

CASE NO.: LCA 53/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

CATHERINE MATUPI HAIMBODI

APPELLANT

and

**STAMPRIET VILLAGE COUNCIL
MATHEO RUDATH (ARBITRATOR)
LABOUR COMMISSIONER**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

CORAM:

MULLER J

Heard on:

4 March 2011

Delivered on:

25 March 2011

LABOUR JUDGMENT

MULLER, J.: [1] This is an appeal against an arbitration award made by an arbitrator in terms of S 87(15) of the Labour Act 11 of 2007 (the Act) in favour of the applicant. The appeal is based thereon that the arbitrator allegedly did not duly consider or disregarded "*peremptory*" provisions of Section 27 (3)(iii) of the Local Authorities Act, no. 23 of 1992 and in particular because she was not reinstated and payment for a period of 5 years, together with benefits in terms of the appellant's employment contract, were not ordered.

[2] The appellant was employed by the first respondent as village secretary, and also acted as a chief executive officer (CEO) in terms of an employment contract entered into by the appellant and first respondent on 20 December 2004. The employment of the appellant in the capacity, as mentioned, is also based on the provisions of the Local Authorities Act, no. 23 of 1992, as amended. (Local Authorities Act)

[3] It is common cause that the appellant acted as mentioned before and served a term

of 5 years in the said capacity. The appellant's term of office was due to end on 30 November 2009 according to section 27 (3)(a)(i)(aa) of the Local Authorities Act in terms of which she had been appointed and which reads:

"A person who is appointed as a chief executive officer ...shall occupy that office for a period of 5 years from the date of his or her appointment...."

[4] Section 27(3)(b)(i) of Local Authorities Act requires the appropriate council to inform the chief executive officer concerned in writing at least 3 calendar months *before the expiry of the period of office* if it intends to retain the service of the chief executive office for an extended term, or not. In terms of that provision, the first respondent should have notified the appellant not later than the 1st

September 2009 of its intention. It is common cause that no such notice was given to the appellant within that time.

[5] However, in anticipation of the provisions of Section 27(3)(iii), the appellant had already informed the first respondent on 17 August 2009 of the requirement contained in section 27(3)(b)(i) of the Local Authorities Act as follows:

"Submission in terms of Section 27(3)(b)(i)."

Purpose

*"To inform the council of the requirement in terms of Section 27(3)(b)(i) the Local Authority Act (23 of 1992) as amended. **Back ground***

*I have been appointed as chief executive officer of the Stampriet Village Council in terms 27(1)(a) of the Local Authority Act (Act 23 of 1992). I entered into an employment contract with the council as from 1 December 2004. In terms of Section 27(3)(b)(i)(aa) of the Local Authority Act (Act 23 of 1992) I am entitled to occupy the office for a period of 5 years. **Discussion***

In terms of Section 27(3)(b)(i) of the Local Authority Act (Act 23 of 1992) the

Council is mandated to inform the chief executive officer in writing of the intention to retain his/her in-service for an extended term or not." **Consultation**

By way of this submission the Council is hereby consulted.

Recommendation

It is hereby recommended that the Council consider its intention in terms of Section 27 (3)(b)(iii)."

(S 27(3)(b)(iii) - (v) were inserted by S 18 (1)(c) of the Local Authorities Amendment Act, no. 24 of 2000)

[6] The Local Authorities Act further provides in section 27(3)(b)(iv):

"(iv) the Local Authority Council shall upon receipt of a submission in terms of sub-paragraph (iii) consider and decide thereupon within the period of one month after receipt thereof and the chairperson of the local authority council concerned shall, within a further period of not more than seven days after such decision inform the chief executive officer in writing of its intention as contemplated in sub-paragraph (i), and if the local authority council concerned fails to do so, it shall be deemed that a notice has been given to the chief executive officer, that he or she is retained in the service for an extended term."

(My emphasis)

[7] There was apparently no council meeting before the special council meeting of 28 September 2009. At that meeting the council decided as follows in respect of this issue:

"b) Termination of contract

The chairperson said the notification period should be 3 months well In advance. What should be done? Can we consult a lawyer to seek for advice? The members agree to write a letter to CEO to ask her why not she

informed them about the contract which is coming to an end. After all, they will say the council is not going to renew your contract since you did not do A, B and C. as it was stated in her contract that Councillors will see whether to renew or to terminate it.

Hon. Motinga concluded by saying this kind of delay might lead for the Councillors to automatic renewal of this contract, as it was done in 2004. She suggested for the notice to be postponed to the 31 December 2009 to be line with the law."

It is common cause that the appellant was informed by letter dated 28 September 2009, which she received on 5 October 2009, that her contract will not be renewed and that it will expire on 31 December 2009.

[8] It is clear from the papers that the first respondent failed to comply with its duties in terms of the Local Authorities Act. The Appellant informed it of what its duties are. Even upon that information they failed to act within one month as provided for in the Local Authorities Act. Despite all this, first respondent did not understand its duties as is abundantly clear from the decision taken on 28 September 2009. It seems that the council was confused what they ought to do. Council was clearly ignorant of the relevant requirements of the Local Authorities Act and also of the fact that the applicant did inform them in terms of S 27 (3)(b)(iii). It is also incomprehensible how they could retain the appellant services for a further month and on what authority that could be done in the light of what occurred before. What the letter of 28 September 2009 conveys to the appellant is also not what the council decided on 28 September 2009.

[9] Subsequent to the letter of termination the appellant apparently stayed on in her

position for a period until the 1st of March 2010 when she was formally put out of her office. During that period first respondent evidently did not know what to do. It held further meetings, asked the Minister as well as the Hardap Regional Council for advice and resolved to register "the case" with the Labour Commissioner. Save to mention that the appellant never accepted the decision of the first respondent, it is not necessary to dwell upon what occurred during this period.

[10] The appellant further formally referred the issue to conciliation and arbitration on 1 March 2010 and a hearing in terms of the Act ensued. At the hearing the first respondent applied for a postponement, which was denied by the arbitrator. The hearing continued in the absence of the first respondent. Only the appellant testified and submitted her documents to the arbitrator. On 10 June 2010 the arbitrator made his award, which was served on the parties concerned.

[11] In its award the arbitrator found that appellant's dismissal by the applicant was substantially and procedurally unfair and awarded an amount of N\$168 538.89 to the appellant.

[12] According to the appellant's notice of appeal, she appeals in this court

against the arbitration award as follows:

"The Appellant/Complainant had not being considered for re-instatement or for full payment for the five (5) year extended period as required by the provisions of section 27(3) of the Local Authorities Act, No. 23 of 1992 as amended by Act 24 of 2000."

[13] The first respondent accepted the award. In this court Mr Stolze appeared for the appellant and Mr Maasdorp represented the first respondent. Both counsel submitted heads of argument.

[14] On an enquiry from the court, Mr Stolze conceded that the appeal is in fact only against the second part of her appeal, namely by not awarding her full payment for the extended period of 5 years and not for reinstatement. He conceded that the appellant did not ask the arbitrator for reinstatement and was correctly not granted same.

[15] Mr Stolze referred the court to the case of *Cronje v Municipality Council of Mariental*, reported in LLP 2004 (4) 129 NSC, and submitted that although there might not have been evidence in respect of the payments of salary and benefits for the extended period placed before the arbitrator, same can be calculated. Mr Stolze then proceeded to calculate what the appellant would have been entitled to for the extended period according to him, based on her employment contract in respect of basic salary, bonus, 13th cheque, motor vehicle allowance, housing allowance and cell phone allowance. Mr Stolze arrived at an amount of N\$1 280 320.00.

[16] According to Mr Maasdorp this is a concise matter which regards a question of law, and not a question of fact. According to him it is not for this court to substitute its opinion for that of the arbitrator who had to deal with the matter as part of the discretion which the arbitrator derives from the provisions of sections 86 (15) of the Act wherein an arbitrator is empowered to make an appropriate award. According to Mr Maasdorp there is no allegation that the arbitrator capriciously based his decision on wrong facts.

[17] It is evident that the appellant accepted the award which was made in her favour. The first respondent also accepted it. What the appellant now wants in this appeal are additional payments for the extended period, which was not considered by the arbitrator at all. The appellant was invited by the arbitrator to state exactly what she claims to be entitled to and this she did. The arbitrator thereupon considered those claims and made an award. The appellant never claimed for the salary and benefits that she now on appeal wants to be included in the award made by the arbitrator. The appeal is not based thereon that this court should make an order in terms of section 89 (9) of the Act. She also did not request the setting aside of the arbitrator's award and thereafter that the Labour Court should make an order in terms of Section 89 (10) of the Act. What she wants is that this court should make an order on appeal against the decision of the arbitrator which is not provided for in the Act.

[18] I also agree with Mr Maasdorp that the arbitrator came to a conclusion on the evidence before him. The arbitrator provided full reasons for his award. The issue that was originally complained about, namely that the arbitrator refused to postpone the matter and continued in the absence of first respondent, was not taken further and is not a ground of appeal to be considered by this court. In fact there is no appeal by the first respondent against the award of the arbitrator.

[19] In the light of the above, it is obvious that the appeal must fail.

[20] In the result the appeal by the appellant is dismissed.

MULLER, J.

ON BEHALF OF THE APPELLANT:

MR STOLZE

INSTRUCTED BY:

CHRIS BRANDT ATTORNEYS

ON BEHALF OF THE RESPONDENT:

MR MAASDORP

INSTRUCTED BY:

SISA NAMANDJE & CO. INC.