HS CONTRACTORS versus ABEL VIHANGA

CASE NO. LCA 18/98

Silungwe. J. 2000.05.09

LABOUR LAW -- Procedural steps to be taken when employer intends to terminate contract of employment in terms of s.50(1) of the Labour Act No. 6 of 1992 - Purpose of notice to accord employee/trade union opportunity to negotiate conditions on which, and curcumstances under which, termination is to take place so as to minimise or avert adverse effects on employee - negotiations must be genuine - must precede termination.

LABOUR LAW -- damages - can only be founded on evidence, not on submissions, however forceful they may be.

LABOUR LAW - Whether a respondent can properly be convicted by a District Labour Court for a contravention of s.50 of the Act - s.19 of the Act does not confer criminal jurisdiction on the District Labour Court -To prefer a criminal charge in terms of s.50(2) of the Act, provisions of s.84(1) of the Criminal Procedure Act must be complied with.

CASE NO. LCA 18/98

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

H.S. CONTRACTORS APPELLANT

and

ABEL VI HANG A RESPONDENT

CORAM: SILUNGWE, PRESIDENT

Heard on: 1999.05.03

Delivered on: 1999.07.30

JUDGMENT:

SILUNGWE, J., PRESIDENT: This is an appeal against the entire judgment of the District Labour Court delivered on August 28, 1997, wherein the appellant was found liable and convicted of contravening section 50(2) of the Labour Act, Act No. 6 of 1992 (hereafter referred to as the Act); he was then sentenced to a fine of NS3,000.00 or 7 months imprisonment and ordered to pay the sum of NS12,150.00 to the respondent "as full and final settlement of all the legal issues" between the parties.

Mr Mouton appears for the appellant but there is no appearance by the respondent or his representative. The respondent has hitherto been represented by his trade union - the Namibia Workers Union (hereafter referred to as NATAU) and there is proof that NATAU was served

with the notice of hearing through registered mail on February 9, 1999 and that on April 19, 1999, the appellant's Heads of Argument were served on NATAU and signed for by its representative. The service is supported by the appellant's affidavit. I am satisfied that there has been proper service and that the appellant is, therefore, entitled to be heard, notwithstanding the non-appearance of the respondent or his representative.

The circumstances that gave rise to this matter may shortly be stated. The appellant is a company responsible for testing and evaluating certain new vehicles prior to their release on the market. At the material time, the appellant had under its employment a total of 27 test drivers, including the respondent.

On November 2, 1996, the appellant decided at a Board meeting to retrench 7 test drivers, inclusive of the respondent (allegedly on the basis of a recession in its business). All these drivers were members of NATAU. On November 20, 1996, the appellant sent a notice (letter) of retrenchment to the Labour Commissioner a copy of which was served on NATAU. On November 22, the appellant sent a letter to the respondent notifying him of the retrenchment. This letter was copied to the Labour Commissioner as well as to NATAU c/o Mr Onesmus (who was the NATAU's acting General Secretary and who represented the respondent, on behalf of NATAU, at the hearing of the matter in the Court *a quo).* That letter read:

"'Dear Mr Vihanga

Although a new contract for test vehicles has been obtained, you are most probably aware that the number of vehicles that are currently given to us for testing, has been reduced substantiously. Due to this fact it has left me with no other alternative but to reduce the number of test drivers with its contractors. The task to choose whom to retrench was extremely difficult for me and it is with great regret that I have to inform you that you were one of seven drivers that will be retrenched on Monday, the 25"' of November 1996. All leave, shift monies

and other remuneration due to you will be paid on that date. The retrenchment is being done according to the stipulations as prescribed in the Labour Act. I have also informed the Labour Commissioner as well as Mr Onesmus from NATAU about our decision.

Should we be able to again obtain more vehicles in the future then (sic) we will firstly enquire from any of you if you will be available to join our employ again.

Trusting that you understand my difficult position. I remain

Yours faithfully HSTAHN

p.p. HS CONTRACTORS"

On November 25, 1996, the respondent was duly retrenched. On December 2, 1996, a scheduled meeting at which the merits of retrenchment were to be discussed failed to materialise. On December 12, and apparently ignorant of what had transpired, the Labour Commissioner advised the appellant by letter to act in conformity with the Labour Act and so also did NATAU (on the same date). It is not in dispute that subsequent attempts by the appellant aimed at discussing the retrenchment all came to nothing. Also not in dispute is the fact that, on November 26, 1996, the appellant was paid his salary for two months, that is to say, for November and December 1996.

On these facts, the chairperson of the District Labour Court found, and properly so, in my view, that the issues raised by the case revolved around the provisions of section 50 of the Labour Act. In Mr Mouton's submission, the purpose of this section is to bring the employer and the employee's representatives to the negotiation table when the former intends to terminate the employee's contract of employment. The chairperson held that it is not the language of section 50 that the employer first terminates the contract of employment and thereafter seeks to have negotiations concerning such termination. He found that the

respondent "had no chance to even raise an argument as to how adversely the intended termination was going to affect him." He, therefore, came to the conclusion that the respondent's retrenchment was a violation of section 50(l)(a) of the Act in that the appellant had failed to accord reasonable time to allow for an amicable settlement of issues surrounding the termination of the respondent's contract of employment.

This appeal is premised on the following questions:

(1) were the provisions of section 50 of the Act complied with?

(2) was the compensation awarded to the respondent justified? and

(c) was the conviction (not to mention the sentence) competent?

Mr Mouton's reaction is that the answer to the first question is in the affirmative but that the other questions deserve to be answered in the negative. As against (a), it is argued that the learned chairperson erred in finding that the appellant had failed to comply with the 4 weeks notification as provided for in section 50 of the Act because, although the respondent was retrenched on November 25, 1996, the appellant paid him his salary for 2 months which must be regarded as sufficient notification in terms of sections 47 and 50 of the Act as such notice pay period can be regarded as due notice in compliance with section 50. In support of this argument, he cites *African Granite Co (Pty) Ltd* v *Mineworkers Union of Namibia & Others* (1993) 14 ILJ 6996 (LCN).

First of all, it will be observed that section 47 of the Act relates to termination of contracts of employment by notice and this must be the reason why the *African Granite* case finds its way into Mr Mouton's submission. We are here not concerned with termination of contracts by

notice where payment of remuneration in lieu of such notice suffices. This is not such a case, as the learned chairperson founded his decision of liability on section 50, without any mention of section 47. This aspect of the submission is thus ill-founded.

Mr Mouton attempts to show that, as the respondent was paid remuneration up to December 31, 1996, that date is the effective date upon which the retrenchment took effect. But this is no more than clutching at a straw for it is indisputable, on the facts, that the effective date of the respondent's retrenchment was November 25, 1996.

Mr Mouton takes the position that, having regard to the fact that the first meeting between the appellant and NATAU scheduled for December 2, 1996, failed as a result of NATAU's non-attendance, there is, as in the case with an employer, also a duty upon employees and/or their representatives, as well as an obligation, to negotiate in good faith and/or to initiate consultations. This is reminiscent of Mr van Rooyen's submission, on behalf of the appellant, in the Court *a quo* as reflected at page 14 of the record of appeal which is to the following effect:

> The notice was given from November to December 1996. We attempted to have meetings to discuss the conditions of the retrenchment but the Union representative could not attend.

Whilst it is correct to say that both sides, in circumstances pertaining to retrenchment, are required to enter into genuine negotiations, such negotiations must fall within the purview of section 50(1)(a) of the Act, that is to say that the negotiations are designed to, and must, precede the terminations.

It is expedient to look at section 50 which provides that -

"50(1) Any employer who intends to terminate any or all of the contracts of employment of his or her employees on account of the re-organisation or transfer of the business carried on by such employer or to discontinue or reduce such business for economic or technological reasons, such employer shall -

(a) inform -

(i) The registered trade union recognised by him or her as an exclusive bargaining agent in respect of such employees; or

(ii) if no such trade union exists, the workplace union representative elected in terms of section 65,

on a date later than four weeks before such contracts of employment are so terminated or such other period as may in the circumstances be practicable, of his or her intentions, the reasons therefor, the number and categories of employees to be affected by such intended termination and the date on which or the period over which such terminations are to be carried out;

(b) afford such trade union, workplace union representative or the employees concerned an opportunity to negotiate on behalf of such employee or employees the conditions on which and the circumstances under which such terminations ought to take place

with a view to minimizing or averting any adverse effects on such employees;

(c) notify the Commissioner in writing of his or her intentions and the reasons therefor, the number and categories of employees to be affected by such intended termination and the date on which or the period over which such terminations are to be carried out;

(2) …"

On a proper interpretation of section 50(1), it is evident that once an employer intends to terminate contracts of employment for any of the reasons envisaged by the subsection, and takes a decision to that effect, the employer is duty-bound to observe the following steps:

(1) to communicate such intention and the reasons for it to the registered trade union recognised by the employees to be affected by the intended terminations, or the workplace union representative, as the case may be, at least four weeks prior to the terminations of such contracts, "or such other period as may in the circumstances be practicable." Also to be communicated are the number and categories of the affected employees and the date on, or the period over, which such terminations are to take effect;

(3) to notify the Labour Commission in writing of the text of (a) above; and

(4) to give such trade unions, workplace union representative or the employees concerned an opportunity to negotiate the conditions on, and the circumstances under, which such terminations ought to take place in order to minimize or avert any adverse effects on such employees.

The sole reason for the period of notice reflected under (1) above is to accord an opportunity for negotiations, if any, to be embarked upon in connection with the conditions on, and the

circumstances under, which the terminations ought to take for the purpose of minimizing or averting any adverse effects upon the affected employees. Surely, the clear intention of the legislature is that such opportunity ought to be accorded prior to (not after) the date or period upon which the terminations are to take effect.

In this matter, the effective date of the respondent's termination of contract of employment was November 25, 1996. It is common cause that although the appellant took a decision on November 2, 1996, to terminate *(inter alia)* the respondent's contract of employment with effect from Monday November 25, 1996, that decision was not communicated to NATAU and the respondent until Wednesday the 20th and Friday the 22nd of that month, respectively, which in effect gave two working days notice to NATAU but no working days notice was accorded to the respondent for purpose of negotiations. This, in my view, amounted to a denial of opportunity to negotiate and was, therefore, a fragrant disregard of the provisions of section 50(1) of the Act. It

follows that the argument advanced in this connection must be rejected. See also a decision of the Full Bench in *Carl Martinus Visagie v Namibia Development Corporations* Case No. FA 8/97.

Having thus disposed of question (a), I will now turn to question (b), namely, was the compensation awarded to the respondent justified?

It will be recalled that the sum of NS12,150.00 was awarded against the appellant "as full and final settlement of all the legal issues between the parties." Attacking this award, Mr Mouton submits that it was arbitrary as no supporting evidence was presented before the Court *a quo* on the matter.

An examination of the record of appeal reveals (at page 22) that Mr Onesmus, who represented the respondent before the Court *a quo*, led no evidence whatsoever as to the quantum of compensation due to the respondent. In a question and answer situation between the Court and Mr Onesmus, the following appears:

> "Q: What is the remuneration you are claiming?
>
> A: It was difficult for us to calculate because complainant was being paid according to shifts and bonuses and how they calculated that we don't know.
>
> Q: What do you expect the Court then to come up with for you? A:
>
> May I consult my client?"

Thereafter, the record continues:

> "Mr Onesmus:
>
> [T]he average amount per month because the claimant was being paid between NS2 100,00 and NS1 200,00 we have added the two amounts together and we got NS3 300,00 and then divided by two and an verage is NS1 650,00. Now calculated as from February 1997 to August 1997 i.e. 7 (seven) months X NS1 650,00 gave us NS12 150,00. This is done in good faith and I believe it would be acceptable to court."

This serves to illustrate how the figure of NS12,150.00 was arrived at and gained the court's acceptance as reflected in the award.

What Mr Onesmus said before the Court *a quo* on compensation was a mere submission. It is trite that a submission, however forceful it may be, does not constitute evidence. There was thus no evidence proffered on the matter at issue and Mr Mouton's argument on this ground is

accordingly upheld. The matter will, therefore, have to be sent back to the Court *a quo* for assessment and determination of the respondent's compensation.

The final question for determination is (c), that is to say: was the conviction competent?

Mr Mouton contends that the court of .first instance could not have found the appellant criminally guilty of contravening section 50 of the Act because -

(i) the District Labour Court is not regarded as a criminal court;

(ii) the appellant was not criminally charged with such an offence; and

(iii) the offence under the Act was not proved beyond reasonable doubt.

As regards (i), the view that 1 take is that section 19 of the Act (i.e Jurisdiction and powers of district labour courts), does not confer any criminal jurisdiction upon the District Labour Court. Mr Mouton's point on this issue is, therefore, well taken.

As to (ii) and (iii), it is appropriate to consider them together since both are inter-related. The respondent's conviction was premised on section 50(2) of the Act which reads:

> "50(2) Any employer who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding $4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."

As the subsection creates a criminal offence, I am naturally inclined to examine the Criminal Procedure Act, Act 51 of 1977, section 84(1) of which provides:

"84(1) Subject to the provisions of this Act and to any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to time and place at which the offence is alleged to have been committed ... as may be reasonably sufficient to inform the accused of the nature of the crime."

//; casu, there was no charge whatsoever preferred against the appellant and, obviously, the provisions of section 84(1) of the Criminal Procedure Act, were not complied with. Clearly, what the District Labour Court was faced with was a labour complaint which calls for the ordinary standard of proof applicable to civil matters, namely, proof on a preponderance of probabilities. Hence, the standard of proof required in a criminal case was beside the point and, as such, could not reasonably be expected to be met.

From the discussion above, it is inevitable to come to the conclusion that, in all the circumstances of the matter, the appellant's conviction was not competent and ought, therefore, to be set aside together with the accompanying sentence. To this extent, the appeal has achieved partial success.

In the result, the following order is made:

(5) On the issue of liability, the appeal fails and it is hence dismissed;

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(7) the conviction and sentence against the appellant are both set aside; and

(8) in the circumstances of the case, there shall be no order as to costs.

ON BEHALF OF THE APPELLANT	**ADV C MOUTON**
Instructed by:	**Lorentz & Bone**
ON BEHALF OF THE RESPONDENT	**MR ONESMUS**
Instructed by:	**The Namibia Transport and Allied Workers Union**