REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: KHORIXAS TOWN COUNCIL APPELLANT and STANLEY XAMISEB FIRST RESPONDENT KLEOFAS GAINGOB SECOND RESPONDENT	**Case No:** HC-MD-LAB-APP-AAA-2019/00057 **Division of Court:** LABOUR COURT (MAIN DIVISION)
Heard before: Honourable Lady Justice Rakow, J	**Date of hearing:** 27 November 2020 **Date of order:** 29 January 2021
Neutral citation: *Khorixas Town Council v Xamiseb* (HC-MD- LAB-APP-AAA-2019/00057) [2021] NALCMD 2 (29 January 2021)	

Having read the record of proceedings as well as having heard the submissions made by counsels for the applicant and the respondent:

IT IS HEREBY ORDERED THAT:

1. The appeal is upheld.
2. The arbitrator's award dated 13 June 2019 is hereby set aside.
3. No cost order is made.

Reasons for orders:

Introduction

[1] Initially the matter was place on the roll and was not opposed but the Appellant did not comply with rule 17(23) of the Rules of the Labour Court in that it failed to file heads of argument within the prescribe period being not less than 10 days before the hearing date. The court however allowed the Appellant to rectify this oversight and file an application for condonation, which they then did and the court condones the late filing of the heads of argument.

Background:

[2] The Appellant is the Town Council of Khorixas , a local authority in terms of the Local Authorities Act, 1992, and the first respondent is an employee of the said town council. The representative of the first respondent indicated to the court at the appearance of the matter previously that they do not intend to oppose the appeal. There is further no appearance for the second respondent, the arbitrator that dealt with the matter.

[3] The first Respondnet joined the personnel of the Appellant on 1 March 2009 as a Meter Reader and earned a montly salary of N$2630.00. He was later moved to another department and was placed in the position of a Debtors Controller which caused his basic salary to be adjusted to N$6 397.00. On or about 2 July 2014, the then Ministry of Regional and Local Government, Housing and Rural Development, under whose control the Municipalities, Town Councils and Local Authorities opperated, caused a circular with reference number 13/2/1 to come into opperation although it was issued already in 2013. All Local Authorities in Namibia are catogorized in a specific catorgory in relation to the size of the Local Authority Area with Khorixas designated as a category D Local Authority. This circular contained new approved salary strucures and motor vehicle allowances, which was alligned to the unified salary structure of the Publice Service, which then listed the salary structure for 2014/2015 financial year with effect from 1/7/2014 and which would then be a indicator for the salary structure of a catagory D Local Authority.

[4] The effect of the circular, as contended by the first respondent, was that he should have been placed in the position of an Assistant Accountant, which would have placed him in the C3 salary band with a salary notch of about N$159 590.00. This did not happen and the respondent approached the management of the Town Council to rectify the situation without sucess. This position continued untill such time as he

approach the Office of the Labour Commissioner on 27 June 2018 and laid a complaint with them alleging that the Appellant (then Respondent) treated him in contravention of section 9(2)(a)-(c) of the Labour Act, which consitutes unfair labour practices in thems of section 50(1)(e) of the Labour Act, 11 of 2007.

[5] The arbitrator made the following order after hearing the evidence presented in the matter:

1. The respondent to this case is hereby ordered to comply with the Governement Ministerial circular 13/2/1 which outline the standarized salary structure for Catagory D Local Authorities.
2. The respondent to this matter is hereby ordered to re-introduce the abolished position of assistant accountant as per the Personnel Rule of the respondent and per se Circulare 13/2/1;
3. I hereby order the respondent to place the applicant in to the position of Assistant Accountant retrospectively from the next three(3) months after the first three months have lapsed in terms of Rule 17(3) of the Respondents Personnel rule counting from first of July 2014, after the implementation of the Ministerial unified salary structure as contained in Circular 13/2/1;
4. The respondent to this matter is further ordered to effect the salary of assistant Accountant he would have received if he was not wrongly placed by the respondent during the Grading and Placement process;
5. This order only include the difference in to the salaries between the salary of applicant and that of the Assistant Accountant therefore the benefits are not included, the applicant salary July 2014 = N$8524 and Assistant Accountant Salary July 2014 = N$13 299,17, the difference N$4772,17.
6. The arbitrator then calculates the difference between the salary the applicant (respondent in the appeal) received and should have received in the new position and concludes that the respondent is to pay the total difference in the amount of N$302 666,59.

[6] The Appellant appealed, but the appeal was filed out of time. As a result of this, they had to apply for leave to institute such an appeal and for the court to grant condonation for the late filing of the appeal record. This was heard by my brother Justice Masuku who granted the application as well as stayed the execution of the order as he found that there were reasonable prospects of success on appeal.

[7] The grounds of appeal that was set out in the notice of appeal are as follows:

Ground 1

In terms of Section 86(2)(b) of the Labour Act 11 of 2007 any dispute, other than a dismissal dispute, must be referred to the Labour Commissioner within one year after the dispute arose. In the event that such timeframe is not complied with, as in the case here, the Arbitrator has no jurisdiction to adjudicate the dispute;

Ground 2

Section 50(1)(a) to (g) prescribes the list of conduct constituting unfair labour practice and is exhaustive. The conduct

complained of by the First respondent had nothing to do with alteration of existing rights or terms and conditions of employment and hence does not fall within the parameters of this list and does not constitute unfair labour practice at all. The dispute relates to promotion or the appointment to a new position and is thus a dispute over which the Arbitrator had no jurisdiction to hear and adjudicate.

Ground 3

The dispute relates to promotion or the appointment to a new position and is not a dispute that an Arbitrator can deal with in terms of Section 84 of the Labour Act, which Section defines what a dispute to be referred to Arbitration means. Such a dispute is a dispute of interest and has to be dealt with in terms of Section 28 and not Section 86 of the Act, i.e Conciliation and not Arbitration.

The legal arguments

[8] Section 86(2) of the Labour Act reads that

'A party may refer a dispute in terms of subsection (1) only -

(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or

(b) within one year after the dispute arising, in any other case.'

[9] Section 86(2) places a time restriction of one year on the lodgement of all disputes under the Labour Act, except for unfair dismissal. The first respondent lodged his dispute on 27 June 2018 while the circular forming the bone of contention was issued in 2013 and became operational on 1 July 2014, making the date the dispute was lodged almost 4 years after the date the circular came into operation. It is true however that the period of time only starts to run after all internal remedies were exhausted. The interpretation that was accorded to the provisions of s. 86 by the Supreme Court in *National Housing Enterprise v Maureen Hinda-Mbaziira*[1] is expressed as follows:

'Therefore, the Court *a quo* was correct in the interpretation it accorded to s 86 (2) (a), that is, the six months' time limit in terms of s 86 (2) (a) begins to run after all reasonable or internal remedies have been exhausted and failed to resolve or settle the dispute. Such interpretation does not violate or offend the intention of the legislature in its use of the words "dispute" and "date of dismissal" in s 86 (2) (a).'

[10] In the current matter the first engagement by the first respondent with the appellant was in a letter dated 17 July 2014 to the Human Resources department expressing his unhappiness with the grading on which he was placed. There are a number of letters and letters of appeal from the respondent and his supervisor that form part of the exhibits in this matter. The last letter being a recommendation by his supervisor to the Chief Executive Officer to transfer the

[1] *National Housing Enterprise v Maureen Hinda-Mbaziira* Case No. SA 42/2012.

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first respondent to the vacant position of Assistant Accountant Band C3. This letter is dated 5 February 2018 and differs from the initial request to rectify the grading that the Respondent was placed in. He followed up with requests to re-grade his current position in letters dated 1/8/2014, 20/8/2015, 18/1/2016, 25/1/2017 and 4/10/2017 without receiving a positive response to his requests. From perusing the letter dated 20/8/2015 it seems that there was a letter acknowledging the receipt of the appeal dated 19/12/2014 although there was no copy of the said letter handed in as exhibit.

[11] There was one further response from the Human Resource office dated 28/1/2015 asking for more information regarding the job evaluation of the current position and why this position overlaps with other positions. It is not clear from the documentation received that these questions were indeed answered. This correspondence clearly spans over a period of 4 years with the Appellant ignoring these requests. The initial remedy was therefore to write to the Chief Executive Officer and request a regarding, which was done in the initial letter dated 17/7/2014.

[12] In *Luckhoff v The Municipality of Gobabis*[2] Justice Masuku discussed the decision in *Hinda* and said the following:

'In the Hinda case, the respondent had been dismissed by the appellant, subject to an appeal against same. The appeal was noted to the relevant body and by the time the dismissal was confirmed, the period of six months stipulated in s. 86 (2) (a) had lapsed. The Supreme Court upheld the decision of the Labour Court to the effect that the running of the period does not commence immediately after the initial dismissal but should allow internal processes and remedies availed for appeal, until it was clear that the dispute cannot be settled internally.'

[13] Similarly the court is of the opinion that after at least receiving the acknowledgement of receipt of appeal and following this issue up again in a letter dated 20/8/2015, and then receiving no further feedback on the matter, it should have been clear to the respondent that the dispute with his employer would not be settled internally. He however waited almost another three years before instituting his complaint with the labour commissioner's office on 27 June 2018. The dispute was therefore not referred in terms of section 86(1)(b) of the Labour Act, within one year after the dispute arising and the appeal should accordingly succeed as the arbitrator did not act as a reasonable arbitrator should have, and dismissed the matter for not complying with section 86(1)(b) of the Labour Act. In light of the above finding I am therefore not going to deal with Ground 2 and Ground 3 of the Appellant's grounds of appeal.

[14] I make the following order:

1. The appeal is upheld

[2] (LCA 46/2014)[2016] NAHCMD 6 (2 March 2016).

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2. The arbitrator's award dated 13 June 2019 is hereby set aside. 3. No cost order is made

JUDGE'S SIGNATURE	**Note to the parties:**
E RAKOW **JUDGE**	Not applicable.
Counsel:	
Applicants	**First Respondent**
Adv. T Muhongo *on* *Instructions of ENS Africa*	*T Nanhapo* *of* *Brockerhoff and Associates Legal Practitioners*