
CASE NO.: LCA 96/2009

**IN THE LABOUR COURT OF NAMIBIA**

In the matter between:

**RUBETTA JOAN AGNES REILLY** **APPELLANT**

and

**NAMIBIA PORTS AUTHORITY** **RESPONDENT**

**CORAM:** **MULLER J**

Heard on: 24 June 2011
Delivered on: 22 July 2011

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**APPEAL JUDGMENT**

**MULLER, J.:** [1] The appellant instituted the complaint in terms of rule 6 in the District Labour Court for the district of Walvis Bay in terms of which she sought reinstatement of her position as manager: corporate communications with the respondent. This complaint was opposed by the respondent. In addition to form 2 regarding her complaint, the appellant also filed particulars of complaint together with form 2. The respondent filed a reply in terms of rule 7 of the rules of the District Labour

Court, which it subsequently amplified by an amendment and raised several defences therein. On 26 April 2006 the Walvis Bay District Labour Court heard arguments in this matter. At the time a point in *limine* was raised by the respondent, which was upheld by the District Labour Court and the complaint was dismissed. The complainant noted an appeal against that ruling by the District Labour Court. Problems with the filing of the record led to a delay of this appeal which was eventually heard on 24 June 2011.

[2] At the hearing of the appeal Adv Strydom appeared for the appellant and Adv Mouton for the respondent. Both counsel filed written heads of arguments in advance. This court heard submissions on behalf of the appellant and the respondent by their respective counsel in amplification to the written heads of arguments. At the end of the hearing the court reserved a judgment.

[3] The grounds of appeal against the ruling of the District Labour Court as contained in the appellant's notice of appeal are the following:

> *"1. That the learned chairperson erred in the law and/or on the facts by failing to appreciate that a retrenchment in terms of section 50 in any event is a form of dismissal and as such and by necessary implication entails the relief sought in section 46 of the Labour Act, 1994*
>
> *2. That the learned chairperson erred in the law and/or on the facts by finding that the complainant's action constitutes an action in terms of which relief is sought on the basis of a criminal remedy whereas in effect*

*no such relief is sought save for that contemplated in section 46 of the Labour Act.*

3. *That the learned chairperson erred in the law and/or on the facts in that sufficient particulars were contained in the complaint read together with the particulars of complaint to constitute a cause of action as envisaged by section 46 of the Labour Act which indeed was the case.*

4. *That the learned chairperson erred in the law and/or on the facts in that he failed to appreciate the ambit of his own discretion with regard to the fact that the complainant's particulars of complaint did set out a cause of action and that the court does not follows a strict approach on pleadings and that express provision is made in the District Labour Court to relax such strict compliance.*

5. *That the learned chairperson erred in the law and/or on the facts in that the rules expressly provide and afford the chairperson with such powers as to what he may consider most suitable to the clarification of the issues before court and generally to the just handling of the proceedings which in this case the learned chairperson failed to do.*

6. *That the learned chairperson erred in the law and/or on the facts by failing to appreciate the ambit of the decision of the Labour Court in respect of which both parties were involved wherein the complainant was ordered to institute her proceedings in the District Labour Court which she duly did.*

7. *That the learned chairperson erred in the law and/or on the facts by granting an order for costs without at all exercising the discretion as*

*envisaged by section 24 of the Labour Act, alternatively that there were insufficient grounds to grant a cost order against the respondent."*

[4] The crucial issue in this appeal is that the chairperson of the District Labour Court held that the complaint should not have been founded on the provisions of section 46 of the Labour Act, no. 6 of 1992 (the Act) and that the complainant wrongly assumed that the provisions of section 50 falls under section 46 by necessary implication.

[5] The relevant parts of section 45 and section 46 reads as follows:

**S45:**

*"45 (1) For the purposes of of the provisions of section 46, but subject to the provisions of subsection (2) –*

(a) *any employee dismissed, whether or not notice has been given in accordance with any provision of this Act or any term and condition of a contract of employment or of a collective agreement;*

(b) *any disciplinary action taken against any employee,*

*without a valid and fair reason and not in compliance with a fair procedure, shall be regarded to have been dismissed unfairly or to have been taken unfairly, as the case may be."*

**S46:**

*"46 (1) If, upon a complaint lodged in accordance with the provisions of Part IV by an employee who has been dismissed from his or*

*her employment or against whom any disciplinary action has been taken, as the case may be, a district labour court is satisfied that such employee has been so dismissed unfairly or that such disciplinary action has been so taken unfairly, the district labour court may –*

(a) *in the case of an employee who has been so dismissed, issue an order in terms of which such employer is ordered –*

(i) *to reinstate such employee in the position in which he or she would have been had he or she not been so dismissed.*

(ii) *to re-employ such employee in work comparable to that to which he or she was engaged immediately before his or her dismissal from such date and on such condition of employment as may be specified in such order;*

(iii) *to pay, whether or not such employee is re-instated or re-employed, to such employee an amount equal to any losses suffered by such employee in consequence of such dismissal or an amount which would have been paid to him or her had he or she not been so dismissed.*

(b) *in the case of an employee against whom disciplinary action has been so taken, issue an order in terms of which –*

(i) *such disciplinary action is set aside;*

(ii) *any disciplinary penalty, if any, imposed upon such employee is replaced with any other penalty which the court may deem just and equitable;*

(iii) *the matter is referred back to the employer to reconsider any disciplinary action or disciplinary penalty to be taken or imposed upon such employee in accordance with any guideline, if any, laid down by the court and specified in such order;*

(c) *make such other order as the circumstances may require.*

*(2) An order referred to in subparagraph (i) or (ii) of paragraph (a) of subsection (1) may be made subject to such conditions as the district labour court may deem just and equitable in the circumstances and may include a condition providing for the imposition of an appropriate disciplinary penalty."*

[6] In respect of jurisdiction of the District Labour Court the appellant relies on the provisions of section 19 (1) (a) of the Act, which states as follows:

*"19(1) A district labour court shall have jurisdiction –*

(a) *to hear all complaints launched with such District Labour Court by an employee or an employer (hereinafter referred to as the complainant) against an employer or employee (hereinafter referred to as respondent) for an alleged contravention of, or alleged failure to comply with, any provision of*

*this Act or any term of condition of a contract of employment or a collective agreement."*

According to the appellant this provision provides comprehensive jurisdiction in terms of the Act to the District Labour Court, with specific reference to section 50 of the Act. Under the heading "*Collective termination of contracts of employment*" section 50 of the Act provides as follows:

*"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-organization 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 recognized 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 not 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 therefore, 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 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 therefore, 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) 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 R4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."*

[7] The appellant submitted that it is common cause that the employment relationship between the appellant and the respondent had been terminated in terms of section 50 and that constituted her cause of action. In terms of section 19(1)(b) of the Act the court was therefore empowered to make any order in respect of the respondent or the complainant which it is entitled to make in terms of the provisions of the Act. The appellant also submitted that the chairman of the District Labour Court erred by concluding that the relief so sought constitutes a remedy in terms of which a criminal conviction was sought. The appellant submitted that the complainant never sought a criminal conviction of the respondent and thereby causing the District Labour Court to become a criminal court. Furthermore, it was submitted that in addition to the powers conferred upon the District Labour Court, it is also empowered by provisions of section

46 to deal with such matters as a dismissal of an employee, even when section 50 is applicable. In this regard it is submitted that the retrenchment of an employee in terms of section 50 of the Act constitutes a dismissal as contemplated in the Act. In this regard the appellant relies on the work of *PAK Le Roux, Van Niekerk – The South African Law of Unfair Dismissa*l to the effect that where termination of employment is based on a reorganization of the business of the employer in terms of section 50 of the Act, a form of dismissal is contemplated and therefore the provisions of section 46 also applies in such circumstances. Reference was also made in this regard to the case of *Namibia Development Corporation v Visagie* NLLP 1998 (1) 124 NHC. Based on this the appellant submitted that it is a logical consequence that when an employee is retrenched and the employer fails to comply with the provisions of the section, the retrenchment would also be considered as unfair and unlawful. In this regard the appellant contended that the chairman of the District Labour Court erred in law by deciding that it did not have the required jurisdiction to entertain this matter.

[8] Mr Mouton, on behalf of the respondent, pointed out that the appellant in her particulars of complaint or in form 2 never mentioned any “unfair dismissal” or placed any reliance upon the provision of section 45 and 46 of the Act relating to unfair dismissal in terms whereof reinstatement and compensation can be ordered. He contended that the appellant’s submissions are untenable, because section 50 contains its own sanction which is applicable for non-compliance with the provisions of that section and consequently the appellant has not revealed a cause of action. It is further submitted on behalf of the respondent that the appellant never made any reference in

her particulars of complaint to any method of dismissal or a disciplinary hearing, which Mr Mouton submits are the only causes provided for section 45. Consequently, a retrenchment in terms of section 50 does not comply with the provisions of section 45. In this regard reference was made to case of *Numsa v Atlanta's Diesel Engines (Pty) Ltd* 1993 (14 ILT 642) (LAC) at 651D and the *South African Law of Unfair Dismissal*, *supra* at p253. It is contended by the respondent that because the appellant relies exclusively upon the provisions of section 50 of the Act for the non-compliance with the provisions of that section for her complaint, the only sanction in terms of section 50 is a criminal sanction and the District Labour Court has no jurisdiction in that regard. Reference was made to the case of *HS Contractors v Valinga* NLLP 2002 (2) 138 NLC. During the submissions made in this court, it appeared to me that Mr Mouton considered that in certain circumstances an unfair dismissal in terms of section 45 on basis of non-compliance with section 50 may amount to an unfair dismissal, but he submitted that was not the appellant's case in the District Labour Court and was not pleaded as such. In that regard, if I understand it correctly, Mr Strydom submitted that although it was not directly referred to in those words in the particulars of complaint, the appellant's claim was for re-instatement which brings her complaint within the purview of section 45. Mr Strydom submitted that it is indicated that by the wording of the amended reply of respondent indicates that this is how the respondent understood it.

[9] There was apparently a first point in *limine* relating to "prescription" of the appellant's claim. This issue was not considered by the Chairman of the District Labour Court at all. It is not a ground of appeal and save for mentioning this preliminary point in

heads of argument, no further submissions were made in that regard at the hearing of the appeal. I do not find it necessary to deal with it. In this judgment I shall concentrate on the critical issue that forms the basis of the appeal, namely whether the termination of the appellant's employment with the respondent in terms of section 50 of the Act can be considered as an unfair dismissal within the purview of the provisions of section 45 of the Act, whereby she might have been entitled to re-instatement in her position of manager: corporate communications with the respondent. It is consequently not necessary to deal with each and every ground of appeal.

[10] It is evident from the particulars of complaint attached to form 2 in respect of the appellant's complaint that she relied on a contravention of section 50 of the Act. In this regard the following paragraphs of the particulars of complaint are relevant:

> *"13. Respondent is in breach of the provision of section 50 of the Labour Act that:*
>
> *13.1 The recognised and registered trade union was not informed of*
>
> *13.3 No negotiation process ensued as is required by the act.*
>
> *14. In the premises, the respondent has breach the provisions of section 50 of the act and is in addition guilty of statutory offence set out in sub-section (2) of the said section.*
>
> ***Where for complainant claims from the respondent***
>
> 1. *Re-instatement to her position of as manager: corporate communications of respondent.*
> 2. *Loss of income*

3. *Further and/or alternative relief."*

Upon my enquiry it was confirmed that there was paragraph 13.2 and the above quoted 13.3 should actually be 13.2.

In terms of form 2 the nature of the complaint is referred to as "retrenchment" and the cause as:

*"1. Respondent has failed, refused and/or omitted to pay."*

The relief sought by her is mentioned in the following words:

*"1. Re-instatement, loss of income, benefits, leave days at the time of complainant's dismissal."*

[11] The respondent replied as follows to this complaint:

*"**Kindly take notice that** the respondent intends to oppose the complaint and replies as follows thereto:*

1. *Respondent pleads that the complaint has become prescribed and that it has not been launched within the one year period prescribed by the Labour Act, act 6 of 1992, and that no prior condonation for the late launching for the complaint has been obtained.*
2. *Respondent denies having breached the provisions of section 50 of act 6 of 1992 and/or having terminated complainant's services unlawfully and/or not in accordance with the said section.*

   *Therefore respondent prays that the complainant's complaint be dismissed."*

[12] The respondent amended its reply as follows:

*"1. By renumbering the existing paragraph 2 to paragraph 3, and by inserting a paragraph to the following:*

***"2. Complainant's particulars of complaint do not disclose a cause of action for respondent to answer and reply to. Complainant alleges a breach of section 50 of the Labour Act, act no. 6 of 1992, but fails to allege or bring her complaint into the provisions of section 46 of the act (no unfair dismissal has been alleged), or section 53 of the act. For this reason alone, complainant's complaint should be dismissed with costs."***

*2.1 By inserting a new paragraph 4 which reads as follows:*

***"4. Respondent, in amplification of the denial contained in paragraph 3 supra:***

***4.1 denies that complainant was a member of a trade union, or that a trade union is in law required to be consulted when a management position is made redundant;***

***4.2 denies that no negotiations took place as are required by the Labour Act prior to the retrenchment occurring;***

***4.3 denies that it is guilty of the statutory offenses set out in section 50(2) of the Labour Act;***

***4.4 denies the despite written communications and consultations between the legal practitioners, no steps were taken to resolve the dispute alleged by respondent between the parties."***

[13] In his ruling the Chairman of the District Labour Court concluded as follows:

> *"In this case the complainant was informed about the redundant (sic) of the post she had with the respondent and thereafter a note of retrenchment followed. Therefore the complainant in this matter was suppose to bring up a complaint in terms of section 46 as a representative explained to the court, unfair dismissal which includes retrenchment. In conclusion the point in lamina (sic) brought up by the respondent succeeds and the complaint of the complainant is dismissed without cost."*

[14] In the case of *Du Toit v The Office of the Prime Minister* NLLP 1998 (1) 54 NLC O'Linn J comprehensively dealt with the effect of provisions like sections 45 and 46, as well as section 50. In that case the learned Judge pointed out the differences that exist between South African Labour legislation and the Namibian Labour legislation as contained in the Namibian Labour Act. In respect of what is considered to be "unfair labour practice", the Labour Relations Act of 1956 of South Africa included a definition in that regard whilst there is no similar definition in the Namibian Labour Act. The learned Judge warned against reliance on the South African Act *per se*. He said the following in this regard at p66:

> *"At most one can say that certain elements of the concept of "unfair labour practice" can be recognised in section 45 and 46 of the Namibian Labour Act. Although the said definition distinguishes between "dismissal by reason of any disciplinary action" and "termination of the employment of an employee on*

*grounds other than disciplinary action", both are lumped together in the same definition. This is fundamentally different to the Namibian Labour Act where "dismissal" and "disciplinary action" on the one hand are provided for in separate and distinct sections and the provisions for termination by notice provided for in separate and distinct sections."*

*"Termination by notice" is provided for specifically in the Namibian Labour Act whereas in the South African Act it is only dealt with in the "unfair labour practice" definition under the paragraph dealing with termination on grounds other than disciplinary action. Termination by notice is only excluded from the definition in extremely limited situations where various other specific requirements are made.*

*It should also be noted that where as the "collective termination" of employment as provided for in section 50 of the Namibian Act, independently of the unfair dismissals provisions of sections 45 and 46, in the South African Act it is dealt with in the definition of "unfair labour practice" as an exception when certain requirements, equivalent to those in our section 50, are complied with.*

*The conclusion is inescapable that the Namibian Legislature has deliberately chosen to follow the earliers of South African legislation.*

*When considering the applicability in Namibia of decisions of South African courts and the comments of writers on the South African legislation, the importance, and sometimes fundamental differences between the respective legislation must be kept in mind."*

Reference was also made by the learned Judge to the case of *Minister of Health and Social Services v Vlasiu*, NLLP 1998 (1) 35 NLC."

[15] O'Linn J then dealt in the *Du Toit* decision with the provisions of sections 45, 46, 47 and 50, respectively. The learned Judge carefully and comprehensively considered all the arguments in respect of dismissal or termination of an employee and the applicability of sections 45 and 46 with regard to the termination of an employee under section 50. In this regard he approved of the submissions by Mr Coleman to the effect that section 45 and 46 deal with dismissals without a valid and fair reason and section 47 with termination of contracts, while section 50 deals with collective termination of contracts in respect of the retrenchment of employees. With regard to these submissions O'Linn J said the following at p74:

> *"There is considerable substance in the latter submission. The word "dismissal" is used in section 45 in conjunction with the words "any disciplinary action" and there is much to be said for the view that these expressions were intended to and in fact relate to the same genus particularly when these provisions are seen in context of the distinct provisions of sections 47 to 53."*

The learned Judge then concluded on p81 as follows:

> *"I also have no doubt that sections 45 and 46 are not applicable to contracts terminated in accordance with the provisions of sections 48 and 50."*

*This is also the case where termination takes place in accordance with the provisions of section 50, dealing with the collective termination of the contracts of the employment."*

[16] In *Goagoseb v Araechenab Fishing and Development Company (Pty) Ltd* NLLP 1998 142 NLC Strydom JP (as he then was) held that section 50 also applies in circumstances where the services of only one employee is terminated, although that section is referred to as 'collective termination".

[17] Although the procedure in respect of labour matters is much more flexible than those in magistrates or high courts and pleadings are not required, the appellant did file a comprehensive pleading, named "Particulars of complaint", to which the respondent replied and later amended its reply. As referred to earlier and quoted in detail, the appellant clearly based its case and its cause of action on non-compliance with section 50 of the Act. It was argued that although this was the case, the appellant did claim re-instatement, which is a sanction provided for in section 45 of the Act and consequently the appellant's claim, if I understand this submission correctly, should be regarded as one arising from circumstances provided for in section 50, but which actually falls under section 45 based on an "unfair labour practice". It is further submitted on behalf of the appellant that this is also how the respondent understood it when its reply and amended reply are considered.

[18] I do not agree with the submissions on behalf of the appellant. The appellant's claim, as set out in form 2, referred to above, as well as her particulars of complaint clearly brings her cause of action under the purview of section 50 and nothing more. Although reference has been made to other cases, they are either not applicable or distinguishable or do not take the real issue much further. As decided by O'Linn J in the *Du Toit* case, supra, a claim under section 50 cannot be considered as one that falls under sections 45 and 46. However it might have been regarded by the respondent which it pleaded, is immaterial. It is the claimant who must set out his or her claim and in the manner that she did in this matter, no claim under sections 45 and 46 was lodged. In this regard the essence of the decision of the arbitrator on this preliminary point is in my opinion correct and therefore the appeal must fail.

[18] In the result, the appeal is dismissed.

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**MULLER, J.**

**ON BEHALF OF THE APPLICANT:** **MR. STRYDOM**

**INSTRUCTED BY:** **NEVES LEGAL PRACTITIONERS**

**ON BEHALF OF THE RESPONDENT:** **MR. MOUTON**

**INSTRUCTED BY:** **KOEP & PARTNERS**