finding of an arbitrator will only amount to a question of law where there is no evidence which could reasonably support the finding of fact. The test remains: did the arbitrator reach a decision that no reasonable decision maker could have reached?

Summary: The respondent advertised the positions of Centre Manager/Principal and Head of Liason, Marketing and Business Development in local newspapers, thus open to any qualified person to apply, with the closing dates for the applications being 26 and 31 May 2016 respectively. The appellants applied and together with others, they were invited for interviews. The appellants were interviewed for attachment to the said positions.

Both appellants were successful and were each attached to a mentor. The mentors of the appellants provided written reports that the appellants are suitable for employment in the positions that they were attached. However, the appellants were never appointed to the respective positions.

The appellants thereafter referred a complaint of unfair labour practice to the office of the Labour Commissioner for a determination whether they were appointed permanently in the positions they applied for or merely attached to be groomed.

The arbitrator in a nutshell held that the documentary evidence showed that the appellants were attached in order to be groomed to take over the positions and were not eventually appointed to such positions.

The appellants appeal against the said award.

Held that: The invitation letters of 2 and 4 August 2016, addressed to the appellants to attend the interviews are titled invitation to attend to an interview for an attachment. The body of the letters provide flesh to the heading and state that the

appellants are invited to attend an interview for attachment. The letters proceed to state that the said attachments will prepare the successful candidate to the positions once the incumbents' contracts expires.

Held further that: Nowhere in the said invitation letters did the respondent suggest that the appellants were invited for interviews for appointment to the concerned positions. To the contrary, the heading refers to attachment, and the body of the letters makes it plain that the interviews were for the successful candidates to be attached to the incumbents. Silence of the letters on appointments, cannot permit appointments be read into the content of such letters as it is foreign to the language and terms contained in the letters.

Held further that: The language by the respondent had always been attachment. It follows that the said probation was, linked to the period of attachment and not appointment.

Held further that: Our labour laws are insufficient when it comes to regulating appointments, promotions and demotions. A comparison to s 186 (2) of the South African Labour Relations Act No. 55 of 1996 reveals how the Legislators in South Africa broadened the definition of unfair labour practice to include unfair conduct regarding promotion, demotion, probation, training etc, and it may be time for our Legislator to equally consider broadening the definition of what constitutes unfair labour practice in order for our labour law to remain relevant.

ORDER

---

1. The respondent's late filing of the grounds of opposition is condoned.

2. The appellants' appeal against the award delivered by the arbitrator on 23 March 2022 is dismissed.

3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

Sibeya J:

Introduction

[1] The purpose of the probation is to evaluate a person's character and ability towards a desired result, suitable position, or permanent employment, etc. This is done by assessing performance and giving the person or employee reasonable assistance, training and guidance. The assessment allows consideration of matters of 'fit'– aspects of demeanour, diligence, compatibility and character.

[2] The determination on whether a probationary person or employee has attained the required standard, is in the case of an employee in the discretion of the employer based on reasonable grounds.

Parties and representation

[3] The first appellant is Neville Uandara, an adult male employee of the first respondent at Windhoek Vocational Training Centre. He shall be referred to as 'the first appellant'.

[4] The second appellant is Doris Peya Nangolo, an adult female employee of the first respondent at Windhoek Vocational Training Centre. She shall be referred to as 'the second appellant'.

[5] The first respondent is the Windhoek Vocational Training Centre situated at 11 Rooivalk Street, Khomasdal, Windhoek. The first respondent is the only respondent that opposed the appeal and it shall be referred to as 'the respondent'.

[6] Where reference is made to the first and second appellants jointly they shall be referred to as 'the appellants' and where reference is made to the appellants and the respondent jointly they shall be referred to as 'the parties'.

[7] The third respondent is Immanuel Helao Heita N. O. an adult male cited in these proceedings in his official capacity as the arbitrator in this matter duly appointed by the Labour Commissioner in terms of s 120 of the Labour Act 11 of 2007 ('the Labour Act').[1] His address of service is 32 Mercedes Street, Khomasdal, Windhoek. The second respondent shall be referred to as 'the arbitrator'.

[8] The third respondent is cited as the Office of the Labour Commissioner. The Office is not a legal persona nor does it have legal standing, resultantly, no regard will be heard to the third respondent as cited.

[9] The appellants are represented by Mr Tjitemisa, while Mr Walters represents the respondent.

Background

[10] The appellants, who are employees of the respondent, have been single-minded that they were appointed to positions of 'Head of Liason Marketing' (regarding the first appellant) and as Centre Manager (regarding the second appellant). The respondent's position is a different kettle of fish.

[11] The respondent advertised the positions of Centre Manager/Principal and Head of Liason, Marketing and Business Development in local newspapers, thus open to any qualified person to apply, with the closing dates for the applications being 26 and 31 May 2016 respectively. The appellants applied and together with others they were invited for interviews.

[1] Labour Act 11 of 2007.

[12] The respondent, in a letter of 4 August 2016 addressed to the first appellant, maintained that first appellant would just be attached to the Head of Liason Marketing, hereinafter referred to as 'the HOLM'.

[13] The said letter titled 'Invitation to an interview for an attachment to the Head of Liason and Marketing (HOLM)'s Office' provided that:

'You are hereby invited to attend an interview for your attachment to the office of the Head of Liason and marketing (HOLM) you are one of four staff members of WVTC to be invited to this honour.

This attachment will prepare the successful candidate for the position of Head of Liason (HOLM), once the current Head of Liason and Marketing (HOLM)'s contract expires. The successful candidate will be requested to work with management in serving WVTC.

The interview will take place at 10h00 on Friday, 5th August 2016 in the Management meeting room.

I would like to congratulate you on your selection for this interview and trust you shall accept this opportunity to showcase your talent.

Yours sincerely,

Mr PM Haukongo

Principal/Centre Manager'

[14] In view of the significance of the invitation letters, I consider it prudent to further quote the content of the letter dated 2 August 2016 which was addressed to the second appellant inviting her to an interview for attachment to the Centre Manager's office where it was stated that:

'You are hereby invited to attend an interview for your attachment to the office of the Centre Manage. You are one of three (3) staff members of WVTC to be invited to this honour.

This attachment will prepare the successful candidate for the position of Centre Manager, once the current Centre Manager's contract expires. The successful candidate will be requested to work with management in serving WVTC.

The interview will take place at 10h00 on Wednesday, 3 August 2016 in the Management meeting room.

I would like to congratulate you on your selection for this interview and trust you shall accept this opportunity to showcase your talents.

Yours sincerely,

Mr PM Haukongo

Principal/Centre Manager'

[15] Both appellants were successful and were each attached to a mentor, namely P. M. Haukongo, the Centre Manager/Principal and Mr Niklaas M. Mberirua, the Head Liason Department Marketing and Business Development. The appellants were subjected to probation for a period of one (1) year.

[16] In a letter dated 10 August 2016, addressed to the second appellant regarding the outcome of the interviews, it provides, *inter alia*, that:

'OUTCOME OF INTERVIEW FOR ATTACHMENT TO THE CENTRE MANAGER AT WVTC

It gives me great pleasure to inform you that you have been the successful candidate for the attachment to the office of the Centre Manager of WVTC. Your starting date is 1st September 2016 and you will be attached on probation up to 31st August 2017…

Your attachment allowance is N$ 4 500-00 (Four Thousand Five Hundred Namibia Dollars) per month. This will be payable as from the end of September 2016.'

[17] On 24 October 2017 and 25 September 2017 respectively, the mentors of the appellants provided written reports that the appellants are suitable for employment in the positions that they were attached. No further evaluations were conducted.

[18] The appellants continued to occupy the positions for a further period of five months after the expiry of the probation period. They later received letters dated 31 January 2018 that their mentorship will be extended for a period of five months up to 30 June 2018.

[19] The appellants thereafter referred a complaint of unfair labour practice to the office of the Labour Commissioner for a determination whether they were appointed permanently in the positions they applied for or merely attached to be groomed.

[20] After hearing evidence and submissions at arbitration, the arbitrator delivered the award on 23 March 2022, where he found, *inter alia*, that:

(a) The appellants were attached on probation;

(b) The letters dated 10 August 2018 received by the appellants are not appointments letters but attachment letters to the concerned positions for a period of one year;

(c) The documentary evidence showed that the appellants were attached in order to be groomed to take over the positions and were not eventually appointed to such positions;

(d) The terms and conditions of employment were not unilaterally changed by the respondent when they were removed from the concerned positions;

(e) The appellants' claim of unfair labour practice was baseless.

[21] The appellants appeal against the said award, which is now the live issue before this court.

[22] The appellants raised a plethora of grounds of appeal which when stripped to the bare bone constitute the following:

(a) That the arbitrator erred when he disregarded the appellants' testimony that the positions were advertised externally where the appellants were successfully appointed on probation in the said positions and not merely attached;

(b) That the arbitrator erred when he found that the respondent did not unilaterally amend the appellants' employment terms and conditions and therefore did not act unfairly.

[23] The respondent's statement of grounds for opposing the appeal in terms of rule 17(16)*(b)* was filed a day late. Mr Tjitemisa took issue with the said delay. After hearing arguments, I condoned the one day late filing of the respondent's statement of opposing the appeal particularly as no prejudice suffered was demonstrated by the appellants.

[24] In the statement of opposition, the respondent contend that the appellants were never hired in the concerned positions but were merely attached and that no evidence was led that the appellants were appointed to the positions. It was further contended that the appellants were attached on probation with a possibility of appointment, but attachment does not constitute appointment.

Relevant legal principles

[25] Section 89(1)*(a)* of the Act set out the jurisdictional parameters of the Labour Court sitting as a court of appeal. It provides that:

'A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, …
(a) on any question of law alone;

[26] The Supreme Court in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd,*[2] said the following regarding the interpretation of rule 89(1)*(a)*:

'[42] … In interpreting rule 89(1)(a), therefore, it is important to bear in mind both the legislative goal of the speedy and inexpensive resolution of labour disputes, as well as the constitutional values of the rule of law and justice for all.

[2] *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* (SA 33/2013) [2016] NASC 3 (11 April 2016).

[43] I now turn to the language of s 89(1)*(a)*. First and foremost, it is clear that by limiting the Labour Court's appellate jurisdiction to 'a question of law alone', the provision reserves the determination of questions of fact for the arbitration process. A question such as 'did Mr Janse van Rensburg enter Runway 11 without visually checking it was clear' is, in the first place, a question of fact and not a question of law. If the arbitrator reaches a conclusion on the record before him or her and the conclusion is one that a reasonable arbitrator could have reached on the record, it is, to employ the language used in the United Kingdom, not perverse on the record[3] and may not be the subject of an appeal to the Labour Court.

[44] If, however, the arbitrator reaches an interpretation of fact that is perverse, then confidence in the lawful and fair determination of employment disputes would be imperilled if it could not be corrected on appeal. Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review. It is this principle that the court in *Rumingo* endorsed,[4] and it echoes the approach adopted by appellate courts in many different jurisdictions.

[45] It should be emphasised, however, that when faced with an appeal against a decision that is asserted to be perverse, an appellate court should be assiduous to avoid interfering with the decision for the reason that on the facts it would have reached a different decision on the record. That is not open to the appellate court. The test is exacting – is the decision that the arbitrator has reached one that no reasonable decision-maker could have reached…

[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

---

[3] The word 'perversely' was used by Lord Brightman in *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484 (HL) 518 where he said: 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body, and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely'. See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29, per Viscount Simmonds, a court will intervene where a decision maker 'has acted without any evidence or upon a view of the facts which could not reasonably have been entertained'. This approach is similar to the approach adopted in *Yeboah. v Crofton [*2002] EWCA Civ 794 in the context of employment appeals. See n 17 above.

[4] See above paras [37] – [41].

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.'

[27] It is apparent from the above quotation that there is no carte blanche for the appeal court in labour matters to interfere with the findings of the arbitrator. To the contrary, the powers of the Labour Court on appeal are circumscribed in s 89 (1) *(a)* of the Act. The fact that the Labour Court, on the evidence presented to the arbitrator, would have found differently is no authority for the Labour Court to set aside the finding of the arbitrator and substitute same with its own. It is only when the finding of the arbitrator is not reasonably supported by the evidence or where the analysis of evidence leads to an inescapable result that no reasonable arbitrator would have made such a finding, that the Labour Court will then be clothed with the authority to interfere.

[28] The appellants' complaint is one of unfair labour practice. Can it be said that the respondent's conduct towards the appellants falls under unfair labour practice as prescribed in the Act? Or could a reasonable arbitrator had, on the evidence, dismissed the appellants' complaint of unfair labour practice?

[29] Unfair labour practice is provided for in s 50 of the Act and the relevant provision thereof is s 50(1)*(e)* which states that:

> '50 (1) It is unfair labour practice for an employer or an employer's organization – …
> (e) to unilaterally alter any term or condition of employment;'

[30] The question to be determined is whether the appellants were appointed as HOLM and Centre Manager respectively and, therefore, by subjecting them to attachment constituted unilateral alteration of their terms and conditions of employment thus resulting in unfair labour practice. Or were the appellants never appointed or employed in the concerned positions?

Appellants' case and argument

[31] It was the appellants' case that they were appointed to the positions of HOLM and Centre Manager respectively.

[32] Mr Tjitemisa argued that the appellants were appointed in the respective positions and the respondent wanted to discard the said appointments and unilaterally move the appellants to lower ranks, thus resulting in unilateral alteration of the appellants' positions.

[33] Mr Tjitemisa emphasised that the appellants were appointed to the said positions on 10 August 2016 subject to probation for a period of one (1) year and they were found to be suitable for the positions after written evaluation. The respondent, therefore, it was argued, had no authority to unilaterally change terms and conditions of employment of the appellants and subject them to attachments and further probation.

Respondent's case and argument

[34] It is the respondent's case that the evidence led before the arbitrator supports the finding made by the arbitrator and such finding is one that every reasonable arbitrator similarly placed would have made.

[35] Mr Walters argued that the appellants failed to produce evidence to prove that they were appointed in the said positions. He argued further that the arbitrator cannot be faulted for concluding, based on the evidence, that the appellants were full-time employees of the respondent in the positions of Senior Instructor: Brick Layering and Plastering and Head of Training respectively. Subjecting them to extension of the probation period of attachment cannot be said to constitute unilateral alteration of the terms and conditions of their employment.

[36] Mr Walters further argued that the appellants' attachments were additions to their employment and not separate standing appointments.

Analysis

[37] At the outset it should be made clear to all that at arbitration proceedings, the parties who were represented by legal practitioners agreed, in terms of rule 20(2) of

the Rules relating to the Conduct of Conciliation and Arbitration, and in order to shorten the proceedings before the arbitrator, on, *inter alia*, that:

'… (d) Both Applicants were successful in their respective interviews and were appointed to the positions on 10th August 2016. The appointments were subject to probationary periods of one (1) year each from 01st September 2016 to 31st August 2017…

(e) Both parties were thereafter attached to a mentor…

(f) During the probationary periods and attachment both Applicants were subjected to evaluations to ascertain whether they have the abilities to do the jobs as required and also to ascertain whether they are suitable candidates for the jobs in the wider sense.

(g) At the end of their probationary periods their mentors reported in writing on 24 October 2017 and 25 September 2017 respectively, that the Applicants are suitable for permanent employment…

(h) No further evaluation processes were conducted and the Applicants continuously occupied those positions for further five (5) months after the expiration of the probation period until 31st January 2018 when they received letters that their mentorship (probation) periods will be extended with five (5) months up to 30 June 2018.'

[38] The rule 20 (2) agreement proceeded to set out the areas of dispute as required by the rule. The parties listed the following facts in dispute between them:

'**FACTS THAT ARE IN DISPIPUTE**

(a) <u>The Applicant's case</u>

That their permanent employment has been confirmed after the expiration of their probation period.

(b) <u>The Respondent's case</u>

That the applicants were never permanently employed in the positions of Centre Manager/Principal and Head of Liaison, marketing and Business Development respectively.'

[39] A closer assessment of the rule 20(2) agreement reveals that some of the facts agreed to between the parties overlap with the facts that are in dispute. For instance, it is recorded that the parties agreed that after being successful in their

interviews the applicants (presently appellants) were appointed to the positions on 10th August 2016 subject to the probationary periods of one (1) year each from 01st September 2016 to 31st August 2017. Under facts in dispute the parties recorded that the respondent contends that the applicants were never permanently employed in the said positions while the applicants contended that their permanent employment was confirmed after the expiration of the probationary period.

[40] The rule 20(2) agreement constitute a vital part of labour proceedings. Parties are called upon to approach the engagement provided for in rule 20(2) objectively with the aim to curtail the proceedings. Parties are expected to be well-vested with their respective cases and be able to dissect from the case, the issues that are not in dispute and thus agreed to and the issues that are in dispute. The issues should thereafter be unambiguously recorded for those concerned to see and appreciate. Arbitrators and courts should not be left in the dark or sent on a wild goose chase, so to speak, on a fact finding mission on an aspect that is not dispute between the parties.

[41] Similarly, the arbitrators and courts should not be burdened with second-guessing whether a particular issue is in dispute between the parties or not. The parties have a duty to assist the arbitrators and the courts to identify agreed facts and facts in dispute for the arbitrators and the courts to retain their functions to optimally utilise their limited time to resolve real disputes. Where a rule 20(2) agreement contains conflicting statements, namely where agreed facts are also listed directly or indirectly as disputed facts, such rule 20(2) agreement abandons, not only its texture but its value and may be akin to irrelevancy on the material issues and if the whole agreement is tainted it may be regarded as *pro non scripto*.

[42] In my view, the parties, in the rule 20(2) agreement *in casu*, spoke in a forked tongue. At first the parties attempt to set out agreed facts only to somersault later and in essence label the agreed facts as facts in dispute. This renders the rule 20(2) agreement a waste of time and energy. Accordingly, nothing, in my view, turns on the rule 20(2) agreement between the parties.

[43] At arbitration, the appellants led the evidence of a sole witness, Mr Niklaas M. Mberirua who testified that he is a 65-year-old pensioner. He said that he was employed by the respondent until his retirement in August 2019, occupying the position of Head of Laison and Marketing.

[44] Mr Mberirua testified further that since his retirement was looming, his position was externally advertised in May 2016 for replacement. He said the aim for the advertisement was not for attachment but for someone to fill the position. The first appellant was successful and was appointed to the position subject to probation for one (1) year. He said further that a potential employee is not attached to an externally advertised position, but is appointed subject to a certain period of probation. He stated that he was the mentor to the first appellant. First appellant was not full time with Mr Mberirua and in Mr Mberirua's words "Actually either way he was recommended to me, he was not full time there, but he came in and out partly."

[45] Mr Mberirua found the first appellant to be suitable for permanent appointment as a result he made recommendations to the Centre Manager accordingly.

[46] When asked whether the first appellant was appointed to the position of HOLM, Mr Mberirua responded that "He was not officially appointed, but he was recommended to work under me. But the letter which was utilised there, it said he was the successful candidate."

[47] The respondent called no witness.

[48] The letters of invite dated 2 and 4 August 2016, respectively, and quoted hereinabove, addressed to the appellants to attend the interviews are titled invitation to an interview for an attachment to the HOLM and Centre manager's office. The introductory content of the said letters make it plain that they are invitations to attend interviews for attachment to the positions. The invitation letters further provide that the attachment will prepare the successful candidate for the positions once the incumbents' contracts expire.

[49] Subsequent to the interviews the appellants received letters dated 10 August 2016 informing them that they were successful. A copy of the latter of 10 August

2016 addressed to the second appellant forms part of the record while I could not locate a copy of a similar letter addressed to the first appellant, despite a diligent search. It is common cause between the parties that the letter received by the second appellant is similarly worded to that of the first appellant. The letter to the first appellant was further read into the record by Mr Mberirua and no dispute between the parties arose on the said content. This give me comfort to produce the content of the letter addressed to the first appellant in this judgment as read out by Mr Mberirua as follows:

'Dear Uandara, the outcome of the interview for attachment to the Head of Liaison, Marketing and Business Development at WVTC…
It gives me pleasure to inform you that you have been the successful candidate for the attachment at the, to the Head of Liaison, Marketing and Business Development of WVTC. Your starting date is 1st September 2016 and you will be attached on probation up to 31st August 2017. Your attachment allowance is three thousand five hundred Namibian dollars (N$3 500.00) per month. This will be payable from the end of September 2016.'

[50] It is clear from the evidence and copies of the adverts that the concerned positions were advertised externally in the local newspapers. This much is also common cause between the parties. The appellants were amongst the candidates that were shortlisted for the said positions.

[51] The invitation letters of 2 and 4 August 2016 addressed to the appellants to attend the interviews are titled invitation to attend to an interview for an attachment. The body of the letters provide flesh to the heading and state unambiguously that the appellants are invited to attend an interview for attachment. The letters proceed to state that the said attachments will prepare the successful candidate to the positions once the incumbents' contracts expire.

[52] Nowhere in the said invitation letters did the respondent suggest that the appellants were invited for interviews for appointment to the concerned positions. To the contrary, the heading refers to attachment, and the body of the letters makes it plain that the interviews were for the successful candidate to be attached to the incumbents.

[53] After the interviews of the candidates, the appellants were provided with letters dated 10 August 2016. The said letters are titled outcome of interview for attachment. Similar to the invitation letters, the respondent informed the appellants, in the said letters, that they were the successful candidates for the attachment. The letters proceed to state that the starting date is 1st September 2016 on probation until 31st August 2017. The said letters further provide for the attachment allowance to the appellants.

[54] The content of the aforesaid letters on the outcome of the interviews of the appellants demonstrate consistent language by the respondent used also in the invitation letters, that the appellants were interviewed for attachment to the concerned positions. Again, nowhere in the letters of 10 August 2016, did the respondent refer to the candidates being appointed, or employed in the substantive positions advertised, or at the very least suggest that the appellants were so appointed. To the contrary, the language by the respondent had always been attachment.

[55] What worsens the position of the appellants is the fact that they claim to have been appointed with the letters of 10 August 2016. The said letters do not speak of appointment of the appellants. Even if one does not intend to accept the silence of such letters on appointments, as excluding appointments, appointments cannot be read into content of such letters as it is foreign to the language and terms contained in the letters.

[56] To the further demise of the appellants, the 10 August 2016 letters, provide for appellants to receive attachment allowances. The appellants do not challenge the provision of attachment allowances in the said letters. One wonders how the appellants claim to have been appointed substantively while receiving attachment allowances for the positions they claim to have been so substantively appointed. In my view, the provision for payment of attachment allowances cements the respondent’s case that the appellants were on attachment and not substantive appointment to the concerned positions.

[57] It is an established fact that the appellants were on probation for a period of 12 months and more while being mentored by the incumbents in the positions

applied for. The terms and conditions of such mentorship is contained in the letters of 10 August 2016 discussed above. It follows that the said probation was, in my view, linked to the period of attachment and not appointment.

[58] The interpretation of the letters of 10 August 2016, suggested by Mr Mberirua in his testimony is of little assistance. The said letters are constituted by their content which is open to all to examine, the court being no exception. Mr Mberirua was not convincing in his interpretation of the content of the said letters but as stated earlier the said content is clear to the court and it is that the letters provides for the attachment of the appellants not appointments as Mr Mberirua at one stage appeared to claim.

[59] Mr Tjitemisa referred the court to a judgment from Uganda of *Mbonyi Julius v Appliance World Limited,*[5] where the Industrial Court remarked as follows regarding probation:

'The probationary period of the claimant was therefore expected by both parties to end on 15/09/2015 unless it was extended in accordance with Section 67(2) of the Employment Act as above mentioned. In the case of M/s. Akello Beatrice vs World Vision Uganda, HCCS No. 072/2007 where the plaintiff had been placed at a 3 months' probationary period, His Lordship Remmy Kasule, (High Court Judge, as he then was) held:

"The above stipulation, in the considered view of this court, places upon the defendant an obligation to expressly inform the plaintiff, after the three months' probation period had expired, that his performance was not satisfactory and his probation period was being extended for another period and find out from her whether or not she agreed to the extension. In the absence of that express communication, the plaintiff was entitled to assume, and to carry on her duties on the assumption that after the expiry of the three months' probationary period, she was now a regular, full time, employee subjected, like all other confirmed employees to annual performance reviews…."

Unless the probationary period is extended in accordance with the Section of the law above mentioned, an employee is presumed confirmed in appointment. This means that such employee will begin to enjoy benefits and privileges accorded to an employee under the

[5] *Mbonyi Julius v Appliance World Limited* (Labour Dispute Reference 103 of 2016) [2021] UGIC 10 (16 April 2021) p. 4 – 5.

Employment Act and such benefits include termination of employment only and only after due process of the law.'

[60] Sound as the principle laid out by the Industrial Court of Uganda is in relation to probation, it is set out at the backdrop of section 67 of the Ugandan Employment Act which provides for a maximum period of probation of six months which may be extended for a further period of not more than six months with the agreement of the employee. Our Labour laws contain no similar provision and, therefore, renders the above interpretation and principle set out in the *Mbonyi* matter irrelevant to the matter under consideration.

[61] As I come close to the finishing line of this judgment, I consider it prudent to lay bare that our labour laws are insufficient when it comes to regulating appointments, promotions and demotions. A comparison to s 186(2) of the South African Labour Relations Act No. 55 of 1996 reveals how the Legislators in South Africa broadened the definition of unfair labour practice which includes unfair conduct regarding promotion, demotion, probation, training etc.[6] It may be time for our Legislator to consider equally broadening the definition of what constitutes unfair labour practice if our labour laws are to remain relevant in the wider sphere of the labour industry.

Conclusion

[62] In the view of the foregoing findings and conclusions made, I hold the view that the appellants failed to establish that the arbitrator erred in law to the extent that the award should be set aside. I find that any reasonable person similarly placed as the arbitrator would not rule differently compared to the arbitrator.

[63] In the premises, the appeal against the arbitration award falls to be dismissed.

Costs

[64] Section 118 of the Labour Act provides that no order for costs would be issued by the Labour Court in labour matters, save where the institution, defence or

[6] See also: *Department of Justice c CCMA* [2004] 4 BLLR 297 (LAC) para 58.

further pursuit of proceedings is either frivolous or vexatious. In my view, the institution and prosecution of these proceedings are not frivolous or vexatious. I will, therefore, not make an order as to costs as guided by s 118 of the Act.

Order

[65] I find that the following order meets the justice of this matter:

1. The respondent's late filing of the grounds of opposition is condoned.

2. The appellants' appeal against the award delivered by the arbitrator on 23 March 2022 is dismissed.

3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

_____

O S Sibeya

Judge

APPEARANCE:

FOR THE APPELLANTS: J Tjitemisa
Tjitemisa & Associates
Windhoek

FOR THE 1ST RESPONENT: Walters
Adv. S. S. Makando Chambers
Windhoek