REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 120/2013

In the matter between:

THE COUNCIL OF OMARURU MUNICIPALITY **APPLICANT**

and

EPHRAIM E KATJATENJA **FIRST RESPONDENT**

ONO ANGULA N.O. **SECOND RESPONDENT**

Neutral citation: *The Council of Omaruru Municipality vs Katjatenja* (LC 120/2013) [2013] NALCMD 31 (19 September 2013)

Coram: PARKER AJ
Heard: **16 August 2013**
Delivered: **16 August 2013**
Reasons: **19 September 2013**

Flynote: Practice – Applications and motions – *Locus standi* – Minimum requirement for deponent of founding affidavit to state authority – In challenging such authority, respondent should adduce evidence to establish that deponent has no such authority – Applicant's deponent clearly stating in founding affidavit he has authority – Respondent's challenge a weak one and accordingly rejected.

Summary: Practice – Applications and motions – *Locus standi* – Deponent of founding affidavit stating he is the Chief Executive Officer (CEO) of applicant and stating clearly he has authority to bring the application – Court finding that management committee of the applicant (a local authority council) has power in

terms of the Local Authorities Act 23 of 1992 to propose a cause of action by resolution to the applicant for applicant to accept or reject – In instant case court finding there is no evidence tending to show that the applicant did not accept its management committee's resolution that the present application be pursued or did not authorize the deponent (the CEO) to launch the application – Court concluding that considering the management system of local authority councils under Act 23 of 1992 the deponent has established he has authority to bring the present application and the first respondent has not placed any evidence before the court to establish that the CEO had no such authority – Court accordingly dismissed the first respondent's challenge.

Flynote: Labour law – Arbitration – Appeal order suspending arbitration award pending finalization of appeal against award – Interpretation and application of s 89(8) of the Labour Act 11 of 2007.

Summary: Labour law – Arbitration – Appeal – Order suspending arbitration award pending finalization of appeal against award – Interpretation and application of s 89(8) of the Labour Act 11 of 2007 – Court should have regard to where irreparable harm would lie if award was suspended or not suspended and prospects of success on appeal – In instant case court found that the arbitration proceedings were not in accordance with justice and the arbitrator made an award of reinstatement which is wrong in law and so there were reasonable prospects of success on appeal and further the first respondent is impecunious and would be unable to pay any remuneration that would have been paid to him and the appeal succeeded and that would be loss of public funds – Consequently, court granted order to suspend the entire award pending finalization of the appeal.

JUDGMENT

PARKER AJ:

[1] The applicant, represented by Mr Hinda SC, brought an urgent application on notice of motion for an order in terms of paras (1) and (2), or, alternatively to para 2, para (3), para (4) and para (5) of the notice of motion. The first respondent, represented by Mr Tjitemisa, moved to reject the application. The second respondent did not answer to the application; and so, hereinafter, the first respondent will be referred to simply as 'the respondent'.

[2] Having heard Mr Hinda and Mr Tjitemisa, I made the following order:

1. That the applicant's non-compliance with the rules of court is condoned and the matter is heard on urgent basis in terms of rule 6(24) of the Labour Court Rules.

2. That the enforcement of every part of the second respondent's arbitration award CROM5-13 delivered on 29 July 2013 (as corrected) is hereby suspended pending the finalization of the appeal that the applicant has lodged against the said award.

3. That there is no order as to costs.

4. That reasons will be delivered on or before 24 September 2013.

These are the reasons.

[3] I shall now consider the respondent's challenge to the authority of Edward Paul Ganaseb, the Chief Executive Officer ('CEO') of the applicant, to bring this application on behalf of the applicant. The locus of the challenge is only that the CEO 'did not attach any resolution to confirm his authority'. In a replying affidavit the CEO states that the applicant authorised him to bring the application, and he annexes a resolution to establish such authority. For Mr Tjitemisa; the resolution is not good enough. And why does counsel so aver? It is only this. The resolution should have been that of the applicant and not the managing committee of the applicant. Mr Hinda's response is briefly this. The resolution is sufficient proof of authority that the CEO has to bring the present application on behalf of the applicant.

[4] At face value Mr Tjitemisa's submission has some merit – at least on generalities. But on the facts and circumstances of the instant proceeding that is not good in substance. Considering the resolution in question, one must not lose sight of the scheme of the management system of local authority councils in terms of the Local Authorities Act 23 of 1992. To start with, the membership of a managing committee of a local authority council is not far removed from the membership of the council in the sense that a management committee of the particular council consists of a sizeable number of the members drawn from among members of the particular local authority council. In the instant proceeding, there are seven members of the applicant and three of them constitute the management committee. (See s 21(1)*(a)*, read with Schedule 1 of Part II, of the Local Authorities Act.) Furthermore, in terms of s 31 of that Act, a local authority council may 'authorize its management committee, the chief executive officer or any other officer or employee to perform any duty or function imposed upon it by or under this Act'. And in terms of s 31(2) of that Act a local authority council may alter or withdraw any decision taken by the management committee, the chief executive officer or the employee in that regard.

[5] In the instant case, the management committee of the applicant recommended, by resolution, to the applicant to pursue the present application and to authorize the CEO to bring the application and to ratify and accept the resolution. There is nothing in the Act to establish that the managing committee has no power to do what it did, that is, propose a course of action to the applicant. And there is no evidence to establish that the applicant did not accept what the management committee had proposed to the applicant, that is, pursue this application and authorize the CEO to bring the application. *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298 tells us that it is trite that the applicant, as in the present application, need do no more in the founding affidavit than allege that authorization had been duly granted. Where that was alleged, it was open to the respondent to challenge the averments regarding authorization. The respondent has not challenged the averments. Furthermore, considering the management system of local authority councils under the Local Authorities Act, as I have briefly explained previously, coupled with the facts and circumstances of this case, I conclude that the respondent's challenge to the authority of the CEO to bring this application on behalf

of the applicant is a weak one, and I accept the evidence that has been put forth to establish the CEO's authority (See *Otjozondu Mining (Pty) Ltd.*) Having disposed of the challenge to authority, I now proceed to consider the merits of the case.

[6] The provenance of the present proceeding lies some four years ago when the applicant placed an advert, inviting suitably qualified persons to apply for the post of Administrative Officer the applicant had on its establishment ('the post'). One relevant minimum requirement for the post and which is relevant in this proceeding was this: 'At least diploma in Administration or Business Management or related field'.

[7] In support of his application for the post the respondent submitted to the applicant the respondent's Curriculum Vitae ('CV'). The only tertiary qualification of note which appears on the CV is this:

> '2004/5 Oxford Brookes University, UK ('the University'): Currently I am a candidate for a Masters of Business Administration (MBA) degree and only left with acceptance of submitted dissertation.'

[8] In the course of events, since the applicant was not satisfied that the respondent has, indeed, the tertiary qualification he had presented to the applicant he had, the applicant proferred certain charges against the respondent, particularly when he had failed or refused to submit to the applicant acceptable documentary proof of his tertiary qualification in terms of the aforementioned advert. Thus, in March 2012, the respondent was suspended from duty on suspicion that he did not possess the necessary qualification for the position he was originally appointed to (PA). Upon lifting of the suspension, the respondent was charged with four charges, namely, 'charge 1: Fraudulent non-disclosure; Charge 2: Failing job requirement; Charge 3: Refusing to execute fair and reasonable instructions'; and Charge 4: Refuse (verbatim) to execute fair and reasonable instruction'. I should say that all the charges relate primarily to (a) the respondent's fraudulent misrepresentation that he had enrolled for an MBA degree with the University and that he had studied towards the award of the University's MBA degree and that all that remained at the material time was the acceptance of his dissertation, and (b) the respondent's failure or

refusal to submit to the applicant an acceptable documentary proof of his tertiary qualification when lawfully instructed to do so by the applicant.

[9] The disciplinary hearing instituted by the applicant found the respondent guilty on all the charges, except Charge 4. I should say in parentheses that I do not seem to see the difference between Charge 3 and Charge 4. Be that as it may, it is worth signalizing this piece of evidence that was placed before the arbitrator: It was only after more than four years had passed since the respondent had lawfully been instructed to submit an acceptable documentary proof of his tertiary qualification to the applicant that he at long last did so; and – curiously and inexplicably – it was at the appeal hearing of the applicant's. I shall return to this relevant piece of evidence in due course; but now I should make the point that it was too late in the day for the respondent to do so; and the arbitrator should have found that the respondent's submission at that late hour of documentary proof of his tertiary qualification after charges against him had been proferred and hearing had been concluded on the facts then before the disciplinary hearing had no probative value. I cannot, therefore, fault the applicant for rejecting the submission of documentary proof of the respondent's tertiary qualification during the appeal hearing.

[10] Aggrieved by being found guilty by the disciplinary hearing and the confirmation of the decision on appeal and his dismissal by the applicant, the respondent lodged a complaint of unfair dismissal with the Labour Commissioner. The dispute remained unresolved after conciliation, and so it ended up in an arbitration conducted by the second respondent ('the arbitrator'). The arbitrator's award contains the following order:

> '7.1 The dismissal of the Applicant Mr Ephraim Katjatenja by the respondent Omaruru Municipal Council was substantively unfair.
>
> 7.2 The Applicant is to be reinstated back into the position prior to his unfair dismissal on the same terms and conditions with the same salary and benefits.
>
> 7.3 The reinstatement is with retrospective effect in that the date that he was dismissed. He must be paid his salary for the months he was without employment being N$15 875,10 (Fifteen Thousand Eight Hundred and

Seventy Five 10/100): 11 months from September 2012 to July 2013 which is equal to N$174 626,10 (One Hundred and Seventy Four Thousand Six Hundred and Twenty Six 10/100).

7.4 The said amount is to be paid to the Applicant on or before 15th August 2013.

7.5 The Applicant must report for work on 01 August 2013 at 08h00 and the Respondent must accept the Applicant into the job.

This award is final and binding on all parties hereto and the above amount attracts interest from the 16 August 2013 in terms of section 87 of the Labour Act, 11 of 2007.

The award may be made a court Order by either Party in terms of section 87 of the Labour Act 11 of 2007.'

[11] The arbitrator signed the award on 22 July 2013 but he or she (for the sake of neatness, I shall settle with 'he') delivered the award on 29 July 2013 after he had 'rectified' certain terms that appeared in the original award. The applicant lodged a notice of appeal on 5 August 2013, and on the same date launched the present application as a matter of urgency. Doubtless, the lodging of the appeal and the launching of the present urgent application were done barely five days after the delivery of the final arbitration award. For this reason, I find that the urgency is not self-created (See *Hardap Regional Council v Sankwasa James Sankwasa and Another* LC 15/2009 (Unreported).) The applicant has acted with reasonable and commendable expeditiousness both in lodging the appeal against the arbitration award and in launching the present application.

[12] On the facts of this case, I should say there are relevant points that emerge indubitably from the totality of the evidence that was placed before the arbitrator and which are significant for our present purposes. They relate to the charges that were proferred against the respondent and the fact that the proof of those charges was sufficiently established at the disciplinary hearing and the appeal therefrom. The arbitrator – without justification – did not bring his mind to bear on them, leading the arbitrator to the slippery slope of drawing conclusions which the evidence cannot account for.

[13] First, the respondent failed or refused – when lawfully instructed to do so by the applicant – to submit to the applicant acceptable documentary proof of his tertiary qualification. Second, the respondent gave no adequate and reasonable explanation as to why he could not produce such proof of the Diploma the respondent had informed the applicant he possessed. Third, and this is most damning; in his CV which, as I have said previously, he had submitted in support of his application for the post, the respondent had made statements about an MBA degree. He knew the statement was fraudulent. He had not then been enrolled in any MBA programme and so he could not have been waiting for the acceptable of his MBA dissertation.

[14] With a calculated aim of deceiving the applicant, the respondent did not even inform the applicant's interview panel about the MBA degree. He only informed the panel that he had acquired 'the qualification of a Diploma in Business Administration' from the University. In any case, this is also false; for, when at long last he did submit 'documentary proof' of his tertiary qualification, he did present three extremely confusing titles of his tertiary qualification. The question that immediately and inevitably arises from this is this: Is the respondent's qualification (a) Diploma in Business Administration, or (b) Diploma in Administration Management, or (c) Post-Graduate Diploma in Business Administration, or (d) all three that is, (a), (b) and (c)?

[15] In this regard, I note that a copy of a transcript issued by the University indicates 'Award Title – Diploma in Business Administration', but an e-mail from a David Ainslie, Team Leader at the same University, says that the qualification that was awarded to the respondent is a 'Diploma in Administration Management'. The same e-mail says that the respondent failed to complete his studies in time to be awarded an MBA. And yet the respondent fraudulently misrepresented to the applicant, as I have noted previously, that he was only awaiting the acceptance of his MBA dissertation by the University.

[16] I note the absurdity and ludicrousness of a discipline called 'Administration Management' in which a person may graduate at a University. (See George F Grant, *Development Administration* (1982): passim, about 'administration' and 'management'.) I cannot, therefore, with respect, accept Mr Tjitemisa's argument that

‘Diploma in Business Administration’, ‘Diploma in Administration Management’ and ‘Post-Graduate Diploma in Business Administration’, ‘are the same qualification’. Those qualifications cannot on any stretch of imagination – legal or otherwise – be ‘the same qualification’.

[17] Apart from all else, the absolute and intractable confusion that remained unresolved at the close of the arbitral proceedings revolve around these relevant questions: (a) What tertiary qualification or qualifications did the University award the respondent? Is it (a) Diploma in Business Administration, (b) Post-Graduate Diploma in Business Administration, or (c) Diploma in Administration Management, or (d) all three titles, that is in (a), (b) and (c)?

[18] In the face of this real and important confusion which goes to the root of the charges the respondent was found guilty of by the disciplinary hearing and which the appeal hearing confirmed, the arbitrator – as a tribunal within the meaning of Article 12(1) of the Namibian Constitution – was duty bound to resolve the confusion surrounding the tertiary qualification the respondent possessed and which he presented to the applicant before the arbitrator could make any reasonable inferences that formed the only basis of the arbitrator’s decision that the respondent was unfairly dismissed. As I have found in para 12, it is the arbitrator’s failure to consider all the evidence that was placed before him that led him to draw conclusions which the evidence cannot account for. In sum, I find that the conclusions drawn by the arbitrator are not in accordance with justice.

[19] Additionally, the order made by the arbitrator in paras 7.2 and 7.3 concerning reinstatement is wrong in law. In our law an arbitrator or the court may order an employer to reinstate an employee in terms of s 86(15)*(d)* of the Labour Act where the court or tribunal finds that the employer dismissed the employee unfairly, but the tribunal or court cannot order the reinstatement of the employee retrospectively, as the arbitrator in the instant case did. (*Transnamib Holdings Ltd v Engelbrecht* 2005 NR 372 (SC)); *Chegetu Municipality v Manyora* 1997 (1) SA 662 (ZSC))

[20] For these reasoning and conclusions, an appeal court may come to a conclusion different from that reached by the arbitrator. Besides, as I have shown

previously, the applicant did within five days after delivery of the final award lodge an appeal against the award and I find that the appeal is not frivolous or vexatious: the appeal has been lodged with a genuine intention of seeking to reverse the award and not for some indirect purpose.

[21] Accordingly, I find that the applicant has established a clear right worthy of protection. (*Melvin van Wyk v Elizabeth Cornelia Gowases and Another* Case No. LC 40/2008 (Unreported)); for, it has been shown that the arbitral proceeding was not in accordance with justice, including my holding that the arbitrator is wrong in law for making the order that makes the reinstatement of the respondent retrospective which I have shown to be bad in law. Additionally, as Mr Hinda submitted, on his own papers, the respondent has demonstrated that he is impecunious, and if an appeal court in due course overturned the award, the respondent would be unable to pay back any remuneration that might have been paid to him. And that would be a total loss of public funds. Besides, to allow the order of reinstatement to stay until overturned on appeal in due course would – as I have said previously – be unfair and unreasonable and inequitable in the extreme, particularly when the arbitrator is clearly wrong in law in making the order.

[22] Accordingly, I find that the applicant would suffer irreparable harm if the award was not suspended pending finalization of the appeal, particularly when there are reasonable prospects of success on appeal. I, therefore, exercise my discretion in favour of granting the order sought in para 2 of the notice of motion. I have already demonstrated that the urgency in this case is not self-created. But that is not the end of the matter. Mr Tjitemisa argued that although it is trite that an application for the stay (suspension) of an arbitration award is urgent by nature, it should be considered in relation to the facts and circumstances of the particular case. I accept counsel's argument. In my opinion, the facts and circumstances of the present case that I have found them to exist and which are set out in paras 6–20, scream for the application of this trite rule to the present proceeding. It would be unreasonable and unfair to hold otherwise. It follows that, in my opinion, a case has been made out for the grant of the order sought in para 1 of the notice of motion concerning urgency.

[23] Having so decided to grant the order sought in paras 1 and 2 of the notice of motion, there was no need to consider any order (in para 3 of the notice of motion) which is alternative to the order sought in para 2 of the notice of motion.

[24] For all these reasons, I granted the order first before mentioned in para 2 of this judgment.

C Parker

Acting Judge

APPEARANCES

APPELLANT:	G Hinda SC Instructed by Murorua & Associates, Windhoek
FIRST RESPONDENT:	J N Tjitemisa Of Tjitemisa & Associates, Windhoek