

IN THE LABOUR COURT
JUDGMENT



OF NAMIBIA

Case no: LCA 21/2013

In the matter between

MINISTER OF AGRICULTURE, WATER & FORESTRY**APPLICANT**

and

HAROLD KAVARI N.O. (ARBITRATOR)**1ST RESPONDENT****KAHIHA SERUBABEL****2ND RESPONDENT****THE LABOUR COMMISSIONER****3RD RESPONDENT**

Neutral citation: Minister of Agriculture, Water & Forestry v Kavari & Others (LCA 21/2013) [2013] NALCMD 27 (29 July 2013)

Coram: Smuts, J

Heard on: 19 July 2013

Delivered on: 29 July 2013

Flynote: Appeal against arbitrator's award under s 89 of the Act 11 of 2007. An arbitrator had ruled that the State was precluded by s 12(1)(a) of that Act from setting-off sums payable in respect of accumulated leave and a pro rata portion of an annual bonus against the employees indebtedness under a study leave agreement upon resignation. The section precludes deduction from remuneration unless permitted in terms of a court order of any law. The set-off was expressly authorised under a Public Service Staff Rule promulgated under s 35 of Act 13 of 1995. The court found the rule constituted subordinate legislation which in turn was contemplated by 'any law' in s 12(1)(a). Appeal upheld.

That the appeal is upheld and the arbitrator's award is set aside and the second respondent's referral is thus dismissed.

JUDGMENT

SMUTS, J

[1] At issue in this labour appeal is whether the second respondent's indebtedness to the State under a study leave agreement can be set-off against an amount due to him upon his resignation in respect of accumulated leave and a pro rata portion of an annual bonus. An arbitrator found that s 12(1)(a) of the Labour Act, 11 of 2007 (the Act) precluded that and ordered the appellant (State) to pay the amount of N\$76 117, 58 plus interest to him. The appellant has appealed against the award under s 89 of the Act.

[2] The facts in this appeal are largely common cause. The second respondent, a former employee of the appellant, entered into a special study leave with full remuneration agreement with the latter. In terms of that agreement, the State financed his tertiary studies and provided him with pay during study leave. As a counter prestation, the second respondent bound himself to work for the State for 2 years for every year of study leave granted. In breach of the agreement, he resigned before completing that period. He acknowledged that he owed the State N\$76 117, 58 representing a pro rata amount owing under the agreement (after taking into account the period of time he had worked for the State after completing his studies). The State, (represented by the Minister of Agriculture, Water and Forestry) contended that the ministry was entitled to set-off his admitted indebtedness against the sum owing to the second respondent in respect of accumulated leave and a pro rata portion of this annual bonus.

[3] The second respondent contested this and referred this dispute the office of the Labour Commissioner, claiming that the Act precluded his employer from making the

deduction by way of set-off. An arbitrator was appointed and found in his favour, holding that s 12(1) of the Act precluded set-off and directed the appellant to make payment to the second respondent despite his admitted indebtedness. Section 12(1)(a) provides:

'(1) An employer must not make any deduction from an employee's remuneration unless-

(a) The deduction is required or permitted in terms of a court order, or any law.'

[4] Mr Ndlovu, who appeared for the appellant, pointed out that the deduction in question was expressly authorised by a Public Service Staff Rule, handed in at the arbitration dealing directly with the issue in Chapter D.II where clause 3.1 provides:

'The leave gratuity payable on termination of service should be used as a set-off against any departmental debt which a staff member may have, unless such debt can be recovered by other means, e.g. outstanding salary and allowances.'

[5] Mr Ndlovu submitted that this staff rule, promulgated under s 35 of the Public Service Act, 13 of 1995, being subordinate legislation constitutes 'any law' for the purpose of s 12 (1)(a) and that the set-off would not be in conflict with s 12(1)(a) and thus be authorised by that section.

[6] Mr Ndlovu further pointed out that in the definitions section of the Public Service Act, the Act itself is defined to include 'Public Service Regulations and Public Service Staff Rules mentioned in s 35.'

[7] Mr Nederlof who represented the second respondent countered by pointing out that the appellant could only deduct a maximum of a third of the withheld amount under s 12(2) read with s 12(1)(b) and argued that the appeal should be dismissed. He further submitted that 'any law' would mean acts of Parliament.

[8] As was pointed out by Mr Ndlovu, the term 'any' gives a very wide meaning to 'law'. That term would not in my view be confined to acts of Parliament. Had the legislature intended such a meaning, that term would have been used. Instead 'any law' is used which certainly carries with it a far wider meaning.

[9] The first respondent's approach is also contrary to the definition of law contained in the Interpretation Proclamation, 37 of 1920 where 'law' is defined 'to mean and include any law, proclamation or other enactment having the force of law'. This would in my view include subordinate legislation such as regulations or, in this case, Public Service Staff Rules promulgated under s 35 of the Public Service Act which are further and in any event expressly included in the definition of the Act, as constricting part of that Act thus enjoying the force of law. A wide meaning to the term 'any law' in this context also accords with the way in which this phrase has been interpreted in other unrelated legislation.¹

[10] It follows in my view that the Public Service Staff Rule in question constitutes 'any law' for the purpose of s 12(1)(a) and that the deduction was authorised under that section. Given the conclusion I have reached, it is not necessary for me to consider whether to make an order myself permitting the admitted indebtedness to be set-off from the accumulated leave and pro rata portion of the second respondent's bonus so as to fall within the ambit of s 12(1)(a) as a court order. No such application was however directed to me to do so and the second respondent was also not called upon to meet that eventuality.

[11] It further follows that the appeal succeeds and the award is set aside.

[12] I accordingly make the following order:

The appeal is upheld and the arbitrator's award is set aside and the second respondent's referral is thus dismissed.

DF Smuts
Judge

¹*R v Adams* 1946 CDD 288 where it was found that the term meant any law enacted by a body having legislative authority in the union. See also *R v Mpeti* 1912 AD 414.

APPEARANCE

APPLICANT:

M. Ndlovu
Instructed by Government Attorney

RESPONDENTS:

M. Nederlof
Instructed by Nederlof Inc.