REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2022/00035

In the matter between:

REHOBOTH TOWN COUNCIL **APPELLANT**

and

LABOUR COMMISSIONER **FIRST RESPONDENT**
DIONYSIUS LOUW **SECOND RESPONDENT**
GABRIEL DAX **THIRD RESPONDENT**

Neutral citation: *Rehoboth Town Council v Labour Commissioner* (HC-MD-LAB-APP-AAA-2022/00035) [2022] NALCMD 75 (7 December 2022)

Coram: PARKER AJ
Heard: **4 November 2022**
Delivered: **7 December 2022**

Flynote: Labour law – Appeal – Payment of moneys in lieu of accrued leave upon termination of employment – Retiree third respondent, retired from employment with the appellant public authority – Personal Rules of appellant approved by the responsible Minister and gazetted – Rule 21(1) thereof limiting to 60 days the

number of days in respect of which the appellant would pay moneys in lieu of leave earned but not taken upon termination of employment – Court found that the Rules were not in conflict with the Local Authorities Act 23 of 1992 or the Labour Act 11 of 2007 and they formed a part of the terms of the contract of employment between the third respondent and the appellant and should therefore be implemented.

Summary: Labour Law – Appeal – Payment of moneys in lieu of accrued leave upon termination of employment – The retired third respondent sought to be paid accrued leave pay in respect of all 88 days; that is, 28 days over the limited 60 days – The arbitrator found that two other employees had been paid leave pay upon termination of employment for accrued leave days in excess of 60 days and the appellant's human resources manager had promised third respondent that he would be paid leave pay for the days in excess of the capped 60 days – The arbitrator concluded that the third respondent had legitimate expectation that he would be paid for all the 88 accrued leave days in virtue of s 37(1)*(c)* and *(d)* of the Labour Act 11 of 2007 – The arbitrator decided that rule 21(1) of the Personnel Rules did not bind the third respondent because the arbitrator accepted the third respondent's evidence that he had not understood the letter written in English to him warning him that if he did not take his accrued leave days he would forfeit any days in excess of 60 days – Court concluded that the arbitrator's factual finding was perverse in the extreme on the ground that the official language of the appellant is English and the third respondent was not employed as a cleaner but was appointed as Assistant Townlands Administrator in the Infrastructure, Town Planning & Technical Services Department – In all, court found that the arbitrator's award was wrong on the ground that it was not made on judicial grounds and was made upon the application of the wrong principles – Consequently, court entitled to interfere with the arbitrator's award – Appeal upheld and the arbitrator's award set aside.

Held, where rules are delegated legislation and are not in conflict with the enabling Act they should be implemented.

Held further, legitimate expectations can include expectations which go beyond enforceable rights; provided they have some reasonable basis.

Held further, it is against public policy for a public authority to follow a practice at the workplace which is inimical to the objects of the Labour Act 11 of 2007 where employees are paid leave pay for limitless number of accrued leave days because such practice undermined one of the objects of the Labour Act which is to ensure the health, safety and welfare of employees, and not taking leave when it is due did not conduce to health, safety and welfare of the employees.

ORDER

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1. The order made by the arbitrator in the award granted under case no. CRWK 412-20, dated 22 April 2022, is hereby set aside.

2. There is no order as to costs.

3. The matter is finalised and removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] In the instant appeal, in terms of the notice of appeal filed on Form 11 the appellant, a local authority council, and therefore a public authority, appeals against the order of the arbitrator (the second respondent) under case number CRWK412-20, dated 22 April 2022. The third respondent opposes the appeal. The third respondent was an employee of the appellant until he retired from the service of the appellant.

Interpretation and application of 'Town of Rehoboth: Personnel Rules: Local Authorities Act 23 of 1992' ('the Personnel Rules')[1]

[2] The appellant and the third respondent rely on the interpretation of the relevant provisions of the Personnel Rules. On top of that, the third respondent calls in aid the legitimate expectation doctrine.

[3] Mr Ilovu represents the appellant, and Mr Esau the third respondent. Although a bevy of authorities were referred to the court by both counsel – six Namibian authorities and 11 foreign authorities by Mr Ilovu, and seven Namibian authorities and one foreign authority by Mr Esau – the determination of the appeal turns on a very short and narrow compass. Without meaning to pour cold water on the industry of both counsel, I should say it is largely labour lost. Most of the authorities are of no assistance on the points in issue and under consideration.

[4] What are the points in issue and under consideration? It is plainly this single most question: Is the third respondent entitled to be paid, upon his retirement, money in lieu of 88 accrued leave days?

[5] Mr Esau says the third respondent is so entitled. And why does Mr Esau argue that way. It is for the following reasons. Counsel submitted that in terms of rules 21(1) and (2) of the appellant's Personnel Rules, the third respondent was entitled to accumulate leave days as opposed to his right to be paid moneys in lieu thereof. Mr Esau submitted further that the arbitrator was correct in awarding an amount of money in lieu of all the 88 accrued leave days based on s 37(1)*(c)* and *(d)* of the Labour Act 11 of 2007.

[6] Mr Esau, with respect, misses the point. It is not the case of the appellant that the third respondent was not entitled to payment of money in lieu of accrued leave days. The appellant's case is rather that the third respondent was not entitled to be paid money in lieu of accrued leave days for a period more than 60 days. Thus, according to the appellant, the third respondent was not entitled to be paid money in respect of accrued days for a period more than 60 days.

[1] GN No. 17 of 2009.

[7] It is irrefragable from Mr Esau's submission that the third respondent was aware of the Personnel Rule that prohibited the payment of money in lieu of accrued leave days for a period more than 60 days. Consequently, I hold that the arbitrator was wrong in accepting the third respondent's testimony that he did not understand the import of the letter that was written to him, which was in English, informing him to take leave and that any leave days more than 60 days would lapse if he did not make use of the leave days.

[8] The arbitrator set much store on, with respect, these extremely perverted factual findings when he concluded that the third respondent was 'not bound in law or logic by a document s/he does not understand'. And so, according to the arbitrator, the third respondent 'was not required within the purview of Rule 22 of the Personnel Rules of the Rehoboth Council to take leave or face the consequence of forfeiting leave in excess of 60 days'.

[9] The monumental wrongness of the arbitrator's findings and conclusions are put in sharp focus when one considers that the third respondent worked for a public authority where the official language is English. And the third respondent was not employed as a cleaner but was 'appointed as a team member in the Infrastructure, Town Planning & Technical Services Department' of the appellant. The arbitrator's findings are not only wrong but also, with the greatest deference to him, puerile and ludicrous. Doubtless, those factual findings were not made on sound judicial grounds.[2]

[10] For completeness, I should deal with Mr Esau's reliance on rule 22 intituled 'Compulsory vacation leave'. The *ipsissima verba* of that rule does not provide a peremptory command to the Council (the appellant) to require a staff member, who has more than 60 days' vacation leave to his or her credit, to take leave for the days that are more than the stipulated 60 days. The evidence is incontrovertible that the third respondent knew he had accrued leave days of more than 60 days; and he was given sufficient warning in writing to take the excess days, else he would forfeit those

[2] See *Paweni v Acting Attorney General* 1985 (3) SA 720 (ZS); applied in Namibia in many cases; see eg, *S v Kuzatjike* 1992 NR 70 (HC); *Reuter v Namibia Breweries Ltd* [2018] NALCMD 20 (8 August 2018].

days. Consequently, I find that Mr Esau's reliance on rule 22 for support is misplaced.

[11] Furthermore, as a public authority, the appellant 'can only do … that which it was allowed by law'.[3] Rule 21(1) of the Personnel Rules provides clearly, unambiguously and peremptorily:

'21(1) A staff member cannot accumulate more than 60 days leave with remuneration in all.'

[12] Upon the authority of *Anhui Foreign Construction Group Corporation Ltd*[4] and *Agnes Kalumbi Kashela*[5], I hold that any payment of money in lieu of accrued days in respect of a period that is more than 60 days after the coming into operation of the Personnel Rules on 4 February 2009 will be outwit the Personnel Rules and, accordingly, unlawful, and invalid. The third respondent retired in November 2019. He was caught within the operation of the Personnel Rules.

[13] It must be remembered that the Personnel Rules are not only delegated legislation, but also, they form part of the terms of the contract of employment between the appellant and the third respondent. *A fortiori*, they have been approved by the responsible Minister. That is significant.[6]

[14] The arbitrator's reliance on s 37(1)*(c)* and *(d)* of the Labour Act to decide that the third respondent is entitled to be paid money in lieu of accrued leave days for a period more than the 60-day limit is wrong for these reasons.

[15] The first reason is this. It has not been established – and I do not read – that the Personnel Rules, in particular rule 21(1), conflicts with s 37(1)*(c)* and *(d)* of the Labour Act.[7] In that case, rule 21(1) of the Personnel Rules must be implemented.

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[3] *Agnes Kalumbi Kashela v Katima Mulilo Town Council and Others* [2018] NASC (16 November 2018).
[4] *President of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* [2017] NASC (28 March 2017)
[5] *Agnes Kalumbi Kashela v Katima Mulilo Town Council and Others* [2018] NASC (16 November 2018).
[6] See *Luderitz Town Council v Shipepe* 2013 (4) NR 1039 (LC).
[7] Ibid at 9.

The rule amounts to the parties (ie the appellant employer and the third respondent employee) having contractually agreed in their conditions of employment to specifically limit the employee's entitlement to be paid money in lieu of accrued leave upon termination of employment, for a period not exceeding 60 days.[8] In sum, the trite principle of *pacta sunt servanda* applies to their contract.[9]

[16] The second reason is this. Rule 21(1) must be implemented on public policy grounds. A practice which permits an employee to accumulate countless number of leave days and be paid money in lieu of such innumerable accumulated leave days is inimical to an object of the Labour Act which is to ensure the health, safety, and welfare of employees. And employees not taking leave when it is due would not conduce to health, safety, and welfare of the employees. Indeed, the Parliament could not have intended such absurd, anti-public-policy result when it enacted s 37(1)*(c)* and *(d)* of the Labour Act. 'Leave is', said Silungwe P, 'ostensibly designed for restorative purposes for the good of the employee, let alone the good of the employer.'[10]

Does the doctrine of legitimate expectation apply?

[17] The arbitrator made the following factual findings: that the third respondent was promised by Mr Tutu (the human resources manager of the appellant) that the third respondent should continue working and that all his accrued leave days would be paid to him; and that at least two employees received payment in lieu of accrued leave days in excess of 60 days.

[18] For these factual findings, Mr Esau argued that the third respondent had acquired 'legitimate expectation' that upon his retirement he would be paid moneys in lieu of accrued leave days for a period of 28 days on top of the limited 60 days.

[19] But there are several obstacles in the way of Mr Esau in calling in aid the legitimate expectation doctrine. In our law-

[8] Loc cit.
[9] See *Erongo Regional Council and Others v Wlotzkasbaken Home Owners Association and Another* 2009 (1) NR 252 (SC).
[10] *Municipality Council of the City of Windhoek v Petrus Gerhardus Swarts* Case No. LC 01/2004 (HC) at 11.

'[49] … the exercise of public power is that the rule of law and the principle of legality require that public officials and institutions may only act in accordance with powers conferred upon them by law. As was unequivocally stated by this court in the *Rally for Democracy and Progress* matter, the Constitution requires that the exercise of any public power is to be authorised by law – either by the Constitution itself of by any other law.'[11]

[20] In *Minister of Health and Social Services v Lisse*, referred to the court by Mr Esau, O'Linn AJA stated that 'Legitimate expectations are capable of including expectations which go beyond enforceable legal right rights: *provided they have some reasonable basis*.'[12] (Italicised for emphasis) The qualification, which for good reason I have italicised is neither insignificant nor aleatory. The qualification is crucial in any consideration based on the legitimate expectation doctrine.

[21] 'Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which *the claimant can reasonably expect to continue*.'[13] (Italicised for emphasis)

[22] The expectation of the third respondent has no 'reasonable basis'[14] and the third respondent could not 'reasonably expect'[15] that there would be payment to him of money in lieu of accrued leave days for a period more than 60 days, where such payment cannot be made without offending a statutory provision and the expected payer of such money is a public authority.[16]

[23] I have discussed legitimate expectation doctrine to make the point, as I have done, that the application of the legitimate expectation doctrine has an important qualification to it. And I have demonstrated that the third respondent has failed to surmount the legal qualifications that stood in his way. The arbitrator overlooked

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[11] *President of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd* [2017] NASC (28 March 2017) para 49; and the case there relied on.
[12] *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) at 771F.
[13] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 ALLER 935 (HL) per Lord Fraser at 943J-944A, applied by O'Linn AJA in *Lisse* footnote 4 at 771G-H.
[14] See *Minister of Health and Social Services v Lisse* footnote 4 at 771F.
[15] See paras 11-13 above.
[16] See *Council of Service Unions* footnote 11.

these crucial legal qualifications, and unfortunately, Mr Esau followed suit in his submission.

[24] It is trite that if the lower court or tribunal has exercised its discretion on judicial grounds and for a sound reason, that is, without caprice or bias or the application of the wrong principle, the appellate court will be slow to interfere and substitute its own decision.[17]

[25] From the analysis of the facts and the applicable principles discussed previously, I find that the arbitrator exercised his discretion on the application of the wrong principles, including the principle of legitimate expectation. The second respondent could not be thankful of the legitimate expectation doctrine. In sum, the second respondent's expectation could not be legitimate or reasonable because it was founded on an illegality.

Ground 5 of the grounds of appeal

[26] I accept Mr Esau's submission that ground 5 of the appellant's grounds of appeal is not a ground, properly so called.[18] In any case, that does not in any way affect the conclusion I have reached as respects the arbitrator's award and the order made, that important factual findings were not made on judicial grounds and for sound reasons and the arbitrator applied the wrong principles.[19]

[27] Based on these reasons, I conclude that the appeal succeeds. In the result, I order as follows:

1. The order made by the arbitrator in his award granted under case no. CRWK 412-20, dated 22 April 2022, is hereby set aside.

2. There is no order as to costs.

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[17] *Paweni v Acting Attorney General* footnote 2.
[18] *S v Gey van Pittius and Another* 1990 NR 35.
[19] See *Paweni* footnotes 2 and 15.

3. The matter is finalised and removed from the roll.

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C PARKER

Acting Judge

APPEARANCES:

APPELLANT:	N Ilovu Of Office of the Government Attorney, Windhoek
3RD RESPONDENT:	D V Esau Instructed by Ministry of Justice: Legal Aid, Windhoek