



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: LC 43/2015

In the matter between:

**PU TJIHOREKO**

**APPLICANT**

and

**OMAHEKE REGIONAL COUNCIL**

**FIRST RESPONDENT**

**MINISTER OF LOCAL GOVERNMENT AND HOUSING**    **SECOND RESPONDENT**

**Neutral citation:**    *Tjihoreko v Omaheke Regional Council* (LC 43/2015) [2017]  
NALCMD 35 (17 November 2017)

**Coram:**        USIKU, J

**Heard on:**    **16 May 2017**

**Delivered:**   **17 November 2017**

**Flynote:**        Labour law – Application to review a decision made by a Regional Council brought in terms of section 117(1)(c) of the Labour Act – Section 24(2)(a) (xii) of the Regional Councils Act – Decision by the Regional Council not to extend applicant's fixed term contract – Applicant contending that he is entitled to be heard

before decision not to extend his term of office is taken – Court holding that a fixed term contract comes to an end by effluxion of time – Applicant not entitled to have his term of office extended and therefore has no right to be heard before such decision is taken.

**Summary:** Applicant was appointed on a statutory fixed term of contract of service of five years in terms of section 24(2)(a)(xii) of the Regional Councils Act – Respondent gave due notice to the applicant of its intention not to extend the term of office upon its expiration – Applicant contended that he was entitled to be heard before the decision not to extend was taken – Court holding that applicant is not entitled to be heard before the decision not to extend is taken – The fixed term contract comes to an end by effluxion of time.

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### **ORDER**

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1. Applicant's non-compliance with the time limits prescribed by Rule 14(2)(a) (ii) of the Rules of the Labour Court is hereby condoned.
  2. The review application is dismissed.
  3. No order is made as to costs
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### **JUDGMENT**

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USIKU, J:

#### Introduction

[1] In this application, the applicant seeks review and setting aside of a decision, taken by the first respondent on the 30 October 2014, not to extend applicant's term of office, at the expiry thereof.

[2] The applicant was appointed as a Chief Regional Officer of the Regional Council of Omaheke, on the 1<sup>st</sup> March 2010, on a fixed 5 years term of contract of employment which was due to expire on the 28 February 2015. In terms of the provisions of section 24(2)(a) (xii) of the Regional Council Act<sup>1</sup>, the first respondent was required to inform the applicant at least two calendar months before the expiry of the term of office, as to whether it was going to retain him in service for an extended term or not.

[3] On the 27<sup>th</sup> November 2014 the applicant received written notice from the first respondent dated 31 October 2014, informing him that the first respondent had on 30 October 2014, decided not to extend applicant's term of office upon its expiry.

[4] On the 25 February 2015 the applicant referred a dispute of unfair dismissal to the Office of the Labour Commissioner in terms of the provisions of section 86(1) of the Labour Act.<sup>2</sup>

[5] On the 26 March 2015 the applicant launched the present review application, in which he seeks an order in the following terms: -

1. Condoning, as far may be necessary, the late delivery of this application.
2. Reviewing and setting aside the first respondent's purported decision taken on 30 October 2014 purportedly in term of section 24(2)(a)(xii) of the Regional Councils Act (22 of 1992) read with section 10A(1)(b) of the Public Service Act (2 of 1980) as amended, not to renew the applicant's contract of employment.
3. Directing the first respondent to extend the applicant's 5 year term of office as the first respondent's Chief Regional Officer, alternatively re-appoint the applicant for 5 year term of office as the first respondent's Chief Regional Officer.

In the alternative to prayer 3

4. Directing the first respondent to return the applicant to the position as Chief Regional Officer of the first respondent until such time as the first respondent has applied the *audi alteram partem* rule and afford the applicant an opportunity to be heard concerning the first respondent's exercise of its discretion to retain him or not, which opportunity shall include:

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<sup>1</sup> Act No. 22 of 1992

<sup>2</sup> Act No. 11 of 2007.

4.1 Written notice of all factors the first respondent proposes to consider in the exercise of its discretion under section 24(2)(a)(xii) of the Regional Council Act read with section 10A(1)(b) of the Public Service Act;

4.2 Written notice of all information regarding the applicant in the first respondent's possession, adverse or potentially adverse to the applicant, which the first respondent proposes to consider in the exercise of its aforementioned discretion;

4.3 21 working days within which the applicant may make representation in writing to the information provided to him by the first respondent;

4.4 7 working days notice of the meeting at which the first respondent will meet to exercise its aforementioned discretion.

4.5 An opportunity to orally address the first respondent on the exercise of its discretion at the meeting when it proposes to exercise its discretion;

4.6 Written reason for its decision, transmitted to the applicant within 5 days of the decision, if the first respondent, after consulting with the second respondent, decides not to renew the applicant's contract for a further 5 year term.'

[6] The first respondent opposed the application. There is no opposition filed by the second respondent. I shall therefore make reference to the first respondent as "the respondent" herein except where the context otherwise indicates.

[7] The following facts are either common cause or not disputed: -

(a) on the 5 April 2013, the respondent suspended the applicant from employment, on the recommendation of the Public Service Commission, with full remuneration.<sup>3</sup> The reason given for the suspension were: maladministration and failure to execute resolutions of the respondent;<sup>4</sup>

(b) on the 18 February 2014, the legal representatives of the applicant addressed a letter to the respondent requesting that applicant be reinstated within 5 days failing which they would approach the office of the Labour Commissioner;<sup>5</sup>

(c) on the 03 April 2014 the second respondent (Minister of Local Government) directed the respondent to lift the suspension of the applicant with immediate effect,

<sup>3</sup> Annexure PT22, at page 122 of the record.

<sup>4</sup> Annexure PT17, page 103 of the record.

<sup>5</sup> Supra, page 122.

as the respondent had taken too long to institute any disciplinary proceedings against the applicant;<sup>6</sup>

(d) on the 30 October 2014 the respondent resolved not to extend the term of office of the applicant upon its expiry on 28 February 2015.<sup>7</sup> The information that his term of office shall not be extended upon its expiry came to the attention of the applicant on 27 November 2014. The reason later furnished by the respondent for its decision not to extend the term of office of the applicant is that applicant's term of office would have come to an end by effluxion of time;<sup>8</sup>

(e) since the suspension from employment on the 5 April 2013, the applicant's suspension has never been lifted till his 5 year term came to an end on 28 February 2015 and applicant had not been charged for any misconduct;

(f) on the 25 February 2015 the applicant referred a dispute of unfair dismissal to the office of the Labour Commissioner, for conciliation or arbitration;

(g) on the 26 March 2015 the applicant lodged this review application seeking setting aside of the decision not to extend his term of office;

(h) on the 24 April 2015 this court granted default judgment in favour of the Applicant. This default judgment was rescinded by the court, on application by the respondent, on the 7 June 2016.

[8] The respondent raised six points in limine, namely: *lis pendens*; lack of jurisdiction; late filing of the review application; Labour Court being wrong forum; failure to establish review grounds and review application not meeting required formalities. The applicant on the other hand raised one point in limine that the deponent to the respondent's answering affidavit had no authority to oppose the review application, and that her affidavit contains inadmissible hearsay.

[9] I shall first deal with the point in limine raised by the applicant.

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<sup>6</sup> *Supra*.

<sup>7</sup> Resolution of the respondent dated 31 October 2014, at page 106 of the record.

<sup>8</sup> Annexure PT17, page 102 of the record.

[10] In his replying affidavit, the applicant disputed the authority of the deponent to the answering affidavit of the respondent. The applicant denies that the deponent has authority to oppose the application or to depose to the affidavit. The applicant further indicated that the deponent did not allege that she has authority to oppose the application, and that the deponent did not attach a resolution confirming such authority. For that reason, the applicant contended that respondent's answering affidavit be disregarded and that the application be considered on an unopposed basis. The applicant further argued that the deponent to respondent's answering affidavit has not laid out basis for her allegation that she has personal knowledge of the contents of her affidavit. For that reason, the applicant argues that all factual averments and denials in the respondent's answering affidavit be struck out as inadmissible hearsay.

[11] The issue of authority to oppose the application was dealt with by Unengu J, during the rescission of default judgment application, where it is noted that the deponent thereto had authority to bring the application to oppose the applicant's application.<sup>9</sup>

[12] Authority to oppose having been granted already at that earlier stage, the deponent to the present answering affidavit need not allege or prove same authority. Moreover the applicant had not shown evidence to the contrary that the opposition to the application was not authorized. Therefore, the challenge to the authority to oppose is a weak challenge and is rejected.

[13] Insofar as the applicant contends that the deponent has no authority to depose to the affidavit, it is trite that it is irrelevant whether or not a deponent has been authorised to depose to an affidavit in motion proceedings. A deponent need not be authorised to depose to an affidavit. It is the institution of the proceedings and prosecution thereof that must be authorised.<sup>10</sup>

[14] In regard to the argument by applicant that all factual averments and denials contained in the answering affidavit be struck out as inadmissible hearsay; such a

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<sup>9</sup> See *Omaheke Regional Council v Tjihoreko* (Unreported) (LC 43/2015) delivered on 7 June 2016 para [4].

<sup>10</sup> *Nashinge v SWAPO Party Youth League* (Unreported) (2017/00156) NAHCMD (delivered on 25 August 2017) para [47].

claim is simply overbroad and cannot be entertained. A party seeking the striking out of certain averments must set out clearly the words and paragraphs of the affidavit that s/he seeks to have struck out as well as the legal grounds therefor.<sup>11</sup> The allegation that all factual averments and denials in the answering affidavit are inadmissible hearsay is a generalization that cannot be entertained, and the argument is therefore rejected on that ground.

### Respondent's points in limine

#### (a) Lack of jurisdiction

[15] On this issue the respondent argues that this court does not have jurisdiction to resolve a labour dispute whether by review or otherwise, and that section 117 (1) (c) of the Labour Act does not confer such jurisdiction on the court.

[16] The gist of the matter before this court is whether the decision taken by respondent, not to extend applicants' term of office in terms of the provisions of the Regional Councils Act was lawfully taken. Such a decision concerns a matter within the scope of the Labour Act (namely conditions of employment of the applicant) and therefore the matter falls within the jurisdiction of this court under section 117(1)(c).<sup>12</sup>

[17] The contention that this court has no jurisdiction to consider and decided the issue raised in the application, does not find support in the provisions of the Labour Court.

### Lis pendens

[18] The respondent submits that the current proceedings be stayed pending the finalization of the dispute referred by the applicant to the office of the Labour Commissioner. This submission was made in view of the fact that the primary forum to resolve labour disputes lies in arbitration tribunals.

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<sup>11</sup> R. 58(3) of the Rules of court.

<sup>12</sup>Section 117 (1)(c) reads as follows:

'Jurisdiction of the Labour Court

117(1) The Labour Court has exclusive jurisdiction to-

(c) review despite any other provision of any Act, decision of any body official provided for in term of any other Act, if the decision concerns a matter within the scope of this Act;'

[19] On the facts of this matter, I am of the opinion that it is more just and equitable that the present proceedings be allowed to proceed, and I, therefore, do so decide.

(c) Review application filed out of the prescribed time

[20] The other point in limine raised by the respondent is that the review application was filed late. In terms of Rule 14(2) of the Rules of the Labour Court, a review application must be brought within 30 days after the impugned decision was taken. The applicant stated that the decision in question came to his attention on 27 November 2014, and he lodged this review application on the 26 March 2015.

[21] In explaining the reason for his delay, the applicant stated that he secured new lawyers, as he did not share the views of his erstwhile lawyers. His new lawyers wrote a letter to the respondent's lawyers on 11 December 2014, requesting certain information. On the 16 January 2015 applicant's lawyers forwarded a follow-up letter to the respondent as they had not received response to their earlier letter. On 19 January 2015 the respondent's lawyers responded that they were still waiting for instructions from their client. The respondent's lawyers responded on 6 February 2015 furnishing the required information. On the 25 February 2015, applicant's lawyers addressed another letter to the respondent's lawyers indicating, inter alia, that the applicant shall lodge a review application, and requesting the respondent to reconsider its position, by a certain stated date, in order to avoid litigation.

[22] I am of the opinion that the applicant has satisfactorily explained the reasons for his delay, in the circumstances. The applicant was entitled to seek second opinion from new lawyers. The new lawyers were entitled to seek further information from the respondent before launching the application. Although such information was requested in December 2014, the required information was only furnished in February 2015. For the foregoing reasons I grant the applicant condonation for the delay in bringing the application late, and for his non-compliance with the time period prescribed in Rule 14(2) (a) (ii) of the Rules of the Labour Court.



(d) Applicant not entitled to seek the relief he seeks in this court

[23] This point in limine is akin to the point in limine raised above regarding jurisdiction. The views stated in respect of jurisdiction apply with equal force here and this point in limine is rejected.

(e) Application not conforming to the prescribed formalities and requirements of a review application

[24] The respondent argues that the applicant did not indicate whether his application was brought under Rule 6 or Rule 14 of the Rules of the Labour Court. In his notice of motion the applicant had required the respondent to file its answering affidavit within 14 days, whereas in terms of Rule 14, the respondent is entitled to file its answering affidavit within 21 days.

[25] On this aspect, I find that the application does not strictly conform to the requirements of Rule 14. I also find that the respondent was not prejudiced by such non-compliance, therefore I allow that the application stands and the matter proceeds.

(f) Applicant did not make out a prima facie case for review as required by the Labour Act

[26] On this point in limine, the respondent did not specifically deal with the section of the Labour Act that sets out the grounds for review. The review grounds are set out in section 89 of the Labour Act. Section 89 is confined to the review of arbitration awards. The present application has been brought under section 117(1)(c) and therefore the provisions of section 89 do not apply. The review grounds that should apply in the circumstances are common law review grounds.

Merits

[27] The applicant contends that the respondent did not give him an opportunity to make representations on why his term should be extended. He further contends that

the respondent did not furnish him reasons for its decision not to extend his term of employment.

[28] The respondent argues that the applicant was appointed on a fixed term contract of five years. The respondent is required by law to give notice to the applicant on whether respondent was going to retain applicant at the end of employment contract, or not. The notice was duly given to the applicant two months before the expiry of the employment contract. The respondent further argues that the Regional Councils Act ("the Act") does not require the respondent to give reasons if it decides not to retain a Chief Regional Officer, nor does the Act require the respondent to hear the applicant first before it decides not to extend his contract of employment

[29] Section 24(2)(a) (xii) of the Act provides as follows:

"Appointment of chief regional officer

10A (1) subject to the provisions of this Part and Part IV a person who-

- (a) (i) is appointed as chief regional officer; or
- (ii) is promoted to the post of chief regional officer,  
shall hold office as chief regional officer for a period of five years from the date of his or her appointment or promotion.
- (b) A regional council may, after consultation with the Minister and subject to subsection (2), extend any term of office referred to in subparagraph (a) at the expiry thereof for such further period or successive periods as may be determined by that council acting after consultation with the Minister.

(2) (a) The regional council shall, at least two calendar months before expiry of any term of office or any extended term of office contemplated in subsection (1), in writing inform the chief regional officer concerned of its intention to retain him or her in service for an extended term or not.

(b) If the regional council so informs a chief regional officer of its intention to retain him or her in service for an extended term, such chief regional officer shall, within one month from the date of having been so informed, in writing accept or reject the extended employment.";

[30] From the above section it appears to me that the agreement between the parties was a statutory fixed term of contract of service, with a possibility of an

extended term, if agreed upon. It is also apparent from the terms of the provisions of section 24(2)(a)(xii) that upon the expiration of the fixed term (or an extended fixed term) the employment contract would come to an end by effluxion of time. What is required from the respondent is that, the respondent should inform, in writing, the applicant at least two calendar months before the expiry of the term of office, of its intention whether it would retain applicant in service for an extended term or not.

[31] In my view, once the decision not to retain the applicant in service is taken, and the notice to that effect is given, the respondent has fulfilled its statutory obligation in terms of section 24(2)(a)(xii) of the Act.<sup>13</sup>

[32] I am of the view that the *audi* principle applies only where adverse decisions are taken that prejudicially affect an individual in his existing rights or where a legitimate expectation has been established. The decision not to extend a fixed term contract of employment is not an adverse decision, nor does it prejudicially affect existing rights of the incumbent whose term has come to an end by effluxion of time. The incumbent is not entitled legally to have his/her fixed contract extended.

[33] In *Cronje v Municipal Council of Mariental*,<sup>14</sup> the Supreme Court found that a decision not to extend the tenure of a town clerk in terms of the provisions of the Local Authorities Act<sup>15</sup> was not proper and valid because, among other things, the *audi alteram partem* rule was not complied with.

[34] In my opinion the *Cronje* matter is distinguishable from the facts of the present case. In the *Cronje* case, the court found that the incumbent town clerk was entitled to be appointed as an officer/employee of the municipal council in a post on the fixed establishment on conditions not less than favourable than those previously enjoyed by him, if the municipal council decides not to extend his term of office at the expiry of his fixed term contract.

[35] In the *Cronje* case the municipal council decided not to extend the term of office of the town clerk and refused to appoint him in an alternative position as

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<sup>13</sup> See *Hailulu v Council of the Municipality of Windhoek* 2002 NR 305 at 310F

<sup>14</sup> (Unreported) Supreme Court Case No. SA 18/2002 at section G para 1.2

<sup>15</sup> Act No 22 of 1992, S.27.

provided by section 27(6)(b) of the Local Authorities Act. The Supreme Court found that such decision amounted to a dismissal from permanent employment.<sup>16</sup>

[36] Unlike in *Cronje* case, in the present matter the applicant has no entitlement or legitimate expectation to have his term extended, and therefore no requirement exist in law that he should be heard before a decision not to extend is taken.

[37] The applicant contends further that the respondent had considered irrelevant factors in coming to its decision not to extend. In elaboration, the applicant states that the respondent had considered reports adverse to the applicant, without requesting the applicant to provide his version thereto.

[38] The version of the applicant on this aspect is not borne out by the evidence on record. There is nothing in the minutes of the meeting<sup>17</sup> of the respondent dated the 31 October 2014 indicating that there were reports considered at the meeting when the decision not to extend was taken. The allegation by the applicant that irrelevant factors were considered in coming to the decision not to extend, does not have factual basis.

[39] The applicant also argues that the respondent did not consult the Minister before it took the decision not to extend. In supporting this argument, the applicant made reference to the letter by the Minister to the respondent, dated the 3 April 2014, in which the Minister directed the respondent to lift the suspension of the applicant and to reinstate him.

[40] On this aspect too, the applicant does not provide evidence upon which his allegation on non-consultation is based. The mere fact that Minister wrote a letter in April 2014 to the aforesaid effect, does not constitute proof that a decision taken in October 2014 was not taken after consultation with the Minister.

[41] For the reason foregoing I am of the opinion that the respondent acted in conformity with the provisions of section 24(2)(a)(xii) of the Act and had exercised its discretion fairly and that the fixed statutory contract of service of the applicant had

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<sup>16</sup> *Cronje* case, at section G para.2.

<sup>17</sup> See minutes of the meeting of the 30 October 2014, at page 106 of the record.

come to an end by effluxion of time. The applicant's application therefore stands to be dismissed.

[42] In the result, I make the following order:

1. Applicant's non-compliance with the time limits prescribed by Rule 14(2) (a) (ii) of the Rules of the Labour Court is hereby condoned.
2. The review application is dismissed.
3. No order is made as to costs.

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B. Usiku  
Judge

APPEARANCES

APPLICANT

R Maasdorp  
Instructed by Köpplinger Boltman  
Windhoek

RESPONDENT:

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