NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: LCA 78/2011

In the matter:

THE MUNICIPAL COUNCIL OF WINDHOEK **APPELLANT**

and

ERNA OCHURUS **RESPONDENT**

Neutral citation: *The Municipal Council of Windhoek v Ochurus* (LCA 78/2011) [2014] NALCMD 13 (7 March 2014)

Coram: UNENGU, AJ

Heard: 26 July 2014
Delivered: 7 March 2014

Flynote: Labour Appeal against arbitrator's award – Respondent alleging unfair discrimination on ethnicity – Respondent failed to establish discrimination – Arbitrator not necessary to apply Affirmative Action (Employment) Act, 1998 – Appeal upheld and Award set aside.

Summary: Appellant has appealed against the arbitration award issued against it is in terms of section 86(15) of the Labour Act, 2007 (Act 11 of 2007). In the proceedings before the arbitrator respondent alleged that she was discriminated against by the Strategic Executive: Finance of the City of Windhoek on the ground of ethnicity – persuading the arbitrator to issue the award in her favour. In appeal – the arbitrator's award set aside in whole, and as a result, therefore, the appeal upheld and the decision by the Strategic Executive: Finance, confirmed.

ORDER

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1. The appeal is upheld.
2. The award by the arbitrator issued on 16 December 2011 in favour of the respondent is set aside.
3. The decision of the Strategic Executive: Finance to promote Mr Mbangu into the position of Senior Storeman is confirmed.

JUDGMENT

UNENGU, AJ: [1] This is an appeal by the appellant brought against the arbitration award made by the arbitrator on 16 December 2011 under case number CRWK728-11, in favour of the respondent. Here below are the background events which led to this appeal.

[2] On 5 February 2010. The appellant advertised or caused to be advertised a position of a Senior Storeman in the department of the Strategic Executive: Finance. The respondent and other candidates, in particular Mr Mbangu, who together with the respondent worked in the same department, applied for the post; both shortlisted and were interviewed on 25 August 2010. The interview panel recommended the respondent for the position on the basis of affirmative action for being a woman from

a previously disadvantaged group. However, Mr Gertze, the Strategic Executive: Finance, who was the appointing authority, differed with the interviewing panel and, after consultations with two other senior officials in the employment of the City of Windhoek, appointed Mr Mbangu, also from a previously disadvantaged group, but a male person.

[3] On 29 September 2010, the appellant informed the respondent that her application was unsuccessful. As a result, the respondent, and in accordance with the internal policy of the City of Windhoek, lodged a grievance complaint with the Chief Executive Officer against the decision of Mr Gertze, the Strategic Executive: Finance, for not appointing her as recommended by the interviewing panel. The Chief Executive Officer, however, agreed with Mr Gertze and as such confirmed his decision. Still not satisfied, the respondent appealed the decision of both Mr Gertze and the Chief Executive Officer to the Management Committee of the City. But again her appeal was dismissed. Aggrieved by the decision of the Management Committee, the respondent in terms of Section 82(7) and section 86(1)[1], (Regulation 16(1), Regulation 18 and Regulation 20(1)) referred a dispute of unfair discrimination, unfair labour practice; and other relief to the Office of the Labour Commissioner. This happened on the 16 August 2011, but served on the Labour Commissioner on 17 August 2011.

[4] In terms of section 85(5) of the Act, Mr Moses Iinane of the Office of the Labour Commissioner was designated to arbitrate the matter on 16 September 2011 at 09h00. The arbitration proceedings were held on 11, 20, 26 October 2011 and 4 November 2011 when written heads were submitted and the oral submissions presented by the representatives of the parties. Eventually, the arbitrator concluded in favour of the respondent. In terms of the award, the arbitrator found and made the following order:

"(1) That the respondent's decision not to promote the applicant, into the position of Senior Storeman on the ground of, *inter alia*, ethnicity, amounts to unfair discrimination and unfair labour practice and hence a violation of Article 10(2) of the Namibian Constitution, Section 5(2)(a) and (b) of the Labour Act, section 19(2) of Affirmative Action (Employment

[1] Of the Labour Act, 2007 (Act 11 of 2007), (The Act)

Act) as well as relevant clauses of the respondent's Affirmative Action Policy and hence such decision is herewith set aside;

(2) That the respondent is order (sic) to appoint the applicant to the position at grade B4 with effect from the 1st January 2012;

(3) That the respondent is further order to pay the applicant the difference between her current salary at level B2 and the salary she would have earned had she been appointed to the position of a Senior Storeman level B4 on 1st October 2010, this being the date on which that position had been filled. The difference in remuneration is to be calculated from the 1st October 2010 to 31 December 2011.

(4) I have not made an order as to costs in the circumstances."

[5] The award was signed by Mr Moses Shitaleni Iinane at Windhoek on the 16th day of December 2011 and stamped with a date stamp of the Labour Commissioner Private Bag 13367, 16 December 2011 Windhoek, Republic of Namibia.

[6] On 23 December 2011, the appellant filed its Notice of Appeal against the Award, on the grounds that:

"(1) The arbitrator erred in law by finding that the appellant exercised his discretionary powers unreasonably by deviating from the recommendations of the interview panel;

(2) The arbitrator erred in law by placing undue weight on one criteria namely ethnicity as the reason why the Respondent was not recommended to the position of Senior Storeman, whilst ignoring other relevant criteria/reasons such as comments of interviewing panellists, duration of service, experience of candidates;

(3) The arbitrator erred in law by not placing any evidential value to the evidence of Gert van Wyk that the Respondent did not meet the requirements of the position, namely a Grade 12 with 20 points and an E symbol in English;

(4) The arbitrator erred in law by finding and/or ruling that the Respondent must be appointed to the position of Senior Storeman, whilst in his evaluation/analysis or argument he correctly conceded that the **RECOMMENDATION IS NOT PER SE FINAL AT THE STRATEGIC EXECUTIVE HAS A FINAL SAY IN DECIDING WHETHER TO APPOINT A RECOMMENDED CANDIDATE OR NOT**".

[7] On 27 January 2012, the respondent gave notice of her intention to oppose the appeal on the grounds amongst others that the appellant failed to prosecute its appeal within 90 days as required in Rule 17(25) of the Rules of the Labour Court, therefore, the appeal was deemed to have lapsed.

[8] The issue of the appeal to have lapsed due to failure on the part of the appellant to prosecute the appeal within 90 days as required by Rule 17(25) of the Rules of the Labour Court, was heard by Smuts, J on 25 September 2012 and delivered his judgment[2] in favour of the appellant, paving the way for the present appeal.

[9] Before me, Mr Töttemeyer with him Mr Phatela argued the appeal on behalf of the appellant, while Mr Hinda acted on behalf of the first respondent (Ms Ochurus). The second respondent did not oppose the appeal, for an obvious reason, namely, does not have any interest in the outcome of the appeal.

[10] Turning back to the appeal itself, I shall attempt to deal with the grounds thereof, not necessarily following the order in the notice of appeal. I shall start with ground 3, where the appellant is crying foul that the arbitrator made an error in law by not placing any evidential value to the evidence of Mr Gert van Wyk that the respondent did not meet the requirements of the position, namely a Grade 12 with 20 points and an E symbol in English. There is no merit in this ground of appeal. The appellant self allowed and invited the respondent for interviews as if she met all the requirements. Why was she shortlisted in the first place? The shortlisting was done by the Human Resource Office of the appellant who allowed the respondent to come for interview despite the fact that she did not meet the requirement of Grade 12 with 20 points with an E symbol in English. That being the case, I find the requirement to have been relaxed for her and she qualified. In any event, it would appear as though that this ground of appeal was not pursued by the appellant on appeal because Mr

[2] Unreported judgment of Municipal Council of City of Windhoek v Erna Ochurus (LC 03/2012)[2012] NAHCMD 3 (4 October 2012)

Töttemeyer, counsel for the appellant in both his written heads of argument and oral submissions did not support the ground. Therefore, the ground will be disregarded.

[11] Next, is ground number 1. In this ground the appellant is faulting the arbitrator in finding that the appellant exercised his discretionary powers unreasonably by deviating from the recommendation of the interview panel.

[12] It is part of Mr Töttemeyer's submissions that the appellant took an administrative action when it decided to promote Mr Mbangu to the position of a Senior Storeman than Ms Ochurus. He argues that the onus to prove that the decision taken by the Council is wrong rests on the respondent and, according to him, to prove that it was illegal and contrary to a provision of the Act or contrary to a legal principle in fact and in law.

[13] I am also taken aback by the decision of the arbitrator to reverse the decision of the Strategic Executive Finance who promoted Mr Mbangu in the advertised post than the respondent. The issue why Mr Gertze did not follow the recommendation by the interview panel, has been debated extensively before the arbitrator. Reasons were provided by Mr Gertze why he did not follow the panellists' recommendation to appoint the respondent. In his evidence-in-chief, Mr Gertze told the arbitrator that in his belief a recommendation is just a recommendation, it is not an appointment or an approval *per se*, therefore he could change or alter that recommendation. He said: 'I am the appointing authority in consultation or conjunction with the Human Resource Department'. This evidence has not been contrasted by any other admissible evidence of a witness who testified during the arbitration. In the result, the arbitrator should have accepted that Mr Gertze, in his capacity as the appointing authority at the finance department could deviate from recommendations by the panellists on good grounds.

[14] Further, in his evidence-in-chief, Mr Gertze did explain why he deviated from the recommendations of the panellists. He did it not only on the ground of ethnic representation in the department, but also on other grounds as well. He said the following in evidence-in-chief: 'When I received the minutes of the interview panel, I

looked through the outcome of the interview and I realised that the three candidates in the final points presented to me scored the same points. And then I found it interesting because what normally happens at interview panels is that the interview panels come to sort of a consensus scoring. So it was interesting to me that three candidates scored the same points'.

[15] This evidence must have warned the arbitrator that Mr Gertze knew what he expected the panellists to do and that possibly the panellists failed to do what they were supposed to do. He knew that he was not a rubber stamp for panellists but had the authority and the power not to follow recommendations he did not agree with.

[16] To satisfy himself why all three candidates scored the same points, Mr Gertze looked in the file for a reason – why it happened. The following is what he found why he found Mr Mbangu, a better candidate for the post: 'Then I realised when I read through what the panellists have been writing, the summary comments awarded or given to Mr Mbangu seemed to be better comments than that assigned or attached to the other two. The other thing that I considered was the number of years or the experience of the three candidates'. Why the arbitrator says that Mr Gertze, exercised his discretionary powers unreasonably because he deviated from the interview panel, is hard to understand. It is not in dispute that Mr Mbangu has more years of experience in the section than the respondent - meanwhile the third candidate had no experience of the work. What Mr Gertze did to look in the file for more information was not only a reasonable step taken in the exercise of his discretionary powers, but also crucial for the decision he made in my view.

[17] In his oral submission, Mr Hinda, counsel for the respondent, complained about the lack of evidence of the content of the favourable comments made by the panellists in favour of Mr Mbangu. Mr Hinda argues that the arbitrator was denied the opportunity of hearing the facts. Further, he contended that the record of the arbitral proceedings is conspicuously silent on what the comments he got from the his colleagues. But the fact of the matter is that Mr Gertze told the arbitrator he consulted Messrs Gerber and another colleague of his both who indicated to him that according to them, Mr Mbangu was a better candidate for the position. That

evidence was not disputed or challenged in cross-examination by the representative of the respondent. Therefore, in my view, the evidence of favourable comments stands. If Mr Gertze was invited by the representative of the respondent or by the arbitrator to share with them the favourable comments made by his colleagues, he would have done so. Mr Hinda cannot now ask what favourable comments were made in favour of Mr Mbangu. Mr Podewiltz who represented the respondent at the arbitration was in a better position to ask Mr Gertze to tell the arbitrator about these comments, but he did not.

[18] Therefore, and in view of the facts that the arbitrator himself also conceded in his assessment of the evidence that a recommendation is not final; and in particular, when Mr Gertze testified that he took time to consider the recommendation of the panellists, it is my view that the appellant, through Mr Gertze, did not exercise his discretionary powers unreasonably by deviating from the recommendation of the interview panel. The finding of the arbitrator is wrong and on this ground alone the appellant can succeed.

[19] With regard ground 2, there is no doubt that the arbitrator over-emphasized the alleged discrimination at the expense of other factors considered and taken into account by Mr Gertze in promoting Mr Mbangu in the post of Senior Storeman. This appears from the arguments and the analysis of the evidence by the arbitrator. From departure, the arbitrator kicked off with affirmative action and a reference to section 5(2)[3], and deliberately ignored the provisions of subsection (4)[4] of which paragraphs (a)-(c) thereof read as follows:

‘(4) For the purpose of subsection (2) it is not discrimination –

(a) to take any affirmative action measure to ensure that racially disadvantaged persons, women or persons with disabilities-

(i) enjoy employment opportunities at all levels of employment that are at least equal to those enjoyed by other employees of the same employer; and

(ii) are equitably represented in the workforce of an employer;

(b) to select any person for purposes of employment or occupation according to reasonable criteria, including but not limited to, the ability, capacity, productivity and conduct

[3] Of the Labour Act, 11 of 2007

[4] Section 5 of the Labour Act

of that person or in respect of the operation requirements and needs of the particular work or occupation in the industry in questions;

(c) to distinguish, exclude or prefer any individual on the basis of an inherent requirement of a job;" (Emphasis added)

[20] The appellant, amongst other things, was alive to the provisions of section 5(3) and (4) of the Labour Act, but in doing so, in my view, did also not forget that it has to comply with the Affirmative Action (Employment) Act, 1998[5], of which some provisions thereof are included in its Recruitment Policy and Guidelines. In her evidence, Mrs Nakaziko, who testified as a witness for the appellant corroborated the evidence of Mr Gertze in many respects.

[21] As already pointed out, the arbitrator came to a wrong conclusion in his assessment of the evidence because he assessed the evidence piece meal. There was a duty upon the appellant to consider affirmative action only if both Mr Mbangu and the respondent were equally suitably qualified for the post. However, in the instant matter, it was not the case. Mr Mbangu edged the respondent in some respects, therefore affirmative action was not an issue to be considered. I failed to find any evidence or facts established by the respondent to prove the discrimination she is complaining about, also that she deserves to be promoted in the position than Mr Mbangu. She scored the same points as Mr Mbangu but with less experience in the job and no favourable comments from the panellists compared to Mr Mbangu. In fact, the respondent, in my view, was recommended for the post by virtue of her being a female not because she is better suitable for the post than her colleague Mr Mbangu. Before I conclude, I wish to point out again that the appellant did not discriminate against the respondent.

[22] The respondent should not think that being a previously disadvantaged woman armed with Affirmative Action (Employment) Act, is entitled to be wheel barrowed into a position even though not better qualified and suitable above her better suitably qualified previously disadvantaged male counterpart. In doing so, quality delivery of service will be compromised.

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[5] Act 29 of 1998

[23] For the reasons herein before stated, I agree with Mr Töttemeyer, for the appellant, that section 19 of the Affirmative Action (Employment) Act, is only one of the numerous factors one must take into account in balancing various criteria in order to come to a rational conclusion – that it is not a matter of ticking boxes to merely look at section 19 and say, you are a black man, you fall in one category and you are a black woman, in two categories, therefore you get the post. A number of other factors have to be taken into account which the arbitrator failed to consider in this matter. Secondly, the respondent also failed to establish that she has been discriminated against on the ground of ethnicity by the City by not giving her the post.

[24] For the reasons mentioned above and also taking into account written and oral submissions of both counsel as well as the many case law referred to as authorities, I shall allow the appeal. In the result the following order is made:

1. The appeal is upheld.
2. The award by the arbitrator issued on 16 December 2011 in favour of the respondent is set aside.
3. The decision of the Strategic Executive: Finance to promote Mr Mbangu into the position of Senior Storeman is confirmed.

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PE Unengu

Acting

APPEARANCE

For the appellant: Adv R Töttemeyer SC

(and with him) Adv Phatela

Instr. by Hengari, Kangueehi & Kavendjii Inc

or the respondent: Adv G Hinda SC

Instr. by Murorua & Associates