

NOT REPORTABLE

CASE NO: LCA 25/2011

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

OK FURNITURE

APPELLANT

and

FRANCIS KAWANA MBEHA

RESPONDENT

CORAM: HOFF, J

**Heard on:** 15 June 2012

**Delivered on:** 15 June 2012 (*Ex tempore*)

**Reasons on:** 21 June 2012

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**LABOUR JUDGMENT**

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

1. The appeal is upheld
2. The Order given by the chairperson of the district labour court on 13 December 2010 is set aside.
3. The dismissal of the respondent is confirmed.

These are the reasons.

**Background**

[2] The respondent was an employee of the appellant until 1 June 2006 when his services were terminated following a disciplinary hearing in which the respondent was found guilty of assaulting a customer of the appellant during office hours and on the premises of the appellant.

[3] On 9 July 2007 the respondent lodged a complaint with the clerk of the court, stating that his services had been unfairly terminated by the appellant. Appellant denied that the dismissal was unfair and subsequently gave notice to amend its reply to reflect the non-compliance with the time bar as contained in section 24 of Act 6 of 1992.

[4] Section 24 provides *inter alia* as follows:

“Notwithstanding the provisions of any other law to the contrary, no proceedings shall be instituted in the Labour Court or any complaint lodged with any district labor court after the expiration of a period of 12 months as from the date on which the cause of action has arisen ... except with the approval of the Labour Court or district labour court, as the case may be, on good cause shown.”

[5] Subsequent to notices to amend replies and certain applications to the district labour court, the parties on 12 October 2010 at the hearing date of the complaint lodged by the respondent, reached certain agreements in order to finalize the protracted matter, as follows:

(a) that the hearing of evidence would be proceeded with;

the issue relating to the non-compliance with section 24 would only be addressed in argument at the end of the hearing; and  
that only substantive fairness is placed in dispute.

[6] The chairperson of the district labour court made the following findings on 13 December 2010:

(1) the disciplinary hearing was unfair;

the findings of the (disciplinary hearing) are null and void.

reinstatement was not ordered since the relationship between the respondent and the appellant had broken down.

[7] It was further found that because of the unfair proceedings the respondent (complainant) has suffered damages.

[8] The court order appellant to pay "complainant his salary from date of dismissal to date of this judgment". (13 December 2010).

[9] It must be stated that the respondent, as well as his legal representative (Mr Mbaeva), did not attend this appeal hearing.

### **Grounds of Appeal**

[10] In respect of the ground of appeal that there was non-compliance with the

provisions of section 24 of Act 6 of 1992 it is apparent from the record that more than 12 months had lapsed since the date the cause of action arose (1 June 2006) and the date the respondent had lodged the complaint with the district labour court on 9 July 2007. It is also common cause that the respondent (complainant in the court *a quo*) did not obtain approval (on good cause shown) from the district labour court to have lodged the complaint outside the time period referred to in section 24. It follows in my view that the district labour court could not have adjudicated upon the complaint lodged unless the court has first granted approval for the late filing of the complaint. The district labour court in these circumstances acted *ultra vires*. (See *Strydom v Die Land en Landboubank van SA* 1972 (1) SA (A) at 814 E; *Open Learning Group Namibia Finance CC v Permanent Secretary: Ministry of Finance* 2006 (1) NR 275 (HC) at 302).

[11] An act which is *ultra vires* is a nullity *ab initio*. (See *Berend and Another v Stuurman and Others* 2003 NR 81 (HC) at 87 B – C; *Skeleton Coast Safaris v Namibia Tender Board and Others* 1993 NR 288 (HC); *Transnamib Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1993 (1) SA 457 (AA) at 475).

[12] The district labour court is a creature of statute and may not *mero motu* and *ex post facto* condone the late lodging of a complaint with the clerk of the court.

[13] It is trite law that nothing (i.e. no legal consequences) can flow from an act that is *ultra vires*. The district labour court thus did not pronounce itself at all on the complaint lodged with the clerk of the court. (See *Transnamib (supra)*).

[14] The appeal should therefore succeed on this ground alone.

In respect of the finding by the district labour court that the disciplinary hearing was procedurally unfair the ground of appeal was that the chairperson in the district labor court erred in law and/or the facts in finding that the disciplinary hearing was unfair despite an agreement between the parties to limit the issues in dispute only to the substantive fairness of the dismissal.

[15] The chairperson of the district labour court was bound by this agreement between the legal representatives of the parties. In *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd* 2009 (1) NR 331 (SC) Damaseb AJA (Chomba AJA and Strydom AJA concurring) stated the following principle:

“It is equally trite that a party is bound by its counsel’s conduct of pleadings and agreements entered into in the conduct of a case, unless there is a satisfactory explanation for the inference not to be drawn. (Compare *SOS Kinderdorp International v Effe Lentin Architects* 1992 NR 390 (HC) at 398 F – H (1993 (2) SA 481 (Nm) at 490 C – E; *Brummund v Brummund’s Estate* 1992 NR 306 (HC) at 310 C – E (1993 (2) SA 494 Nm at 498 C – F).)”

(See also *Old Mutual Namibia v Johanna Wallenstein* Case LCA 13/2010 unreported judgment delivered on 10 September 2010).

[16] The chairperson of the district labour court found that the conduct of the respondent “was grave by any standards and no employer who relies on customers can tolerate such conduct”. The chairperson then continued and found that had it not been for her finding that the disciplinary hearing was procedurally unfair she “would not have hesitated to dismiss the claim that the punishment was harsh as the conduct of the complainant was abominable”. It was a misdirection by the chairperson in the district labour court to have disregarded the agreement reached between the parties. Her finding that there was procedural unfairness during the disciplinary hearing stands to be set aside.

[17] There was a third ground of appeal namely that the respondent has failed to

adduce any evidence in support of the claim of damages. There is merit in this ground of appeal but due to my findings in respect of the first two grounds of appeal I deem it unnecessary to deal with this ground of appeal as well.

[18] In the result the appeal should for afore-mentioned reasons succeed.

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**HOFF, J**

**ON BEHALF OF THE APPELLANT:**

**MR PHILANDER**

**Instructed by:**

**LORENTZ ANGULA INC.**

**ON BEHALF OF THE RESPONDENT:**

**NO APPEARANCE**

**Instructed by:**

**MBAEVA & ASSOCIATES**