

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-LAB-APP-AAA-2022/00003

In the matter between:

**SAMUEL MBANGO**

**APPELLANT**

and

**OMUTHIYA TOWN COUNCIL**

**1<sup>ST</sup> RESPONDENT**

**MAANO KALOMO N.O**

**2<sup>ND</sup> RESPONDENT**

**LABOUR COMMISSIONER**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Mbango v Omuthiya Town Council and Others* (HC-NLD-LAB-APP-AAA-2022/00003) [2024] NALCNLD 02 (05 February 2024)

**Coram:** MUNSU J

**Heard:** 11 August 2023

**Delivered:** 01 February 2024

**Reasons:** 05 February 2024

**Flynote:** Labour Law – Opposed Labour Appeal – Section 27(3)(b) of Local Authorities Act, 1992 (the Act) – Renewal of statutory five year fixed term employment contract – Legal implications of non-compliance with s 27(3)(b) of the Act.

**Summary:** The appellant was employed as Chief Executive Officer of the first respondent on a statutory fixed term contract of employment of five years. Towards the expiry of his term, the first respondent gave notice to the appellant of its decision to advertise his position and that he had the right to apply. The appellant contended that the notice did not comply with the law in that it was not preceded by a valid Council resolution, that it was not given to him three months before the expiration of his term, and that it did not inform him whether he would be retained or not, contrary to s 27(3)(b) of the Act. He claimed that he was unfairly dismissed. The First respondent maintained that the appellant was never dismissed, but rather, his contract of employment ended by effluxion of time.

*Held*, that the notice given to the appellant was defective in three respects, firstly, it was not backed up by a valid Council resolution, secondly, it was not given to him at least three calendar months before the expiry of his contract, and thirdly, it did not inform him of whether or not his services would be retained.

*Held*, that the appellant's contract of employment allowed for an extension at the end of the term, and the Council was required to notify the appellant three months in advance of the decision to extend or not.

*Held*, that, because the Council served a defective notice on the appellant, it followed that the appellant was never served with a legal notice in the first place. The notice he was served with had not been a notice as contemplated by the Act.

*Held*, that the tenor and spirit of the entire s 27 (3) (b) of the Act is that, notice ought to be given (in compliance with the Act), and in the absence of such notice, it is deemed that a tacit notice had been given to the chief executive officer that he or she is retained in service for an extended term.

*Held*, that the 'deeming provision' in s 27(3)(b)(iv) best expresses the intention of the legislature in enacting s 27 (3) (b).

*Held*, that the arbitrator erred in not finding that the defective notice amounted to a tacit notice extending the appellant's term.

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## ORDER

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1. The appeal is upheld.
2. The award handed down on 15 August 2022 by the arbitrator under case number NROS 148-19 is set aside.
3. The Appellant is reinstated to his previous position of Chief Executive Officer for an extended period of five years from 01 September 2019 to 31 August 2024.
4. The First Respondent is to reimburse the Appellant retrospectively from 01 September 2019 until the time he will resume office.
5. If the First Respondent is unable to comply with para 3 of this order because of the appointment of another Chief Executive Officer in the place of the Appellant as from 01 September 2019 to 31 August 2024, the First Respondent shall be liable to pay the Appellant an amount calculated to place the Appellant in the position he would have been if the First Respondent had not purported to terminate his employment in an illegal manner.
6. There is no order as to costs.
7. The matter is removed from the roll: case finalised.

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## JUDGMENT

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MUNSU J

### Introduction

[1] This is an opposed labour appeal, in which the appellant, Mr Samuel Mbango appeals against the arbitration award handed down on 15 August 2022 by the second

respondent (the arbitrator). The court is called upon to determine the propriety of the aforesaid award.

[2] The appellant was employed by the Council for the town of Omuthiya (the Council) on a five year statutory fixed term contract, as its Chief Executive Officer.

### Background

[3] The Council appointed the appellant to the position of Chief Executive Officer from 01 September 2009 to 31 August 2014. The contract of employment was renewed for another five years from 01 September 2014 to 31 August 2019.

[4] On 10 June 2019, the appellant was served with a letter dated 04 June 2019 informing him that the Council resolved to advertise his position and that he had the right to apply.

[5] For the reasons that will become clear later in this judgment, the appellant maintained that the Council violated the law when it passed the resolution, and as a result, he was unfairly dismissed.

[6] On 28 June 2019, the appellant lodged a complaint of unfair dismissal and unfair labour practice with the Office of the Labour Commissioner. The matter proceeded to arbitration, where the appellant appeared in person, while the Council was represented by one of its employees, Ms Taimi Lungameni.

[7] On 15 August 2022 the arbitrator handed down her award in terms whereof she dismissed the appellant's claim as she found that the appellant was never dismissed but that his fixed-term contract of employment ended by effluxion of time.

[8] Aggrieved by the arbitrator's ruling, the appellant lodged this appeal in terms of s 89 of the Labour Act, 2007 (the Labour Act). He seeks to have the award set aside, and that he be reinstated, and reimbursed retrospectively until he resumes work, alternatively that he be paid for five years.

[9] At least three years passed from the time the appellant lodged the complaint with the Labour Commissioner to the time of the award. It appears from the record that there were several reasons for the delay. These include, preliminary issues relating to legal representation of the parties, and points *in limine* raised, challenging the jurisdiction of the Labour Commissioner to hear the matter.

[10] Also, there was a review application in this court emanating from the arbitration proceedings, and the matter had to be referred back to the Labour Commissioner for a hearing *de novo*. It would also appear that Covid-19 had its fair share in the delay of the matter.

#### The arbitration award

[11] The appellant presented the same arguments both at arbitration and on appeal. For convenience, I will deal with the arbitration proceedings together with the appeal.

[12] After hearing the parties, the arbitrator made the following findings:

- (a) The appellant was given a notice by the Council, however, the notice was not given three months prior to the expiry of the appellant's contract.
- (b) The appellant's complaint of unfair dismissal was lodged prematurely with the Labour Commissioner.
- (c) The appellant's contract of employment ended by effluxion of time, thus he was not dismissed.

[12] The arbitrator proceeded to make the following award:

'Having found that the applicant was never dismissed but only his fixed term contract ended by effluxion of time on 31 August 2019, I hereby dismiss his claim and order the respondent to pay the applicant an amount equal to his daily rate for ten days from 01 – 10 June 2019 for the period he was supposed to be given a notice as a Notice pay.'

### Grounds of appeal

[13] The appellant's grounds of appeal are as follows:

1. Whether the arbitrator erred in law by failing to find that a defective notice in terms of Section 27(3) of the Local Authorities Act, Act 23 of 1992, amounts to a notice given to the chief executive officer that he is retained in service for an extended term.
2. Whether the arbitrator erred by finding that the appellant was only entitled to payment in the amount equal to his daily rate for ten days from 01 – 10 June 2019 instead of 5 years for an extended term.
3. Whether the failure by the town council to pass a duly compliant resolution nullified their decision not to retain the appellant's services.
4. Whether the arbitrator erred by failing to find that the town council had created a legitimate expectation of an extended term towards the appellant.
5. In the alternative and in the event that the above questions of law are not upheld, then a determination on whether the arbitrator acted irregularly and/or erred by placing the burden of proof for unfair dismissal on the appellant instead of the town council.
6. In the further alternative and in the event that the above questions of law are not upheld, then a determination on whether the arbitrator acted irregularly and/or erred by failing to provide the appellant with an opportunity to cross-examine the representatives of the town council.

### The issues

[14] Regard being had to the record of arbitration proceedings, as well as the grounds of appeal, two issues stand out for determination, namely:

(a) Whether the Council complied with the statutory prescripts when the decision not to renew the appellant's contract of employment was taken?

(b) In the event of non-compliance, the legal implications thereof.

[15] I now proceed to determine the above issues.

(a) Whether the Council complied with the law when it resolved not to renew the appellant's contract of employment?

The appellant's case

[16] Both at arbitration and on appeal, the appellant made reference to s 27(3)(b)(i) of the Local Authorities Act, 1992 (the Act) which provides that:

'The local authority council shall in writing inform the chief executive officer concerned at least three calendar months before the expiry of the period contemplated in paragraph (a)(i) or any previously extended period contemplated in paragraph (a)(ii) of its intention to retain him or her in service for an extended term, or not.'

[17] He also referred to clause 6.2 of his contract of employment which states that:

'The employer may renew this agreement for a further period of five years. The employer must give the employee at least three calendar months written notice of its intention of whether it will or will not renew the agreement. The employee in turn should fulfil his/her mandate in terms of the Local Authorities Act with regard to the extension of contact.'

[18] The appellant contended that the notice that the Council served him was not valid as it was not given three months before his employment contract expired. In terms of clause 6.1 of his employment contract with the Council, and in accordance with s 27(3)(b)(i) of the Act, his employment contract was set to expire on 31 August 2019. He emphasised that the notice should have been given before 31 May 2019. However, he was only served with the notice ten days later on 10 June 2019.

[19] The appellant further submitted that the notice did not address the issue of whether his contract of employment would be renewed or not, but rather that Council resolved to advertise the position and that he had the right to apply.

[20] In addition, the appellant also pointed out that the notice was not preceded by a valid Council resolution. According to him, the procedure set out in s 14 and 15 of the Act, including the standing rules relating to the convening and holding of, and procedures at meetings of the Council were not followed. He explained that Council members are required to forward motions to the Chief Executive Officer who would in turn forward them to the Mayor who decides whether or not same would be heard. If the motion is to be heard, it would be placed on the agenda for the next Council meeting. The Chief Executive Officer would then issue a notice containing the date, time and place of the next meeting at least 72 hours before the meeting.

[21] The appellant went on to state that after the meeting, there is supposed to be minutes signed by the Chairperson of the Council, co-signed by the Chief Executive Officer. The minutes are thereafter submitted to the line Minister within seven days after confirmation, together with a copy of the agenda. The appellant submitted that none of the above procedures were followed.

[22] Upon receiving the notice that his position would be advertised, the appellant informed the line Minister of the non-compliance with the procedures set out above. The Minister requested the Council to provide a report on the matter, and upon perusing the response, the Minister referred the Council to s 27 (3) (b) (i) of the Act and concluded:

‘In light of above and in order to avoid an unnecessary labour dispute and challenge, the Council is hereby advised to ensure compliance with the procedures and legislation.’

[23] It was the appellant’s submission that he was dismissed without following any process or procedures. Ms Shipindo for the appellant contended that the arbitrator erred in law by failing to find that a defective notice in terms of s 27 (3) of the Act amounts to a notice given to the chief executive officer that he is retained in service for an extended



term. Counsel further argued that the arbitrator erred in law by finding that the appellant was only entitled to payment in the amount equal to his daily rate for ten days from 01 – 10 June 2019 instead of five years for an extended term.

*The Council's case*

[24] It was submitted on behalf of the Council that the appellant was never dismissed but that his contract of employment ended by effluxion of time.

[25] Despite acknowledging that the notice was not issued at least three months before the expiry of the contract of employment, Ms Ogundiran who represented the Council on appeal argued that the provisions of the Act were sufficiently followed so as to achieve the intended purpose. According to her, as long as the notice is drafted in such a manner that informs the appellant that his contract would either 'come to an end or that Council wish to retain his services', then the notice suffices. She stressed that what matters is the substance of the notice.

[26] Counsel referred to the decision of the Supreme Court in *Torbitt and Others v The International University of Management*<sup>1</sup> discussing the approach to peremptory and directory provisions. She pointed out that the approach that a peremptory enactment must be obeyed exactly has been described as rigid and inflexible and 'that the modern approach manifests a tendency to incline towards flexibility'. It was emphasised that it will be sufficient for as long as substantial compliance can achieve the objects aimed at.

[27] Furthermore, it was submitted that it was clear that the appellant understood the notice to mean that his contract would not be renewed, hence his complaint for unfair dismissal.

[28] As far as the appellant's argument that the notice did not inform him whether he would be retained in his position as Chief Executive Officer or not, reference was made to the following statement in the notice:

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<sup>1</sup> *Torbitt and Others v The International University of Management* 2017 (2) NR 323 (SC).

'...it was resolved that the position you are currently hold as a Chief Executive Officer, will be advertised and you have the right to apply'. (sic)

[29] The Council contended that the above statement could only mean one thing i.e. the appellant's services would not be retained because, had Council intended to retain the appellant, the position would not have been advertised.

### Evaluation

[30] It should be pointed out from the outset that the issue of the appellant's premature referral of the dispute to the Labour Commissioner did not arise on appeal, rightly so in my view. In any event, it was not the reason the arbitrator dismissed the appellant's claim. This is supported by the fact that the arbitrator ordered the Council to pay the appellant for the late notice, even after concluding that the appellant prematurely referred the dispute to the Labour Commissioner. There was no cross appeal in this regard. At the time of the arbitration hearing, the appellant's employment with the Council had long ceased.

[31] It appears from the record of arbitration proceedings that the appellant testified under oath and was cross-examined by the representative of the Council. However, the representative of the Council merely made a statement and the arbitrator did not afford the appellant an opportunity to cross-examine her. There is no reason advanced for the procedure adopted by the arbitrator.

[32] In my view, the arbitrator ought to have given the appellant the chance to cross-examine the Council representative in the same way that she gave her the chance to cross-examine the appellant. This would have made the appellant's case easier for the arbitrator to comprehend.

[33] For instance, the issue of whether the Council's decision not to renew or extend the appellant's contract was preceded by a valid Council resolution, was an important and quite contentious issue. The appellant throughout maintained that there was no

'mover' of the motion. Neither was the motion on the agenda for the next Council meeting. Also the Chief Executive Officer did not issue a notice containing the date, time and place of the next meeting at least 72 hours before the meeting. He went on to assert that there were no minutes of the meeting at which the issue was resolved. According to the appellant, Council members were not aware of the issue of his employment contract.

[34] It was for the Council to rebut the appellant's claims. During the arbitration proceedings, the Council presented the following documents: firstly, the letter dated 04 June 2019 from the Council informing the appellant that his contract was coming to an end, secondly, the appellant's referral of the dispute to the Labour Commissioner, thirdly, the summary of dispute the appellant submitted together with the referral of the dispute, fourthly, the appellant's payslips, and lastly, the appellant's contract of employment. The appellant's claim that there was no legitimate Council resolution was not addressed in any of the aforementioned documents.

[35] The appellant made his closing submissions orally at the conclusion of the arbitration hearing while the Council chose to make written submissions some days afterwards. It was only in their written heads of argument that the Council addressed the issue of the Council resolution and attached some documents which in my view ought to have been presented during the arbitration proceedings so that the appellant could be heard on the said documents.

[36] In her award, the arbitrator remarked that:

'Documents of the agenda in question were submitted by the respondent's representative during the hearing said that it was submitted within 72 hours.'

[37] As stated above, the appellant never had the opportunity to deal with the said documents at the hearing because they were only attached to the Council's written heads of argument some days after the hearing. In any event, the agenda attached for the 'Ordinary Council Meeting on Monday, 03<sup>rd</sup> June 2019 at 14h30 does not contain any item relating to the appellant's employment contract. Similarly, the minutes of the

said meeting do not indicate who was present and absent and what was discussed. This is in contrast to other minutes of the Council attached to the record relating to other matters, which indicate the Councillors in attendance, officials in attendance, those absent with or without an apology and the items discussed.

[38] From the foregoing, I am not convinced that it was proved that the decision by the Council not to renew the appellant's employment contract was preceded by a valid Council meeting.

[39] Both the Act and the contract between the parties clearly state that the Council must give the employee at least three calendar months' notice of its intention to retain him or her in the service for an extended term or not.

[40] The arbitration record demonstrates how the Council downplayed the importance of the above statutory requirement by claiming that the appellant was already aware, by virtue of the contract, that his term would expire on 31 August 2019, and that the notice served only as a reminder of that knowledge. If that was the case, one wonders if the legislature would have felt compelled to specifically include it in the law. It should be noted that the appellant's contract of employment is not like any other fixed-term contract as it is governed by statute.

[41] The Council further blamed the appellant for not making a written submission to the Council in compliance with s. 27 (3) (b) (iii). According to the aforementioned provision, the chief executive officer must notify the council in writing on the agenda of the next meeting of the local authority council if the council fails to notify him or her three calendar months prior to the contract's expiration about its intention to retain him or her for an extended term or not.

[42] The appellant could not have been clearer on this issue. He mentioned that the Council had a calendar for meetings, that he knew when the next meeting was scheduled, and that he planned to make the submission. However, before that could happen, he was served with the notice. Thus, the issue is not that he did not receive notice; rather, it is that the notice he received did not comply with the law.

[43] It is common cause that the appellant did not receive the notice within the time frame specified in s. 27(3)(b) (i). Moreover, the appellant was not informed in the said notice as to whether or not he would be retained by the Council for an extended term. Thus, the Council did not comply with the law. Even after the line Minister brought that fact to the attention of the Council, there was no attempt to remedy the situation.

[44] I find that the notice given to the appellant was defective in three respects, firstly, it was not backed up by a valid Council resolution, secondly, it was not given to him at least three calendar months before the expiry of his contract, and thirdly, it did not inform him of whether or not his services would be retained.

[45] The reliance by the Council on the decision in *Torbitt* is misplaced. In the said matter, the issue had to do with the interpretation of s 86(18) of the Labour Act i.e. whether non-compliance with the section results in an award given outside the 30 day period a nullity. In para 16 of the judgment, the court agreed that the term 'must' is mandatory and peremptory and not permissive or directory. The court looked at the intention of the legislature which was to ensure speedy resolution of labour disputes. The court held that there was no provision in the Labour Act to the effect that non-compliance with s 86(18) is a nullity and void *ab initio*.

[46] The court further held that to interpret the word 'must' as peremptory in the sense that non-compliance with the 30 days period would render such award a nullity would, having regard to the 'circumstances of the case result in a gross injustice'. The court further observed:

[57] The first appellant had no control over the arbitrator in order to ensure strict compliance with s 86(18). The arbitrator issued her award 21 days late through no fault of either first appellant or the respondent. It would be oppressive and extremely unjust in these circumstances to interpret the word 'must' literally, as submitted by the respondent, confirming the suggested invalidity of the award.

[58] This court would in view of the authorities referred to be justified to deviate from the cardinal rule of interpretation and to interpret the word 'must' not as peremptory but as

permissive, requiring substantial compliance with the time period prescribed in s 86(18) of the Act, in order to be legally effective.

[59] This approach, in my view, would not only achieve the object of effective and efficient resolution of disputes, but would at the same time avoid a gross injustice to the first appellant.

[47] There is no reason in this matter for the court to deviate from the cardinal rule of interpretation.

(b) The legal implications of a defective notice

[48] It is evident that the appellant held the position chief executive officer for a period of five years in accordance with clause 6.2 of the appellant's employment contract and s. 27(3)(b)(i) of the Act. The employment contract allowed for an extension at the end of the term, and the Council was required to notify the appellant three months in advance of the decision to extend or not.

[49] Given the court's conclusion that the Council served a defective notice on the appellant, it follows that the appellant was never served with a legal notice in the first place. The notice he was served with had not been a notice as contemplated by the Act.

[50] The tenor and spirit of the entire s 27 (3) (b) of the Act is that, notice ought to be given (in compliance with the Act), and in the absence of such notice, it shall be deemed that a tacit notice had been given to the chief executive officer that he or she is retained in service for an extended term. I am fortified in my reasoning by the authorities to which counsel referred me.<sup>2</sup>

[51] In the *Cronje* matter, the court held that:

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<sup>2</sup> *Cronje v Municipality Council of Mariental* Case No: NLP 2005 (4) 129: SA 18/2002 delivered on 01/08/2003; *Municipality of Walvis Bay v Du Preez* 1999 NR 106 (LC).

'The fact that the notice was not such a notice as required, meant that the applicant's services did not terminate on 15/02/2000 and must be deemed to have been extended until 31/08/2002 and thereafter at least until 31/08/2004. Such deeming or tacit extension...is based on the inference that the Legislature intended by implication that if a proper decision is not taken and notice not given in accordance with section 27 of the 1992 Act read with the provisions of the common law and the Namibian Constitution relating to administrative justice, then it must be implied that the tenure is not terminated and will continue until the term of office is terminated according to law.'

[52] This, in my opinion, is the rationale behind the deeming provision found in s. 27(3)(b)(iv), which states that in the event that the Council neglects to notify the chief executive officer of its intention to retain him or her, the chief executive officer shall notify the Council of the requirement in a written submission on the agenda of the next meeting of the Council. The Council will then consider the submission and notify the chief executive officer in writing of its intention; and if the Council fails to do so, it shall be deemed that a notice had been given to the chief executive officer that he or she is retained in service for an extended term.

[53] The 'deeming provision' in my view, best expresses the intention of the legislature in enacting s 27 (3) (b). Without it, the entire section would serve no purpose.

[54] Consequently, the arbitrator erred in not finding that the defective notice amounted to a tacit notice given to the appellant that he is retained in service for an extended term. The appellant's claim is for five years from 01 September 2019 to 31 August 2024.

#### Costs

[55] In terms of rule 118 of the Labour Act, 2007, this court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by initiating, pursuing, or defending proceedings. I do not find exceptional circumstances to warrant an order for costs against the applicant.

The order:

[56] For these reasons, I make the following order:

1. The appeal is upheld.
2. The award handed down on 15 August 2022 by the arbitrator under case number NROS 148-19 is set aside.
3. The Appellant is reinstated to his previous position of Chief Executive Officer for an extended period of five years from 01 September 2019 to 31 August 2024.
4. The First Respondent is to reimburse the Appellant retrospectively from 01 September 2019 until the time he will resume office.
5. If the First Respondent is unable to comply with para 3 of this order because of the appointment of another Chief Executive Officer in the place of the Appellant as from 01 September 2019 to 31 August 2024, the First Respondent shall be liable to pay the Appellant an amount calculated to place the Appellant in the position he would have been if the First Respondent had not purported to terminate his employment in an illegal manner.
6. There is no order as to costs.
7. The matter is removed from the roll: case finalised.

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D C MUNSU  
JUDGE



## APPEARANCES

APPELLANT:

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1<sup>st</sup> RESPONDENT:

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