**REPORTABLE**

CASE NO.: SA 68/2012

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between

**DIRK JOHANNES HUGO** **Appellant**

And

**COUNCIL OF MUNICIPALITY OF GROOTFONTEIN** **Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and DAMASEB AJA

**Heard:** **2 July 2014**

**Delivered:** **27 October 2014**

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**APPEAL JUDGMENT**

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SHIVUTE CJ (MAINGA JA and DAMASEB AJA concurring):

Introduction

**[1]** The appellant was granted leave to appeal by the Labour Court in respect of questions of law raised in the application for leave to appeal in that Court. In the application for leave to appeal the appellant advanced six grounds, the first of which was abandoned at the hearing. The remaining grounds of appeal on the basis of which leave to appeal was granted are as follows:

'1. The court erred in not finding that the respondent was prohibited by the provisions of s 27 of the Local Authorities Act 23 of 1992 to unilaterally change the conditions of employment of the appellant by attempting to reduce the retirement age from 65 to 60 and that that attempted change had any legal effect at all.

2. The court erred in not finding that it was incumbent upon the respondent to resort to industrial action in terms of the provisions of s 81 of the Labour Act of 1992 to resolve the dispute of interest, i.e. the desire by the respondent to unilaterally change the conditions of employment, and thereby moving the appellant to agree to the change.

3. That the court erred in finding that it was incumbent upon the appellant to take steps to challenge the decision by the respondent to unilaterally change the terms of the contract of employment by reducing the retirement date to 60 years, and that these steps had to be taken at the time of the decision.

4. The court erred in not finding that the appellant was entitled to be appointed, upon expiry of his last term as Chief Executive Officer, in a post on the fixed establishment of the respondent on conditions not less favourable than those he had enjoyed as Chief Executive Officer by virtue of the provisions of s 27 of the Local Authorities Act 23 of 1992.

5. The court erred in finding that the actions by the appellant amounted to an election, to accept the unilateral change of the terms of the employment contract with the resultant reduction of the retirement age from 65 to 60.'

**[2]** Grounds 1 and 4 are concerned with the interpretation of s 27 of the Local Authorities Act read with the judgment of this Court in *Cronje v Municipality Council of Mariental* NLP 2005 (4) 129 (NSC). Grounds 2 and 3 address the question of whether the respondent should have resorted to industrial action in the form of a lockout under

s 81 of the Labour Act 1992. Ground 5 deals with the question of whether the appellant had elected to acquiesce in the unilateral decision of the respondent, taken in 2004, to reduce the retirement age of all its employees from 65 to 60 years. The dispute arose before the Labour Act 11 of 2007 came into operation, so the relevant provisions of the Labour Act 1992 are of application.

Background facts

**[3]** Most of the facts in this appeal are common cause. The appellant originally commenced employment with the respondent on 27 January 1972. His employment was regulated by the then applicable Municipal Ordinance 13 of 1963 (the Ordinance). His appointment was of a permanent nature with a retirement age of 65. The appellant was promoted to the position of Town Clerk in 1988. After Independence in 1990, he retained his position as Town Clerk by virtue of the provisions of Article 141(1) of the Namibian Constitution.

**[4]** From 1992, the position of the appellant was regulated by the provisions of the Local Authorities Act 23 of 1992 (the Act), which provided for a continuation of the position of staff members previously appointed in terms of the Ordinance.

**[5]** The appointment of the appellant as Chief Executive Officer was extended from time to time. The last extension was set out in an agreement dated 25 April 2006. This agreement was extended until 12 May 2009, after the appellant had reached the age of 60 years.

**[6]** On 1 March 1992, a new Retirement Fund for Local Authorities in Namibia was introduced to replace the previously existing Municipal Pension Fund of South West Africa/Namibia. In terms of the old retirement fund, the retirement age was 65. The new pension fund rule provided for a retirement age of 60. It was, however, possible for an employee to retire at age 65 provided that the employer had so approved. On 26 October 2004, the respondent's Council resolved that the condition of service regarding the retirement age of all employees be changed to 60 years, and that in future an employee turning 60 would be compelled to retire at the end of the month of his or her 60th birthday. This resolution was meant to bring the retirement age in line with the provision in the new retirement fund. The appellant objected to the resolution on the ground that it amounted to a unilateral amendment of his conditions of employment. The respondent did not accept the objection. To the knowledge of the appellant, the new resolution was applied in respect of a number of employees who turned 60 after the resolution had been adopted. The appellant did not take any steps to challenge the unilateral change in the conditions of employment until 2009 when he turned 60 years and was requested to vacate his position. He then lodged a complaint with the Labour Commissioner.

History of the litigation

**[7]** This matter has its origins from an arbitration award dated 8 April 2010. The arbitrator found for the appellant and held that based on the documentary evidence before her, the dismissal of the appellant was substantively unfair. Furthermore, the

arbitrator ordered that the respondent pay compensation to the appellant in a sum equivalent to twelve (12) months' salary, which amounted to N$438 814,92. The amount was to be paid on or before 30 April 2010 through the Office of the Labour Commissioner.

**[8]** The respondent appealed against the arbitrator's award to the Labour Court and the matter came before Smuts J, who decided two issues. Firstly, whether the appellant was unfairly dismissed when his fixed term contract came to an end upon his turning 60 years. Secondly, whether the retirement age of the respondent's employees had been validly changed from 65 to 60 years. If not, a further question then arose as to whether the appellant was entitled to be appointed for a further term on the same conditions of employment at the expiration of his term as Chief Executive Officer.

**[9]** Smuts J set aside the arbitrator's award and found for the respondent after concluding that the retirement age of 60 years was binding upon the appellant. It was also held that the appellant was not entitled to any further appointment on the basis of the binding nature of the interpretation of s 27 of the Labour Act 1992 in the *Cronje* case.

**[10]** For the purposes of this judgment, the important clauses in the memorandum of agreement of service entered into between the parties are set out as follows:

'1. APPOINTMENT AND POSITION

The employee has been appointed as the Chief Executive Officer of the Grootfontein Municipality since 1988 and after this date the employee's appointment in terms of section 27(3)(*i*)(aa) was extended until September 1999. Thereafter the employee's appointment as Chief Executive Officer was again extended from time to time until 25 April 2006 when the employee's appointment as Chief Executive Officer was again extended for a further term of three years until he reaches the age of 60 on 12 May 2009, which extension the employee has accepted on the terms and conditions set out hereunder.

. . .

4. REMUNERATION

. . .

4.2.7 Compulsory participation in the employer's approved Pension Fund to which fund the employer contributes 21,7%

. . .

7. PENSION AND MEDICAL AID:

. . .

7.2 Pension Fund Scheme:

The employee is obliged to join the pension fund subscribed to by the employer, to which fund the employer shall contribute 21,7% of the monthly basic salary of the employee and the employee in return shall contribute 9,5% of his monthly basic salary, which shall be deducted from the monthly remuneration to the employee.

. . .

9. PERSONNEL RULES

The employee shall abide by the rules, regulations, codes and procedure of the employer, as amended from time to time.'

Grounds of appeal 1 and 4

**[11]** In relation to grounds 1 and 4, counsel for the appellant submitted that for the respondent to contend that the retirement age of the appellant had validly been

changed to the age of 60, it was incumbent upon it to establish that the parties had concluded an agreement to negate the existing contractual position. Counsel relied on s 27 of the Act and the *Cronje* judgment.

**[12]** In argument before this Court, counsel for the respondent argued that the interpretation of s 27 of the Act in the *Cronje* case was problematic. Counsel submitted that the whole of s 27(6)(*a*) is subject to the provisions of subsec (3)(*a*)(i) (bb). Furthermore, relying on *Black Range Mining (Pty) Ltd v Minister of Mines and Energy* N.O. (SA 09/2011) [2014] 26 March 2014 a (still unreported) judgment of this Court paras 43 and 44 and *Municipality of Walvis Bay v Du Preez* 1999 NR 106 (LC) at 113-114, that in the event of a conflict between s 27(6)(*a*) and 27(3)(*a*)(i)(*bb*), the provisions of s 27(3)(*a*)(i)(*bb*) prevail. Section 27(6)(*a*) is thus subservient to s 27(3)(*a*)(i)(*bb*) to the extent that there is a conflict between the two provisions. As a result, it was submitted that the Town Clerk deemed to have been appointed in terms of s 27(6)(*a*) cannot be deemed to have been appointed for a period of successive terms of two years, or, as was held in the *Cronje* matter, indefinitely. Section 27(6)(*b*) addresses itself to a very specific type of Town Clerk who holds office as such on a date immediately before the date fixed in terms of Article 137(5) of the Namibian Constitution. Quoting *Minister of Home Affairs v Dickson and Another* 2008 (2) NR 665 (SC) para 35, counsel submitted that s 27(3)(*b*) read with s 27(3)(*a*)(ii) of the Act by necessary implication excludes persons whose terms of office have been renewed or extended. In other words, the Town Clerk's rights under s 27(6)(*b*) accrue only when the initial two year period is not extended.

**[13]** Counsel for the respondent contended that from the wording of the relevant sections, it was clear that the provisions were transitional in their nature as they applied to persons who were employed in the previous administration and had to be carried over to the period that followed after the Act came into operation. The Court in the *Cronje* case had erred in its interpretation of those provisions. Counsel was in agreement with the views expressed in paras 33 and 34 by the court *a quo* on the interpretation of the sections.

**[14]** It should be observed at the outset that because of the conclusion arrived at by the Labour Court in this matter, it became unnecessary for that court to express any views on *Cronje*. Moreover, the court below was bound by *Cronje*. Thus, the views expressed by that court about that judgment are strictly obiter and unnecessary, as counsel for the respondent conceded in argument. Furthermore, the views expressed on *Cronje* in the court below do not impact the outcome of the appeal. In my opinion, what is decisive in the present appeal is the interpretation of the memorandum of agreement signed by the parties.

Two contracts?

**[15]** Essentially, counsel for the appellant submitted that the appellant and the respondent had two binding contracts between them: the original contract of employment which arose in terms of the provisions of the Ordinance (as confirmed by the Act) and the written agreement that counsel characterised as a contract ‘for the

extension of appointment as Chief Executive Officer' rather than an agreement for the extension of employment. I am unable to agree. Although the appellant's employment may have initially been one of a permanent nature, the subsequent extension of his employment as Chief Executive Officer from time to time amounted to a variation of the previous contractual relationship, thereby changing the nature of his employment to a fixed term contract.

*Caveat subscriptor* rule

**[16]** It is a trite principle of the law of contract that a person who has signed a contractual document thereby signifies his assent to the contents of the document. Maritz JA in *Namibia Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) paras 9 - 10 stated the following:

> '9. . . . Fagan CJ remarked in *George v Fairmead (Pty) Ltd*
> "When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."
>
> 10. Absent any credible allegation of misrepresentation, subterfuge, dishonest concealment, duress, fraud or the other exceptions to the general rule, the second to 22nd respondents are bound by the quantification of the severance payments reflected in their respective deeds of settlement with the appellant. They agreed to receive them in full and final settlement of their respective claims and, in that sense, their signatures not only sealed the quantum of their severance entitlements but also the fate of their application.'"

**[17]** The appellant's heads of argument do not contain any contention that there was an instance on the part of the respondent that may have led to an absence of consensus. As a result, it can be accepted that the parties were *ad idem* as to the terms of their agreement and the appellant was aware of his rights and obligations at the time of the signing of the memorandum. Furthermore, he intended to be bound by the terms of the agreement.

**[18]** The High Court in *Damaraland Builders CC v Ugab Terrace Lodge CC* 2012 (1) NR 5 (HC) discussed the general principles applicable to the contract when attempting to construe the true intention of the parties in circumstances where there is some inconsistency or ambiguity. Of particular importance to this judgment is the parol evidence rule as discussed in para 11 of the judgment as follows:

> '11. A further aspect that needs consideration in respect of the interpretation of the contracts is the parol evidence rule.
>
> "The rule is that when a contract has once been reduced to writing, no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence. . . ." [*Lowrey v Steedman* 1914 AD 532 at 543.]
>
> There are some exceptions to the parol evidence rule, namely whether or not there was a contract, supplementary and subsequent oral contracts, and to explain the terms used in the contract. (*McKenzie*, supra, 23–24.)
>
> In respect of the exceptions only the second one mentioned above may have application to this case. As an exception to the parol evidence rule a party is

> entitled to show by evidence that apart from the written contract there has been an independent oral contract. It is permissible to provide evidence of the subsequent oral agreement which alters the terms of the written contract. . . .

**[19]** There is no allegation or evidence that there are exceptions to the parol evidence rule in the present case. In deciding the appeal therefore, the memorandum is the principal evidence to consider. To determine whether the respondent acted within the terms of the memorandum, recourse must be had to the ordinary meaning of its provisions. The clauses of the memorandum cited in para [12] of this judgment are important for determining this.

Unilateral change

**[20]** In relation to whether the respondent legally unilaterally changed the retirement age, clauses 4.2.7, 7.2 and 9 are relevant. Clause 7.2 of the memorandum, which provides for a pension fund scheme, explicitly uses the word 'obliged'. I refer to one of the definitions of word 'oblige' as provided for in the Concise Oxford English Dictionary, 10 ed, Oxford University Press, p 982 which provides as follows:

> 'compel legally or morally'.

*Mozley & Whiteley's Law Dictionary* 10 ed, p 316 defines the word 'obligation' as 'a legal or moral duty as opposed to physical compulsion'. The word 'obliged', in clause 7.2 of the memorandum for the present purposes can be accepted to have the same

meaning as obligation, namely a legal or [moral?] duty to join the pension fund to which the respondent had subscribed.

**[21]** It is thus evident that clause 7.2 of the memorandum of agreement for services is couched in mandatory terms and is thus distinguishable from clause 7.1. Clause 7.1 provides that:

> 'The employee <u>may choose to join</u> the medical scheme subscribed to by the employer, to which fund the employer will contribute (on behalf of the employee) 70% of the monthly installment levied by the fund, for the participation by the employee. The remaining 30% shall be deducted from the monthly remuneration paid to the employee.' (My emphasis)

**[22]** The language in clause 7.2, in particular the use of the word ‘obliges’ is mandatory in nature. It places an obligation on the employee. By contrast, the language of clause 7.1, in particular the use of the phrase 'may choose to join', is permissive rather than obligatory, and allows the employee to make a choice.

**[23]** Clause 7.2 places an obligation on the signatory employee to join the pension fund scheme to which the employer has subscribed. This is stated further in clause 4.2.7, which provides for the compulsory participation of the employee in the employer’s approved pension fund. No specific pension fund is identified in clause 7.2 or 4.2.7, or indeed in the entire memorandum. It is merely stated that the employer will provide one.

**[24]** In respect of the terms and conditions relating to the pension fund, the memorandum merely provides the contribution arrangement to the fund as contained in clause 7.2. As such, the respondent was not required to provide a specific pension fund, neither was it required to provide a pension fund with specific rules other than the contribution arrangement towards such fund. Clauses 4.2.7 and 7.2 of the memorandum make this obligation clear.

**[25]** Furthermore, clause 9, which is couched in mandatory terms, requires the employee to abide by the rules, regulations, codes and procedures of the employer, as amended from time to time. As a result, the respondent was well within its legal rights to amend the rules and regulations applicable to the pension fund, which also includes the change of the retirement age. The appellant was required to adhere to these rules and regulations for as long as he remained the respondent's employee.

**[26]** In terms of the memorandum, the appellant was not entitled as of right to belong to a specific pension fund. The respondent as an employer had the right to renew, cancel or change the identity of the pension scheme provider without the consent of the individual who had signed an agreement embodying clauses 4.2.7, 7.2 and 9. Therefore in the circumstances before the Court, the respondent was entitled to unilaterally change the retirement age.

Termination of the contract

**[27]** In relation to the issue of whether the appellant was entitled to employment on the same conditions as provided for in the memorandum following effluxion of the period, recourse to Parker J's judgment in *Overberg Fishing (Pty) Ltd v Docampo* 2012 (1) NR 282 (LC) is necessary. Parker J in para 3 stated the following in respect of fixed term contracts and the termination thereof:

> '. . . A fixed-term contract terminates by effluxion of time and the only thing that remains is whether the employee was given notice within a reasonable time before the expiration of the contract that the contract would not be renewed.'

**[28]** Clause 1 of the contract explicitly states that the appellant's term of employment was to be extended from 25 April 2006 until he reached the age of 60 on 12 May 2009. This makes it sufficiently clear that the contract between the two parties was a fixed term, one which would lapse by the effluxion of the said period. Essentially, in terms of the memorandum, the appellant was not entitled to or assured of any further employment with the respondent at the end of the said period.

**[29]** As was stated by Parker J, what needs to be determined in cases arising from fixed term contracts is whether the notice procedure was adhered to in determining the issue of unfair dismissal. The issue does, of course, not arise on the facts of this appeal as it was not the appellant's case that he was not given sufficient notice that the contract would not be renewed.

**[30]** It follows from the reasons outlined above that grounds 1 and 4 cannot succeed.

Grounds 2 and 3 - Industrial action

**[31]** Counsel for the appellant submitted that the respondent had no right in the legal sense to change the conditions of employment and that its attempts to do so constituted a dispute of rights as that term was defined in the Labour Act 1992. Citing *Smit v Standard Bank of Namibia* 1994 NR 366 (LC) at 371B to 372, counsel contended that when the appellant made it clear in 2004 that he did not accept the unilateral change in his conditions of employment, it was incumbent upon the respondent to resort to the procedures provided for in the Labour Act 1992.

**[32]** Furthermore, counsel for the appellant submitted that the respondent bears the onus to establish that the dismissal was fair and that this onus has not been discharged.

**[33]** Counsel for the respondent on the other hand argued that in the event that the respondent's arguments on s 27(6) of the Act regarding waiver also fail, it would be conceded that the appellant was unfairly dismissed. It follows that the appellant would have been entitled to be employed by the respondent in a post on the fixed establishment of the respondent, or in a post additional to the fixed establishment of the respondent, and the letter dated 18 February 2009, which informed the appellant

that he must go on retirement effective from 29 May 2009, would therefore amount to unfair dismissal.

**[34]** As regards the issue of dismissal, I refer to para [29] where it was found that the contractual relationship between the two parties was terminated as a result of effluxion of time as contemplated in clause 1 of the memorandum.

**[35]** Strydom JP in *Smit v Standard Bank of Namibia* above succinctly discussed the law on industrial action. Recourse to this judgment is essential for the determination of whether it was incumbent on the respondent to employ the mechanisms provided for in s 74 of the Labour Act as argued by the appellant. In determining when industrial action is appropriate, the learned judge at 369I *in fine* – 370A-B stated in relation to the definitions of 'strike' and 'lock out':

> 'Although in both these definitions reference is made to ‘any dispute’ counsel were agreed and correctly so in my opinion, that the wide wording of the definitions are limited and are subject to the provisions of s 79(2)(*a*)(ii)(*aa*) which lay down that parties may not resort to a strike or a lock-out if the dispute between them relates to a dispute of rights. It follows therefrom that only if the dispute between the parties relates to an interest would a lock-out and a strike as part of the negotiating process be permissible.
>
> Where the dispute relates to a right which remained unresolved after conciliation board proceedings, the parties are permitted by the Act to go to the Labour Court which can then adjudicate upon the right (s 79(1)) or they may agree to refer the dispute to arbitration (s 79(1)(*b*)).'

**[36]** At 371B-C, Strydom JP discussed the question of when industrial action would be appropriate and distinguished between a dispute of interests and one of rights. He concluded that industrial action was permissible in the case of a dispute of interests, where either party had no legal right to change the conditions of employment, and that the only way open for such party was the route laid down by the Act in order to persuade the other to agree to the change.

**[37]** The crux of the present matter is whether the respondent could unilaterally change the retirement age. Essentially, this begs the question whether the respondent had a legal right to act in that manner. As it appears from the above discussion, the respondent was entitled by the memorandum binding the parties to change pension funds, even if this had the effect of unilaterally changing the retirement age because the new fund scheme so provided. The respondent had a right, in the legal sense to make these changes simply because the memorandum assented to by both parties afforded it that right. The present case is thus a dispute of rights. As such, there was no need for the change to be effected by way of negotiation and mutual agreement in the way provided for by the Act. The change of pension fund and its applicable rules were not matters that were open for negotiation between the two parties. Therefore, it does not follow that it was incumbent upon the respondent to employ the mechanisms set out in the Labour Act 1992.

**[38]** As already mentioned, the present matter concerns a dispute of rights. As stated by Strydom JP in the *Smit* matter at 370B, a dispute of rights which remains

unresolved after the conciliation board proceedings could be adjudicated in the Labour Court in terms of s 79(1) or could be referred to arbitration in terms of s 79(1) (*b*). This right is subject to the provisions of s 24 of the Labour Act 1992, which provides a time limitation of 12 months from the date upon which the cause of action arose.

**[39]** It follows that the appeal on grounds 2 and 3 can also not succeed.

Ground 5 - Election

**[40]** As regards ground 5 relating to the question of whether the appellant had elected to acquiesce in the respondent's unilateral change of the retirement age, counsel for the appellant contended that the respondent could not legislate unilaterally on conditions of employment, and that therefore any change must be consensually agreed. Citing *Namibia Broadcasting Corporation v Kruger and Others* paras 35 - 36 counsel submitted that the parties in the present matter were on an equal footing despite the respondent being an organ of the State.

**[41]** Counsel for the appellant relying on *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading NO* 150 CC 2005 (5) SA 186 (SCA*)* para 32 and Christie's *The Law of Contract in South Africa*, 6 ed on p 26, submitted that the doctrine of quasi-mutual assent found no application in the present matter. Counsel contended that no evidence was adduced on behalf of the respondent that it had been misled and in fact relied on this misrepresentation. Furthermore, there was no evidence that the officials

of the respondent had through this misrepresentation reasonably concluded that an agreement had been reached on the new terms of employment. Counsel for the appellant contended that the officials of the respondent could have been under no illusion that their actions to enforce a unilateral change in conditions of employment were reasonable.

**[42]** It was the appellant's further submission that estoppel did not apply in the present case, as no case had been made out that the respondent had acted to its detriment as a result of the alleged election by the appellant nor was there any evidence to found estoppel. Counsel argued that there was no evidence that the respondent understood and accepted the behaviour of the appellant to constitute a waiver of rights with the result that a new employment agreement arose which required the appellant to retire at the age of 60. It was contended furthermore that the appellant's behaviour was consistent with an attitude that his existing contract remained in force, and could not be said to be consistent with an acceptance of the changed conditions of employment.

**[43]** Counsel for the appellant proceeded to argue that the resolution by the respondent on 26 October 2004 to unilaterally change the conditions of employment amounted to anticipatory breach of the employment contract. The resolution in 2004 was a notification by the respondent to the appellant of its intention not to perform when he reached the age of 60, in 2009. Citing Christie op. cit. on p 563 and *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 444 and *Machanic v Bernstein*

1920 CPD 380 at 381, counsel submitted that the appellant was not obliged to take legal action immediately and was entitled to keep the contract alive until the performance was due and then take legal action.

**[44]** It was submitted by counsel for the respondent that if the interpretation of s 27(6) read with s 27(3) of the Act as contained in para [12] herein by necessary implication is upheld, the two grounds of appeal addressing the issue of an election should not stand. In the alternative, if the interpretation was not upheld, so counsel for the respondent submitted, the views of the court below contained in paras 37 - 40 of its judgment which spoke to the applicable time limits for initiating labour dispute resolution are supported and should be upheld by this Court. Smuts J stated the following in the paragraphs relied upon by the respondent:

> '[37] Subsequent to that decision, it is common cause that the respondent took no steps to challenge the change to the conditions of employment. At the time, s 74 of the then applicable Labour Act of 1992 entitled a person in the position of the respondent to apply for the appointment of a conciliation board within 30 days of a unilateral change to conditions of employment. In that event, an employer would be obliged to restore the condition in question until the dispute were to be resolved or settled in accordance with Part X of the 1992 Act.
>
> [38] Furthermore, as is submitted by Ms Bassingthwaigte, s 24 of that Act provided a limitation for the institution of proceedings in the Labour Court or in respect of the lodging of complaints in the District Labour Court to a period of 12 months from the date upon which the cause of action had arisen or for such further period upon good cause being shown in the Labour Court or in the District Labour Court.

> [39] It is clear that the respondent was aware of his rights, including the right to challenge a unilateral change to a condition of employment, when the appellant's council adopted that resolution. It was incumbent upon him then to take steps if he did not seek to be bound by the change in conditions of employment. He was thus faced before an election whether to challenge the change to the conditions of employment or to accept it by his conduct if taking no action to challenge it. That was the election which the respondent faced. He elected not to challenge that change in the retirement age and is in my view bound by that election.
>
> [40] The courts have over the years held that a party is bound by an election in these circumstances.'

**[45]** Counsel for the respondent contended that the appellant was aware of his rights, including the right to challenge a unilateral change to a condition of employment, when the appellant's council adopted that resolution. As a result, it was incumbent upon him to take steps to challenge the decision if he had no intention to be bound by the change in the conditions of employment. His failure to mount a challenge resulted in his being bound by his election to take this course. In addition, pursuant to the change in conditions of employment and his knowledge thereof, the appellant subsequently entered into a contract of employment that extended his term of employment until its expiration when he attained the age of 60 years, and not for the duration of a term as in the past. According to counsel, the appellant was the most senior administrator in the respondent and was aware of the respondent's application of the policy. Counsel concluded by stating that the retirement age of 60 years was binding upon the appellant in the circumstances and that he would not have been entitled to any further appointment.

**[46]** In determining this issue, recourse must be had to the case of *Meridien Financial Services (Pty) Ltd v Ark Trading* 1998 NR 74 (HC) at 77B-C in which Teek J stated the following:

> 'It is trite law that, the legal requirement is that where there was a breach of an agreement by the applicant then the respondent had to elect to cancel or to enforce the contract and unequivocally communicate such election to the applicant.'

**[47]** The nature of the doctrine of election requires that there should be a breach of a contractual term by the defaulting party which results in the innocent party having a choice either to cancel or enforce the contract. The case before the Court does not present such a situation. As discussed above, the respondent was within its legal rights to change the pension fund administrator and adjust the terms of employment in accordance with the rules of the pension fund as provided for in the memorandum. The memorandum afforded the respondent the right to make such necessary changes to the extent that it did not affect the contribution as contained in clause 7.2. As such, the appellant needed not have consented to the decision to change the pension fund scheme.

**[48]** It follows that since the respondent acted in a manner contemplated by the memorandum, the unilateral change of retirement age cannot amount to anticipatory breach as submitted by the appellant as the nature of anticipatory breach on the facts of this case requires that one must act in a manner not consistent with the agreement. On the facts of this appeal this has not occurred.

**[49]** It then follows that the doctrine of quasi-mutual assent or election finds no application in the present matter. Therefore ground 5 of the appeal must also fail.

Conclusion

**[50]** For the reasons set out herein, I am not persuaded that the Labour Court erred in dismissing the appeal. The appeal ought therefore to suffer the same fate in this Court. On the issue of costs, counsel for the appellant has made no submission concerning costs whereas counsel for the respondent has submitted that costs for one instructing and instructed counsel should be awarded in the event of the appeal succeeding. An order will be made accordingly.

Order

**[51]** The following order is made:

1. The appeal is dismissed.

2. The appellant is to pay the costs of the appeal, which shall include the costs of one instructing and one instructed counsel.

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**SHIVUTE CJ**

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**MAINGA JA**

_____
**DAMASEB AJA**

APPEARANCES:

| | |
|---|---|
| APPELLANT: | P C I Barnard |
| | Instructed by Koep & Partners |
| RESPONDENT: | G Narib |
| | Instructed by Kwala & Company. |