REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 35/2017

In the matter between:

NAMIBIA NATIONAL TEACHERS UNION **APPELLANT**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **FIRST RESPONDENT**
LABOUR COMMISSIONER **SECOND RESPONDENT**
NICHOLAS MOUERS N.O **THIRD RESPONDENT**

Neutral citation: *Namibia National Teachers Union v Government of the Republic of Namibia* (LCA 35/2017) [2018] NALCMD 2 (21 February 2018)

Coram: ANGULA DJP
Heard: **20 October 2017**
Delivered: **21 February 2018**

Flynote: Labour Law – Labour Act 2007 – Collective Agreements – Interpretation of such agreements – Terms and conditions of such agreements – Terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment – Variations and Alterations to such terms of the agreement – A document is

conclusive as to the terms of the transaction which it was intended to represent – The task of the court is to determine what the language of the document would ordinarily be understood to mean – The court is not concerned with what the author of the document actually meant to say – The appeal succeeds.

Summary: The appellant, the Namibia National Teachers Union (NANTU) filed an appeal to this court against an arbitrator's award whereby the arbitrator dismissed the appellant's claim for incentive payments based on the arbitrator's interpretation of two collective agreements concluded between NANTU and the Government of the Republic of Namibia, the first respondent, on 23 January 2009 and 8 November 2012 respectively – The resolution of the dispute between the parties was dependent on the interpretation of the two written agreements entered into between the parties.

The issues that the court was called upon to determine were whether the qualified teachers' incentive became a term and condition of the qualified teachers' employment agreement; and whether the terms which became part of the qualified teachers condition of employment were capable of being varied unilaterally through the introduction of the remoteness allowance with the 2012 agreement. If not, the question was, whether the incentive lapsed. If the incentive did not lapse, the further question was whether the Government must be ordered to pay the qualified teachers incentive from 1 April 2015 to the date of determination of the question that is to say to the date of judgment.

Court Held: In an action based, on a contract, the rule of interpretation is to establish not what the parties' intention was, but what the language used in the contract means i.e, what was their intention as expressed in the contract. Moreover, the only way in which a change in the contract of employment between the applicant and the respondent could be effected lawfully was by way of negotiation and mutual agreement.

Held that: The rationale in respect of each benefit of the two agreements concluded by the parties was different and the two benefits were separate and distinct from each other. Similarly the designation of the two benefits, clearly eg. 'incentives' and 'remoteness allowance' indicates the differences.

Held that: The 2009 agreement was not amended or replaced by the 2012 agreement. Nowhere did the 2012 agreement purported to replace or amend the terms and incentives accorded to the qualified teachers by the 2009 agreement. No reference is made to the 2009 in the 2012 agreement. In the absence of a clause in the 2012 agreement purporting to amend or replace the 2009 agreement, there is no basis for contending that the 2009 agreement was amended or replaced by the 2012 agreement. As a result the qualified teachers' incentives did not lapse with or they were amended by nor were they incorporated or harmonised into the 2012 agreement. The court therefore found for the appellant that the qualified teachers' incentives were still valid and due to such teachers. The appeal was upheld.

ORDER

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1. The appeal succeeds.

2. The Collective Agreement dated 23 January 2009, read with read with the Collective agreement dated 10 November 2010 is valid as an existing agreement.

3. The aforesaid agreements did not lapse with the implementation of the 2012 Collective Agreement.

4. The respondent is to pay the qualified teachers their incentives due to them in terms of the 2009 agreement read with the 2010 agreement as from 1 March 2016.

5. The first respondent is ordered to pay the outstanding incentives owed and due to the qualified teachers from 1 April 2015.

6. In regard to para 5 above, the first respondent is granted an opportunity to arrange its finances for a period of six months from date of this judgement in

order to pay the outstanding incentives such payment to carry interest at the ruling rate in terms of the Prescribed Rate of Interest Act No 55 of 1975, calculated from 1 April 2015 to date of judgment.

7. There shall be no order as to costs.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an appeal against an arbitrator's award whereby the arbitrator dismissed the appellant's claim for incentive payments based on the arbitrator's interpretation of two collective agreements concluded between the Government of the Republic of Namibia, the first respondent, (herein after referred to as 'the Government') and the Namibia National Teachers Union, the appellant (herein after referred to as 'NANTU') on 23 January 2009 and 8 November 2012 respectively. In essence the arbitrator confirmed the interpretation of the agreement as contended on behalf of the Government.

The parties

[2] The appellant is Namibia National Teachers' Union, ('NANTU') a trade union registered in terms of section 1 of the Labour Act, No. 11 of 2007 ('the Act'). NANTU is a recognised bargaining agent in terms of the Recognition Agreement entered between it and the Government, in respect all the teachers at primary and secondary levels, principals as well as educators employed by the Government at colleges and training centres.

[3] The first respondent is the Government of the Republic of Namibia. It is the employer of all teachers who are members of NANTU.

[4] The second respondent is the Labour Commissioner. He is cited in these proceedings in his capacity as such and by virtue of the office he holds in terms of the Act.

[5] The third respondent is Mr Nicholas Mouers, the arbitrator who was appointed by the Labour Commissioner in terms of the Act to preside over the arbitration proceedings and to adjudicate the dispute between NANTU and the Government. At the end of the arbitration proceedings he made an award adverse to NANTU. It is that award which forms the subject matter of this appeal. He is cited in these proceedings in his capacity as such.

Factual background

[6] On 23rd January 2009, NANTU, the Government and Namibian Public Workers Union (Napwu) concluded a memorandum of understanding in terms whereof the parties agreed and endorsed that the issue of school principals and payment of incentives to teachers submitted by NANTU to the Office of the Prime Minister be finalised and implemented effective from 1 April 2009. Contrary to the agreement the implementation of payment of incentives was delayed for a number of months. Thereafter the office of the Prime Minister issued a secular dated 11 September 2009 which categorised three groups with their corresponding monthly incentive payments namely: Group A: N$1750.00 per month; Group B: N$1150.00 per month; and Group C: N$750.00 per month.

[7] After the signing of the memorandum of understanding in 2009, it transpired that the parties could not agree on the modalities of implementation of the agreement. As a result NANTU declared a dispute of interest and referred the dispute to the Labour Commissioner in accordance with the provisions of the Labour Act.

[8] The proceedings before the Labour Commissioner culminated in the parties signing what is referred to as the Collective Settlement Agreement on 10 November 2010. In terms of that agreement it was agreed that the Government will implement

the terms of the 2009 agreement by paying the recruitment and retention incentives to qualified teachers for 15 months, that is, from 1 April 2009 to 30 June 2010, as a once off payment. Such payment was to be effected on or before 20 October 2010; that the remaining nine months from July 2010 to March 2011, the recruitment and retention incentive payments were to be paid on or before 20 June 2011, provided that the National Budget had been approved a month before that date; and finally, that as from 1 April 2011 the incentives to qualified teachers will be incorporated into the Ministry of Education's budget for 2011/2012 and be paid on a monthly basis.

[9] The purpose of the incentives to be paid to qualified teachers was to encourage recruitment and retention of qualified teachers in the remote areas. The unqualified teachers including other educators and public service members did not qualify for payment of incentives.

[10] Thereafter, on 8 November 2012, NANTU, the Government and NAPWU entered into another collective agreement in terms whereof it was agreed to introduce a monthly incentive allowance payable to all public service staff members (and not only to qualified teachers) stationed at duty stations classified as remote and harsh areas according to certain categories. The incentive was to become effective from 1 November 2016. I pause here to observe and point out that incidentally the categories and the amounts payable to staff members under this 2012 agreement were similar or the same as the amounts of the incentives which had already been agreed during 2009 in respect of qualified teachers. Furthermore, this agreement did not contain an express term excluding qualified teachers.

[11] Once again the collective agreement of 8 November 2012 was not implemented from 1 November 2012 as initially agreed. Consequently, the parties signed an addendum to the collective agreement of 8 November 2012 on 7 October 2015, in terms of which the parties agreed that the effective date of the commencement of the payment of remoteness and harsh allowance would be from 1 April 2015.

[12] On 5 October 2015, NANTU addressed a letter to the Office of the Prime Minister seeking confirmation of their understanding of the 8 November 2012

agreement, namely that that agreement envisaged incentives for all staff members, including qualified teachers that the agreement should not be confused with the 2009 incentives agreement which were exclusively meant to apply to qualified teachers and aimed at securing the services of qualified teachers, coupled with retaining them at the schools situated in the rural areas.

[13] The Prime Minister responded to NANTU's letter on 5 November 2015, pointing out that the 2012 agreement sought to extend the incentive awarded to the teachers by the 2009 agreement to all staff members stationed at duty stations classified as remote and harsh areas thus harmonising the two incentives into one; that the purpose of the two incentives was to attract and retain staff members in the public service in remote or rural areas; that the incentives was for all staff members, including qualified teachers; and finally that the 2009 incentives for qualified teachers lapsed on the implementation of the 2012 agreement's incentives.

[14] By way of a Public Service Management Circular dated 26 February 2016, the office of the Prime Minister introduced new public service staff rules on remoteness and hardship allowance, effective retroactively from 1 April 2015. The circular further stated that the back pay for eligible staff members in respect of incentive allowance would be paid by the end of February 2016 and thereafter, the allowance would be paid monthly effective from the end of March 2016.

[15] It would appear that NANTU did not agree with the interpretation of the agreements as proffered by the Office of the Prime Minister. Thereafter NANTU, through its legal representative, exchanged correspondence with the Office of the Prime Minister in an effort to resolve the dispute. These efforts did not succeed and as a result, NANTU filed a complaint with the Office of the Labour Commissioner.

Proceedings before the Arbitrator

[16] NANTU requested the Labour Commissioner to adjudicate on the interpretation and application of the collective agreement of 23 January 2009, read with the settlement agreement of 10 November 2010 and 8 November 2012, respectively read with the addendum thereto dated 7 October 2015 concluded

between NANTU, the Government and NAPWU. NANTU further claimed payment of outstanding incentives due to the qualified teachers.

[17] NANTU specifically sought the following orders:

> ‘1. An order declaring that the collective agreement dated 23 January 2009 read with the collective agreement dated 10 November 2010 is a valid existing agreement;
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> 2. An order declaring that the collective agreement dated 23rd January 2009 read with the collective settlement agreement dated 10 November 2010 did not lapse on the implementation of the 2012 collective agreement allowance on 29 February 2016;
>
> 3. An order that the respondent (Government) pays qualified teachers in remote areas their recruitment and retention incentives as per the 2009 collective agreement read with the 2010 implementation collective agreement effective as from 1 March 2016 to date and henceforth; and
>
> 4. An order that the respondent back-pay qualified teachers for remote and hardship allowance from 1 April 2015 to a date of determination of the dispute by the Labour Commissioner.’

[18] At the commencements of the arbitration proceedings the parties agreed to submit the following issues in dispute for determination by the arbitrator:

> ‘18.1 Whether the 2009 agreement have been complied with;
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> 18.2 How did the 2009 agreement and incentive come to lapse;
>
> 18.3 When did the 2009 agreement and insert incentive come to lapse;
>
> 18.4 Whether the recruitment and retention incentive for qualified teachers became a term and condition of employment and a crew has a right to such employees; and

18.5 Whether the respondent employer can unilaterally alter/change such incentive/condition of employment.'

[19] Each party led evidence of one witness. Mr Haingura, the Secretary-General of NANTU testified on behalf of NANTU. In respect of the Government, Ms Haipinge, a deputy permanent secretary for Public Service Management in the Office of the Prime Minister testified.

[20] In my view, the resolution of the dispute between the parties is dependent on the interpretation of the written agreements entered into between the parties. Extrinsic oral evidence is of little, if any, value at all. I will therefore not refer to nor will I rely on the oral testimony by the witness for the parties unless it is necessary.

The arbitrator's award

[21] The arbitrator took the view that the first three questions posed to him by the parties were interrelated and therefore decided to deal with them together. The questions are whether the 2009 agreement has been complied with; and how and when did the 2009 agreement and incentives come to lapse. The arbitrator concluded that the 2009 agreement only pertained to the 2009/10 and 2010/11 financial years. The arbitrator further concluded that the qualified teachers continuously received their incentives as per the 2009 agreement up and until the 2012 agreement came into effect; and that the 2009 agreement lapsed after the Government had complied with it and when the 2012 agreement came into force.

[22] The arbitrator further held that the 2009 incentives became a condition of employment and thus accrued as a right to the qualified teachers.

[23] As to the question whether the Government unilaterally changed the conditions of employment, the arbitrator reasoned that even though the incentives embodied in the 2009 agreement became part of the conditions of employment and having been incorporated in the employment contracts of the qualified teachers, the 2009 agreement was fulfilled by the Government after the passing of the two

financial years, that is the 2009/10 and 2010/11, lapsing with the coming into effect of the 2012 agreement.

[24] Relying on what was stated by the court in the matter of *Samwu v City of Tshwane and Another* (2014) 35 ILJ 241 at para 18, the arbitrator held that the terms of the 2009 agreement remained in force even after the agreement had lapsed and remained in force until the 2012 agreement was concluded, changing the provisions that had been incorporated into individual contracts of the employees. Moreover the 2012 agreement was negotiated with the help of NANTU. The arbitrator accordingly held that there was no unilateral change of conditions of employment by the Government.

[25] Even though the arbitrator was not required to decide on the issue of the purpose of the two benefits he proceeded to express an opinion supporting the argument advanced on behalf of the Government that both benefits 'had a common underlying thread and that was remoteness' and 'to maintain qualified individuals in those rural remote areas'.

[26] Dissatisfied with the arbitrator's award, NANTU decided to lodge this appeal to this court.

Proceedings in this court

[27] The questions of law against the arbitrator's award listed in the notice of appeal read as follows:

> '27.1 The arbitrator erred in law in finding that the collective agreement dated 23 January 2009 read with the collective settlement agreement of 2010 is a valid existing agreement, however it was valid for the two financial years 2009/10 and 2010/11.
>
> 27.2 The arbitrator erred in law in finding that the collective agreement of 2009 read with the settlement agreement of 2010 was complied with by the Government and it lapsed upon the implementation of the 2012 collective agreement.

27.3 The arbitrator erred in law in finding that the qualified teachers are already being paid incentives as per the 2009 agreement and to order such a payment would hold no foundation and as such erred in refusing to order the Government to back pay the incentives due to the qualified teachers.

27.4 The arbitrator erred in law in finding that it was confusing for Nantu to ask for an order that the Government payback qualified teachers incentives for remote and hardship allowance retrospective from 1 April 2015 to 29 February 2016 whereas the teachers had been continuously receiving the allowance even after the 2009 agreement lapsed and when the 2012 agreement came into effect.

27.5 the arbitrator erred in law in considering the hearsay evidence of Ms Haipinge that it was always the intention of the Government to extend their recruitment and retention incentive initially agreed upon in 2009 agreement to apply to all public service staff members who qualified to receive it.

28.6 The arbitrator erred in law in reaching their conclusion referred to in the preceding paragraphs in that there was no basis in law upon which the arbitrator could lawfully come to such, conclusions, findings and or decisions. In reaching the aforesaid conclusions, the arbitrator reached conclusions, findings which no reasonable arbitrator would have reached.'

The respondent's opposition

[28] In its statement of opposition filed in terms of rule 17(16)*(b)*, the first respondent set out its grounds for opposing the appeal. In essence the statement supports and justifies the findings and conclusions by the arbitrator.

[29] The first respondent contends that the arbitrator was correct in finding that there were no two agreements running concurrently; that the arbitrator was precluded from granting the order claimed by the appellant because the 2009 agreement read with the 2012 settlement agreement was fully complied with; and that the 2009 agreement had lapsed.

[30] Finally the respondent complained that the notice of appeal contains factual conclusions and findings under the guise of points of law. In this connection the

respondent argued that this is impermissible because in terms of section 89(1) of the Act, a party may appeal against a question of law alone. Unfortunately the first respondent did not specify which of the grounds, are not questions of law. I will, later in this judgment, consider this aspect in more detail.

Point *in limine* – Defective grounds of appeal

[31] As mentioned in the preceding paragraph, the first respondent raised a point of law *in limine* that some of the grounds of appeal did not constitute points of law. It was thus submitted that the entire appeal should be dismissed for failure to comply with the strict provisions of section 89 of the Act.

[32] Mr Ncube who appeared with Mr Shimakeleni, on behalf of the first respondent, argued forcefully both in their heads of argument and in court, that the whole of grounds 3.1 to 3.3 consisted of factual aspects. He argued further that ground 5.3 was equally a factual ground and not a point of law. Ground 5.3 reads: 'on a proper evaluation of the facts and factors placed before him the arbitrator erred in law in failing to find (order) that the first respondent back-pay qualified teachers for remote and hardship allowance from 1 April 2015 to 29 February 2016'.

[33] In support of this submission, counsel referred to the matter of *Kamwi v Namibian National Veterans Association*[1] where the court held that given the formulation of the Act, it is clear that the legislature intended to confine appeals from arbitrations awards under sections 84 and 86 to questions of law alone and exclude those of facts or mixed of facts and law.

[34] Mr Beukes, who appeared for the appellant, also filed comprehensive heads of argument for which the court wishes to thank him for his diligence. In his heads of argument, counsel pointed out that the appellant was prejudiced in the preparation of his appeal in that the statement of opposition did not specify the ground(s) of appeal which offended against the provisions of section 89; and that it was only in the heads of argument that the grounds against which the points *in limine* were raised were identified.

[1] 2014 (2) NR 504 (CC)

[35] In my considered view, the formulation and crafting of the grounds of opposition is just as important as the drafting of the grounds of appeal in the notice of appeal. Its purpose is to inform the appellant what case he or she has to meet. In addition, the grounds of opposition serve to inform the court about the issues in contention between the parties. Like the notice of appeal 'it crystallises the disputes and determines the parameters within which the court will have to decide the appeal[2]'. It is thus impermissible for counsel for the first respondent to raise new grounds of opposition for the first time in the heads of argument.

[36] At the commencement of his argument, Mr Beukes informed the court that he conceded and was abandoning the grounds in paragraphs 3.1 to 3.3 and 4 of the notice of appeal. In my view, the concession was wisely made. The concession demonstrates the point that the grounds of opposition must be embodied in the statement. Had the grounds been raised in the statement I am sure that Mr Beukes would have conceded it at an earlier stage and it would not have been necessary to waste time to include those arguments in his heads of argument.

[37] Mr Beukes however stood his ground with regard to the attack directed at the ground in paragraph 5.3 on the notice of appeal quoted in para 31 above.

[38] Counsel stressed the point that the arbitrator made a factual finding that is arbitrarily or perverse in the sense that it could not have been reached by an arbitrator acting reasonably. In support of his submission counsel refer to the principle laid in *Jansen Van Rensburg v Wilderness Air Namibia (Pty) Ltd*[3] where the court said the following:

'Thus where a decision on the facts is one that could not have been reached by a reasonable arbitrator, it will be arbitrary or perverse, and the constitutional principle of the rule of law would entail that such a decision should be considered to be a question of law and subject to appellate review.'

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[2] *S v Kakololo* 2004 NR 7 at page 8 H-I.
[3] 2016 (2) NR 554 (SC) at para 44.

[39] Counsel submitted that the ground is in conformity with the principle in *Janse Van Rensburg case.* I agree with Mr Beukes' submission. Paragraph 5 contains five sub-paragraphs. The attack is only directed at 5.3. Paragraph 5.5 reads as follows:

'In reaching the aforesaid conclusions the arbitrator reached conclusions/findings which no reasonable arbitrator could have reached'.

In my view, paragraph 5.5 serves as a summary or an all-embracing conclusion for what is stated in the preceding sub-paragraphs. Therefore paragraph 5.3 cannot be read in isolation: it must be read with paragraph 5.5 which serves as a concluding summary of the preceding sub-paragraphs.

[40] The conclusion, I arrive at is that the ground in para 5.3 read with para 5.5 of the notice of appeal complies with the principle set out in *Jansen Van Rensburg*. In the light of these considerations in my view, the point *in limine* was not well taken. Therefore it cannot be sustained. It follows therefore that the point *in limine* stands to be dismissed. I now turn to consider the appeal on merits.

Issues for determination

[41] The arbitrator was called upon to determine five issues listed earlier in this judgment. Mr Beukes narrowed the issue for determination to two issues only: firstly whether the qualified teachers' incentives became a term and condition of the qualified teachers' employment; and secondly whether the terms which became part of the qualified teachers condition of employment are capable of being varied unilaterally through the introduction of the remoteness allowance in 2012. If not, the next question is whether the incentives lapsed. If the incentives did not lapse the further question is whether the Government must be ordered to pay the qualified teachers' incentives from 1 April 2015 to the date of determination of that question.

[42] In my view, the first question formulated by Mr Beukes has already been answered by the arbitrator. He held that the incentives had become the terms and conditions of the qualified teachers' employment contracts. In this regard the arbitrator had this to say:

'It became clear that neither the applicant nor the respondent disputed the fact that the 2009 incentives became a condition of employment and thus accrued as a right to the employee.'

[43] I do not think much more needs to be said about that issue. The clear answer is that the 2009 incentives became part of the conditions of employment of the qualified teachers working in remote areas.

[44] It would appear to me therefore that the only issue for determination is whether the qualified teacher's incentives were capable of being amended after having being incorporated into their conditions of employment. In this connection the arbitrator held that whereas the qualified teachers' incentives condition became part of their employment contracts they however lapsed when the 2012 agreement came into force which was negotiated between the Government and NANTU.

[45] It is the appellant's case that that the incentives could not and were not amended by the 2012 agreement and thus remained intact. On the other hand it is contended on behalf of the respondent that the incentives for qualified teachers were amended or 'harmonised' with the introduction of the 2012 incentives which was extended to all Government staff members.

Submissions on behalf of the appellant

[46] Mr Beukes submitted that it was not open to the Government to decide to unilaterally change the conditions of employment of the qualified teachers by introducing the remoteness allowance and thereby replacing the qualified teachers' incentives without the consent of the qualified teachers. In support of his contention, Mr Beukes cited the case of *Staff Association for Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty)*[4], where the court held as follows regarding the employer's power to unilaterally change the terms and conditions of an employment contract:

[4] [1998] 6BLLR 616 (LC) at 619

'[18] It is trite that terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment. It is therefore my view that even though the 2006 collective agreement lapsed, its provisions have been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees' employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individual contacts.'

[47] Mr Beukes further pointed out that the agreement upon which the claim for the qualified teachers' incentives was based contained a non-variation clause. Accordingly the Government did not have the power to unilaterally vary the terms of the collective agreement in which the incentive for qualified teachers was contained without the consent of the appellant.

[48] Mr Beukes further pointed out that section 50(1)*(e)* of the Labour Act, 2007 stipulates that an employer who unilaterally alter the terms of the condition of employment would be guilty of unfair labour practice.

[49] Finally, with in order to bolster NANTU's the claim for retrospective reinstatement of the incentives for qualified teachers, Mr Beukes referred the court to what was said by the court in the matter of *Phahlane v University of the North*[5] where the court held that:

'the unilateral withdrawal of benefits which was already confirmed on the employee has financially prejudiced himself and the travel allowance should be reinstated thus be re-instated with retrospective effect.'

On the basis of the above statement counsel submitted that the incentives for qualified teachers must be reinstated with retrospective effect to the date of removal of such incentive to the date of this judgment.

[5] [1997] 4 BLLR 475 CCMA 2481 E.

Submissions on behalf of the respondent

[50] Mr Ncube for the first respondent submitted that the incentives granted to the qualified teachers were not unilaterally changed. The only change was that the incentives which were exclusively granted to the qualified teachers were extended to all staff members. He argued that if the Government knew that there were going to be two incentives it would have made arrangements as to how the two incentives would be paid. Counsel further submitted that the appellant did not file any dispute for unilateral change of times of condition or unfair labour practice in terms of the Act.

[51] Counsel further submitted that even if it were to be accepted that the Government unilaterally changed the employment conditions of the qualified teachers there is no prejudice suffered by the qualified teachers as they continued to receive the same incentive amounts as they had been receiving prior to the alleged unilateral change of employment conditions.

[52] As regard to the first issue agreed by the parties for determination by arbitrator, namely whether the 2012 agreement superseded the 2009 agreement, counsel supported the arbitrator's finding that the two agreements were harmonised to the extent that the 2009 incentives, which were granted to the qualified teachers, were extended to all staff members.

[53] As to the question whether the incentives for qualified teachers became part of the of their employment conditions, counsel argued that the teachers continued to receive those incentives because the two benefits were harmonised and became one benefit. Therefore, he argued, the 2009 agreement did not lapse. In this connection both counsel were in agreement that the 2009 incentives became part of the qualified teachers' conditions of employment. Mr Beukes and Mr Ncube point of departure was, according to Mr Beukes the qualified teachers were entitled to receive both the incentives and the allowance. On the other hand Mr Ncube's position was that the incentives and the allowance became one benefit which the qualified teachers are still receiving.

[54] Regarding the question whether the Government unilaterally altered the qualified teachers conditions of employment, counsel submitted that this did not happen because the qualified teachers continued to receive their incentives. This is so bearing in mind that on the respondent's case the two incentives were harmonised and became one incentives, applicable to all Government staff members.

This concludes the parties' respective submissions.

Applicable laws

[55] I think relevant provision for the purpose of adjudication of the issues under consideration is section 9 of the Act which deals with the basic conditions of employment. The section reads:

> '**9.** (1) Each provision set out in Parts B through to F of this Chapter is a basic condition of employment.
>
> (2) A basic condition of employment constitutes a term of any contract of employment except to the extent that –
>
> (a) any law regulating the employment of individuals provides a term that is more favourable to the employee;
> (b) a term of the contract of employment or a provision of a collective agreement is more favourable to the employee; or
> (c) the basic condition of employment has been altered as a result of an exemption or a variation granted in terms of section 139.
>
> (3) Subject to section 2(3) to (5), if there is a conflict between the provisions of this Chapter, and the provisions of any other law, the law that provides the more favourable terms and conditions for the employee prevails to the extent of the conflict.' (The *underlining supplied for emphasis*).'

[56] Another relevant provision is section 50(1)*(e)* of the Act, which provides that it is an unfair labour practice for an employer to unilaterally alter any term or condition of employment.

[57] The general rule is that a document is conclusive as to the terms of the transaction which it was intended to embody. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[6] the South African Appellate Division had the following to say with regard to the conclusiveness of a written contract:

'This court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, or altered, added to or varied by parole evidence.'

[58] The basic rule of interpretation is that the task of the court is to discover what the language of the document would ordinarily be understood to mean. The court is not concerned with what the author of the document actually meant to say[7].

'In an action, on a contract. the rule of interpretation is to ascertain not what the parties intention was, but what the language used in the contract means i.e, what was their intention as expressed in the contract.[8]'

[59] Parker in his works *Labour Law in Namibia*[9] at page 30, states that there is generally only one lawful way in which terms of a contract of employment may be varied and that is through agreement between the employer and employee. In *Smith v Standard Bank Namibia*[10] the Labour Court held that 'the only way in which a change in the contract of employment between the applicant and the respondent could be effected lawfully was by way of negotiation and mutual agreement'.

[60] Keeping in mind the foregoing principles and the statutory provisions above, I now proceed to consider the facts in this matter.

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[6] 1951 (3) SA 371 AD
[7] Hoffman: *The South African Law of Evidence* 2nd edition at page 226.
[8] *Worman v Hughes* 1948 (3) SA 495 at page 505.
[9] Parker: Labour Law in Namibia at page 30
[10] 1994 NR 366 (LC).

[61] In order to answer the question whether the qualified teachers incentives were amended by the 2012 agreement or had lapsed or were harmonised with the rest of the staff members it would appear to me that the starting point is to enquire into the purpose of the two benefits as they were introduced.

[62] As regard to the qualified teachers' incentives of 2009: the purpose was stated in the circular as 'intended to support the recruitment and retention of qualified teachers to rural schools'.

[63] As regard to the remoteness allowance Policy of 2012 it described as: 'a remoteness and hardship allowance is paid to a staff member stationed at a duty station in an area specified as remote in recognition of the hardship he or she endures as a result of the limited availability of basic services, amenities and infrastructures'. In the letter from the Office of the Prime Minister dated 26 February 2016 addressed to various stake holders including NANTU and NAPWU, another reason for this incentive was added namely, 'as well as the geographical distance from the main service centres'.

[64] Mr Ncube for the Government argued that the two purposes appear to read differently but actually mean the same thing. The arbitrator also stated that he agreed with the testimony given by Ms Haipinge namely that even though the purposes were worded differently, both had a common underlying thread; remoteness.

[65] I disagree that the purposes are the same. I disagree for the reason that the incentives were meant to address two different problems. In my view, the rationale in respect of the qualified teachers was to address the Government's problem in recruiting and retaining qualified teachers in the rural schools. This is clearly borne out by the content of the letter dated 11 September 2009 from the Permanent Secretary in the Office of the Prime Minister, addressed to the Permanent Secretary for Ministry of Education in connection with the incentives for qualified teachers, the following is inter alia stated:

> ‘Purpose:
> The incentive is intended to support the recruitment and retention of qualified teachers to rural schools.’

Furthermore,

> ‘The allowance forms part of a compressive package with the express aim of encouraging qualified teachers to go to schools in the rural areas and in so doing improve the standard of education in such areas to the national level.’

As regard the duration, the following was stated:

> ‘Duration:
> As the allowances is an incentive to support the recruitment and retention of qualified teachers to rural schools, the success or failure there needs to be evaluated on an annual basis with the complete review to take place by the end of the 2010/11 financial year.’

[66] The further distinguishing feature of the qualified teachers’ incentives from the remoteness allowance was that it was not payable to all teachers such as those not qualified but were teaching in the rural schools. Furthermore, the incentive did not apply to other staff members of the public service. Like the Permanent Secretary in the Office of the Prime Minister stated in her letter: the incentive was aimed at enhancing the quality of education at the schools situated in the remote rural areas. It was aimed at attracting and retaining qualified teachers in the remote rural schools.

[67] On the other hand and in contra-distinction to the purpose of the remoteness allowance payable to public staff members as articulated in the letter by Ms Haipinge from the Office of the Prime Minister dated to 26 February 2016 addressed to stakeholders and referred to earlier in this judgment, the allowance was ‘premised on the recognition of the hardship endured by staff members stationed at duty station that are identified and classified as remote due to limited availability of basic services, amenities, facilities and infrastructure as well as the geographic distance from the main service centers’. The letter went on further to say that applicable

category of remoteness has been linked to each duty station as well as the value of the allowance payable for each category of remoteness.

[68] It would appear to me that the purpose of the allowance was to compensate a staff member for the hardship she or he endures by being stationed at a remote duty station. The allowance was not aimed not enticed or incentivized a staff member to move to and stay in the remote area. He or she is already stationed there and is thus paid an allowance for the hardship he or she is enduring.

[69] In my view, even the designation of the two benefits, clearly and already indicates the differences. The one is ‘an incentive’ the other is ‘an allowance’. According to the *Collins Dictionary of the English Language* the word ‘incentive’ is described as ‘an additional payment made to employees as a mean of increasing production’. On the other hand ‘allowance’ is described as ‘an amount or something especial money or food set aside to compensate for something or to cover special expenses’.

[70] In light of all these considerations and in so far as it might be necessary to make a finding, my finding is that the qualified teachers incentives was separate and distinct from the remoteness allowance payable to all staff members of the public services stationed in remote areas.

[71] Having found that the rationale in respect of the each benefit was different and that the two benefits were separate and distinct, I next move to consider whether the qualified teachers’ incentive did lapse.

[72] It is common cause between the parties that the qualified teachers’ incentives were incorporated into the contracts of employment. As I understand the arbitrator’s reasoning, he found that the agreement was that the qualified teachers’ incentive was to last for two financial years namely 2009/10 and 2010/2011 and lapsed when the 2012 agreement came into effect. He further found that ‘Hence the fact the 2009 agreement stated that this agreement was negotiated for the 2009/10 and 2010/11 financial years’. The arbitrator finding on this point is supported by Mr Ncube for the Government. Mr Beukes for NANTU, on the other hand urged the court to give the

agreement its ordinary grammatical meaning. He further argued that the agreement contained a non-variation clause and that accordingly if the Government wanted to replace the qualified teachers' incentives the 2012 collective agreement it should have done so in clear and unambiguous terms.

[73] The issue calls for a close scrutiny of the terms of the 2009 agreement. The written agreement is terse. It simply recorded that the parties agreed and endorsed that the matter of incentives for qualified teachers must be implemented effective form 1 April 2009. It was open ended.

[74] It is common cause that the 2009 agreement was implemented by the collective written agreement entered between the parties on 10 November 2010. By this agreement the parties agreed that the Government would pay the outstanding incentives for the period 1 April 2009 to 31 June 2010 by October 2010; that the incentives for the remaining nine months, that is July 2010 to March 2011 were to be paid on or before 20 June 2011; and that after that the incentives would be incorporated in the Ministry's budget for 2011/2012 and be paid on a monthly basis.

[75] It is further common cause again that no expiry date for the payment of incentive was stipulated or agreed. In other words no time for lapsing of the agreement was stipulated. As pointed out by Mr Beukes, the agreement has a non-variation clause. Christie[11] explains the effect of a non-variation clause in a contract in the following way:

'When the parties impose restrictions on their power of subsequent variation or cancellation of their contract, with the laudable object of achieving certainty and avoiding disputes about whether a variation or cancellation has been agreed, they will incorporate in their contract a non-variation clause. Typically, a non-variation cause provides that no subsequent agreement between the parties on the specific topic (for instance letting, cancellation additional work in a building contract) shall be valid unless it is in writing, or that no variation of any term of the contract (including the non-variation clause itself) shall be valid unless it is in writing, signed by the parties"

[11] The Law of Contract in South Africa 6th edition at page 464

[76] The 2010 agreement non- variation clause reads:

> 'No alternation, amendment or addition will be valid unless such alteration, amendment or addition has been reduced in writing and mutually agreed by the Parties thereto.'

The 2009/2010 agreement could not therefore, be amended without NANTU's consent.

[77] Nowhere does the 2009 agreement state that it was negotiated for the financial years 2009/10 and 2010/11 as found by the arbitrator. All that was stated in the explanatory letter from the Permanent Secretary of the Office of the Prime Minister of 11 September 2009 to the Permanent Secretary of the Ministry of Education, was that the incentive would be reviewed at the end of the 2010/11 financial year. I do not understand the term 'review' to mean that the payment of incentives would be terminated or would lapse. The word review according to the Oxford Word Thesaurus Dictionary means 'look into', 're-examine', 're-assess', 're-evaluate' etc. the context means. Furthermore, the word 'lapse' presupposes a predetermined termination period of the agreement. The 2009 agreement was an open-ended agreement; there was no agreed duration period. In other words the incentives were to endure for indefinite period. The arbitrator's finding in this respect is thus incorrect as is not founded on any evidence on record. The finding cannot be sustained therefor.

[78] I now proceed to consider whether the 2009 agreement was amended by the 2012 collective agreement or harmonised with the 8 November 2012 agreement as contented on behalf of the Government.

[79] The 2012 agreement states that the 'parties agreed to improvement of salaries and benefits for all staff members with effect from 1 April 2012'. As regard to remoteness allowance the agreement reads:

> 'Incentive for remoteness and hardship areas:

An introduction of an incentive allowance for staff members stationed at duty stations classified as remote and hardship areas according to the following categories, with effect from 01November 2012'. The clause the proceeds to set out the categories namely: Group A: N$1 750.00 per month; Group B: N$1 150.00 per month; and Group C: N$750.00 per month'.

[80] Nowhere does the agreement propose or purport to replace or amend the terms and incentives accorded to the qualified teachers by the 2009 agreement. No reference is made to the 2009 by the 2012 agreement. In my view, in the absence of a clause in the 2012 agreement purporting to amend or replace the 2009 agreement, there is no basis for contending that the 2009 agreement was amended or replaced by the 2012 agreement. As I have already found that the incentives were initially a term of the collective agreement and later became a term of contract of employment of the qualified teachers. It is more favourable to the qualified teachers and must be interpreted as such in line with the provisions of section 9 of the Act. My conclusion is therefore that the 2009 agreement was not amended by or harmonised with the 2012 agreement.

[81] The next question is whether the remoteness allowance applies to the qualified teachers. The answer to this question depends on whether the qualified teachers are 'staff members' within the meaning of the Recognition Agreement between NANTU and the Government. The Recognition Agreement defines a 'staff member' to mean 'all the staff members in the bargaining unit'. Furthermore 'the bargaining unit' is defined as to mean 'all the Public Service staff members in the following categories: Teachers at primary and secondary levels, principals as well as educators at colleges and trading centres'.

[82] It was not contended on behalf of the Government that the qualified teachers are not staff members within the meaning of the Recognition Agreement. Neither was it contended that the qualified teachers are not members of the bargaining unit.

[83] In their letter dated 6 October 2015, addressed to the Prime Minister, NANTU argued that the provision of the 2012 agreement envisaged that the allowance is for all staff members, including qualified teachers, whereas the 2009 incentives were

specific for qualified teachers and was aimed at securing the services of qualified teachers coupled, with retaining such teachers at rural schools. In response, the Prime Minister asserted that the 2012 agreement sought to extend the incentives awarded to teachers in the 2009 agreement to all staff members stationed at duty stations classified as remote and hardship area, thus harmonising the two incentives. Furthermore, that the purpose of the two incentives was to attract and retain staff members in public service to remote or rural areas. The Prime Minister concluded that the incentive was for all staff members including qualified teachers and that the 2009 incentives for qualified teachers lapsed on the implementation of the 2012 incentives.

[84] I have, earlier in this judgment, upheld the argument advanced by NANTU and rejected the argument advanced by and on behalf of the Prime Minister. It bears repeating that the rationale for the two benefits is separate and distinct; the qualified teachers' incentives were not amended or harmonised with the remoteness' allowance and that the qualified teachers' incentives did not lapse with the implementation of the 2012 agreement. The 2012 agreement did not deal with or make any reference to the qualified teachers' incentives, whether expressly or tacitly. As has been pointed earlier with reference to case law, the rule of interpretation is to ascertain not what the parties' intention was, but what the language used in the contract means. No words such as 'lapse', 'harmonised' or 'amend' are to be found in the 2012 agreement, with reference to the qualified teachers' incentives. As pointed out earlier, the November 2010 agreement, which implemented the terms of the 2009 agreement, contains a non-variation clause. Its terms could for that reason not be varied without it being reduced in writing and signed by both parties. Furthermore, clause 10.1 of the Recognition Agreement between the Government and NANTU stipulates that all agreements and/or protocols made by the parties in the joint negotiations meetings shall be reduced to writing and signed by both parties.

[85] In the light of all these considerations, I have arrived at the conclusion that the qualified teachers' incentives contained in the 2009 agreement and implemented by the 2010 agreement did not lapse with or were amended by nor were they incorporated or harmonised into the 2012 agreement, I therefore find for the

appellant that the qualified teachers incentives are still valid and due to the qualified teachers falling in the stipulated categories.

[86] There remains one more issue. On the papers there is a checked precedent for the retrospective payments of the incentives. In so far as it needs repeating, the incentives for the period 1 April 2009 to 31 June 2010, were paid on or before 20 February 2010 and the remainder of the incentives were implemented on or before 1 April 2011.

[87] Having arrived at the conclusion that the Government is obliged to pay the qualified teachers their incentives in terms of the 2009 agreement, such incentives are to be calculated retrospectively from to 1 April 2015 to the date of judgment.

[88] In the result it is therefore ordered that:

1. The appeal succeeds.

2. The Collective Agreement dated 23 January 2009, read with read with the Collective agreement dated 10 November 2010 is valid as an existing agreement.

3. The aforesaid agreements did not lapse with the implementation of the 2012 Collective Agreement.

4. The respondent is to pay the qualified teachers their incentives due to them in terms of the 2009 agreement read with the 2010 agreement as from 1 March 2016.

5. The first respondent is ordered to pay the outstanding incentives owed and due to the qualified teachers from 1 April 2015.

6. In regard to para 5 above, the first respondent is granted opportunity to arrange its finances for a period of six months from date of this judgement

in order to pay the outstanding incentives such payment to carry interests at the ruling rate calculated from 1 April 2015 to date of judgment.

7. There shall be no order as to costs.

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H Angula

Deputy-Judge President

APPEARANCES

APPELLANT:	F BEUKES Of Metcalfe Attorneys, Windhoek
FIRST RESPONDENT:	J NCUBE (with him SHIMAKELENI) Of Government Attorney, Windhoek