REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 42/2012

In the matter between:

1.1.1.1. **LUDERITZ TOWN COUNCIL**

APPELLANT

and

THOMAS SHIPEPE **RESPONDENT**

Neutral citation: *Luderitz Town Council v Shipepe (LCA 42/2012) [2013] NALCMD 9 (2013)*

Coram: SMUTS, J
Heard: 18 March 2013
Delivered: 27 March 2013

Flynote: Disputes referred to the office of the Labour Commissioner outside the periods referred to in s86(2) are prescribed. A dispute arose in the present context when the respondent took issue with the withdrawal of unauthorized benefits. Benefits to Local

Authority employees are invalid if ministerial approval is not granted for them.

ORDER

(b) The appeal against the award of the arbitrator succeeds and his award is set aside in its entirety. No order is made as to costs.

JUDGMENT

SMUTS, J

(c) This is an appeal against the award of an arbitrator, given on 18 July 2012. The facts which gave rise to that award and to this appeal are essentially not in dispute.

(d) The respondent was employed by the appellant, a local authority established under the Local Authorities Act, 23 of 1992 ("the local authorities Act"). The respondent's employment as a strategic executive was pursuant to a written offer of appointment which the respondent had accepted. The offer did however state that it was subject to the provisions of the Labour Act, the Local Authorities Act and the appellant's 1995 Personnel Rules.

(e) In terms of his appointment, the respondent received certain benefits which included a fuel allowance, insurance cover and an annual motor vehicle licence renewal fee. But these benefits were discontinued by the appellant in July 2010. This had followed a letter from the Minister of Regional and Local Government, Housing and Rural Development ('the Minister') advising that these benefits were without his approval and thus illegal. As a consequence of the withdrawal of these benefits, the respondent referred a complaint to the office of the Labour Commissioner on 15 May 2012.

(f) In the accompanying form, he stated that the dispute arose in December 2011, being the date upon which 'the matter was brought to the attention of the Acting Chief Executive Officer'.

(g) The arbitrator ruled in favour of the respondent. He ordered the reinstatement of the respondent's housing, insurance, motor vehicle and monthly fuel allowances and further ordered the appellant to pay N$42 502 'for losses suffered during the period the losses were terminated'.

(h) In its opposition to the dispute before the arbitrator, the appellant took the point that the arbitrator had no jurisdiction to adjudicate upon the withdrawal of the benefits, other than the housing benefits, as these had been withdrawn in July 2010 already. The housing benefit was withdrawn in 2012. It was common cause that the dispute was referred to the office of the Labour Commissioner in February 2012. The point was taken that the arbitrator had no jurisdiction to deal with an alleged unfair labour practice as s 86(2)(b) of the Labour Act, 11 of 2007 ("the Act") required the referral of disputes of that nature to be within one year from the date upon which the dispute arose. For some inexplicable reason the arbitrator referred to the withdrawal of benefits (other than the housing benefit) as being in July 2011. Both counsel who appeared before me agreed that there was no evidence to this effect and that the unequivocal evidence was however to the contrary, namely that the benefits had been withdrawn in July 2010. The reference to July 2011 in the arbitrator's ruling when dealing with the question of prescription, if not a typographical error, would in my view clearly constitute a finding which no reasonable arbitrator could have made as there was simply no foundation in fact for it. Insofar as it constitutes a finding of fact by the arbitrator, it cannot thus stand.

(i)

(j) The respondent however contends that the prescription period should not run from July 2010 but rather from December 2011 when the respondent had formally raised the unilateral change to his employment conditions under the attention of the Acting Chief Executive Officer in a grievance process and that when no solution was forthcoming from the aggrieved procedure, then the

prescriptive period would commence to run Ms Keulder, counsel for the respondent, submitted that there had not prior to that date been a dispute and that the dispute had only arisen then.

(k) Section 86(2) of the Act provides:

> '(2) A party may refer a dispute in terms of subsection (1) only-
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> (a) within six months after the date of dismissal, if the dispute concerns a dismissal; or
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> (b) within one year after the dispute arising, in any other case.'

(l) Mr Maasdorp, who appeared for the appellant, took a different view. He submitted that upon the evidence which served before the arbitrator, a dispute had already arisen at least by 25 July 2010 when the respondent together with certain of his colleagues who were likewise affected by the withdrawal of benefits had addressed a letter complaining of that very fact to the appellant. The fact that there was correspondence exchanged thereafter and the matter had not become resolved which eventually led to a grievance procedure being lodged by the respondent in December 2011, followed up by the referral of his dispute to the office of the Labour Commissioner in February 2012 would not alter the position that the dispute itself had already risen by at least 25 July 2011 when the respondent together with certain of his colleagues took up the issue with his employer, the appellant. That is thus the date when the dispute arose for present purposes. Parties are plainly at risk of their causes of action under the Act prescribing if they do not refer their disputes within the time periods specified for the two categories in s 86(2) of the Act.

(m)

(n) As was confirmed by this court, the provisions of s 86(2) are peremptory. [1] As was stressed in that matter, the provisions of the Act clearly demonstrate a statutory intention for disputes to be resolved and determined expeditiously. This is reinforced by the fact that s 86(2), unlike its predecessor in the Labour

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[1] *Namibia Development Corporation v Philip Mwandingi and 2 others*, unreported 3 December 2012, Case No LCA 87/2009.

Act of 1992, [2] does not provide for the power of amelioration by means of a power to condone the late filing of any referral, despite the attempt in Rule 10 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner. [3]

(o) It follows in my view that the referral of the dispute concerning the withdrawal of benefits, other than the housing benefit, was made way outside the time period prescribed by s 86(2)(b) of the Act. As a consequence the award based upon the withdrawal of those benefits, is accordingly a nullity and must thus be set aside. [4]

(p) A further question of law raised by the arbitrator's ruling in favour of the respondent which affected the withdrawal of the housing benefit, was that it was not open to the respondent to withdraw those benefits offered to the respondent and that these had constituted valid contractual terms once accepted by him irrespective of whether there was a ministerial approval of the benefits (or whether they were authorised by the Local Authorities Act). The arbitrator further found that it was not possible for the respondent to ascertain whether those benefits had been approved at the time that the offer had been made. This factual finding was challenged on the basis that no reasonable arbitrator could have arrived at it on the material available to him. The challenge to that finding would appear to be well founded, given the seniority of the respondent and the simple question which he could have asked at the time to the appellant as to whether the terms had been approved by the Minister, as is required by s 27 of the Local Authorities Act. Whether it would be reasonable for a person in the position of the respondent to make such an enquiry in the circumstances is, of course, another matter. But, as was accepted by Mr Maasdorp, this question is irrelevant in the context of the further question as to the legality of the offer and its acceptance to the extent that it was not approved by the Minister, as is required by the Local Authorities Act.

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[2] Act 6 of 1992.

[3] Published in Government Notice 262 of 31 October 2008.

[4] *Nedbank v Louw*, unreported, Case No LC 68/2010, 30 November 2010; *Standard Bank v Mouton*, unreported, Case No LCA 74/2011 of 29 July 2011.

(q) In terms of section 27(1)(c)(ii)(bb) of the Local Authorities Act 23 of 1992, the appellant could only determine the remuneration of and provide or give pensions and/or benefits and housing facilities or benefits for the respondent and with other staff members with the approval of the Minister.

(r) It is common cause that the Minister did not approve of the benefits offered to the respondent including the housing benefit and when alerted to them he expressly disapproved of them.

(s) Mr Maasdorp argued that the absence of ministerial approval as is expressly required by s 27(1)(c)(ii)(bb) meant that the terms of the offer were illegal and that they were unenforceable. He referred to a decision of the High Court in the context of the absence of ministerial approval under s 30(t) of the Local Authorities Act for the sale of immovable property by a town council. The court found that a town clerk (in that instance) did not have the authority to sell immovable property and that the consent of the Minister meant that any sale without that consent would be null and void *ab initio*. The court found that consent in this context was a peremptory requirement for the validity of such a sale, and that it was the intention of the legislature that a town council should not be permitted to alienate their land without the consent of the Minister and that any agreement without that consent would be invalid. [5]

(t)

(u) Mr Maasdorp submitted that the approval of the Minister is expressly required and is thus a peremptory requirement under s 27(1)(c)(ii)(bb) and that benefits offered without such approval would be invalid. He further submitted that estoppel would not arise. He did say with reference to the finding of this court in Council of the Municipality of Keetmanshoop v Josef Rooi and 2 others [6] where it was stated:

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[5]Northland Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi and four others, unreported, case no A350/2008 on 5 May 2011 at paras [11], [28] and [29].

[6]Case No LCA 80/2011 on 18 July 2012 at par [17].

> "The failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires*." [7]

(v) Ms Keulder on the other hand argued that the approach adopted by the appellant would be contrary to Articles 10 and 18 of the Constitution

(w)

(x) Ms Keulder submitted that it would lead to discrimination between employees if unilateral amendments to employment would be permissible to those employed by local authorities whereas this would not be permissible in respect of any other employees. This submission however misses the point. If a benefit is not authorised by law and is thus invalid to that extent, it would not constitute a unilateral change of conditions of employment if it were no longer to be paid.

(y)

(z) Ms Keulder also submitted that it would be in keeping with the spirit and tenor of the Labour Act, as is reflected in the preamble that all employees are to be treated equally, and that the Act also binds the State and that this principle would also apply to any persons employed by the State, in keeping with s 1 of the Act. Ms Keulder referred to the fact that a local authority is included in the definition of State for the purpose of s 1 of the Act. Her submissions however primarily relied upon s 2(4) of the Act which provides that should there be any conflict between the provision of the Labour Act and the provision of a law listed in sub-section (5), the provisions of the Act would prevail to the extent of such a conflict. The laws listed in sub-section (5) include any law on the employment of persons in the service of the State which would thus include those employed by local authorities. Ms Keulder submitted that there was thus a conflict between the Local Authorities Act and the Labour Act and that the provisions of the Labour Act should prevail to the extent of that conflict. Ms Keulder argued that the conflict in question was that the Local Authority Act requires ministerial

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[7] See also *Strydom v Land-en Landbaubank van Suid Afrika* 1972 (1) SA 810 (A) at 816 A-C where the court made it clear that acts of a statutory body which are nullities by reason of being *ultra vires* that statutory body cannot be rendered enforceable by the operation of estoppels.

approval for a valid agreement between the appellant and respondent but that this has the effect of depriving the respondent of benefits previously received, which is in conflict with the Act. The fallacy of this argument rests upon the assumption of validity of the benefits previously provided.

(aa) When pressed in oral argument, Ms Keulder accepted that the conflict in question for the purpose of her argument would be the approval of the Minister for conditions of employment offered by local authorities established under the Local Authorities Act. But that would not in my view constitute a conflict between the provisions of the Local Authorities Act and the Labour Act in any proper sense. To require ministerial approval for conditions of employment of local authorities does not in my view conflict with the provisions of the Labour Act.

(bb)

(cc) At best for Ms Keulder the complaint would however rather arise with reference to the manner in which approval had not been given to terms offered to the respondent. The requisite of approval by the Minister of conditions of employment of local authorities which the legislature has seen fit to require, would not in my view give rise to an inherent conflict of the kind contemplated by s 2 of the Act, relied upon by Ms Keulder. Instead, it would seem to me that her complaint would instead appear to lie against the exercise of the ministerial power and the fairness or reasonableness of the exercise of that power in the circumstances of this case.

(dd)

(ee) The complaint cannot be properly directed at the fact that the legislature has accorded the Minister the power of approval in s 27 of the terms and conditions of employment of local authority employees. As was stated by the High Court in the context of s 30(t), the legislature specifically reserved such a power of approval to the Minister – in this instance in respect of employment conditions. This was presumably enacted to ensure a degree of uniformity within local authority councils or as a check upon the exercise of the powers of local authorities in according benefits to the employees. The legislature made a choice in requiring ministerial approval as a requisite for the validity of the terms and conditions of employees of local authorities. Effect must be given to that legislative choice in providing for ministerial approval for the validity of the terms

and conditions of employment of local authorities. Terms and conditions (and in this instance benefits), given by local authority councils without ministerial approval which is a requisite for their validity would in the absence of that approval be to that extent invalid and unenforceable as being in clear conflict with the wording of s 27 of the Local Authorities Act.

(ff)

(gg) It follows that the benefits offered by the appellant which had not been approved by the Minister were invalid to that extent as being in conflict with the Local Authorities Act. The arbitrator's award seeks to give effect to such benefits and falls to be set aside in its entirety for this reason alone. This is quite apart from the fact that the referral of the dispute in respect of the benefits other than the housing benefit had in any event prescribed under s 86(2).

(hh) It follows that the appeal against the award of the arbitrator succeeds and his award is set aside in its entirety. No order is made as to costs.

(ii)

(jj)

(kk) _____

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D SMUTS

Judge

APPEARANCES

APPELLANT:	R Maasdorp Instructed by Sharon Blaauw Attorneys
RESPONDENT:	Ms Keulder Annerie Keulder Attorneys