



CASE NO.: LCA 42/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA

APPELLANT

and

**FRANCOIS CHARLES GRACE
B.M. SHINGUADJA N.O.**

**FIRST RESPONDENT
SECOND RESPONDENT**

CORAM: MULLER J

Heard on: 22 July 2011
Delivered on: 12 August 2011

APPEAL JUDGMENT

MULLER, J.: [1] The appellant appealed against the arbitrators' award granted on 29 April 2010. The appeal was struck from the roll of this court on 5 November 2010 because the notice of appeal was defective. There were also no grounds of opposition to the appeal filed. Subsequently, the appellant filed an amended notice of appeal and the respondent a statement of its grounds of opposition in terms of Rule 17(16)(b).

Condonation was sought in this court at the commencement of the appeal hearing by the appellant for the late filing of the amended notice of appeal, which application was not opposed and the court granted the requested condonation.

[2] When the appeal was heard, Mr Coleman appeared for the appellant and submitted supplementary heads of argument, while the respondent's legal representative, Mr Tjitemisa, also filed supplementary heads of argument. Originally heads of argument were filed on behalf of the appellant and the respondent before the first hearing in November 2010. The basis on which Mr. Coleman decided to argue the appeal differed substantially from that of his predecessor and, although the original submissions were not entirely abandoned, his supplementary heads contained his new submissions. In supplementary heads Mr Tjitemisa dealt briefly with Mr Coleman's new contentions. Both counsel amplified their written arguments with oral submissions.

[3] It is necessary to refer briefly to the background facts that led to the complainant's (respondent's) claim against his employer (the appellant), which facts are mainly undisputed:

- The complainant (respondent) was employed at the appellant's Ausspanplatz branch as head: service support since August 2005, after having worked at several other branches of the appellant since 20 December 1982;
- In August 2005 the particular post at Ausspanplatz branch was graded as SBG 11, while the respondent's personal grade was SBG10, which is on a supervisory level;

- The manager at Ausspanplatz branch at the time was Mr Jimmy Uys and he was succeeded by Mr Alois Garoeb;
- The respondent endeavoured to be upgraded to SBG 11;
- An SBG 11 grading is on a managerial level and the incumbent is entitled to a higher salary and an incentive bonus, while at a SBG 10 grading the incumbent receives a salary and an annual bonus;
- Mr Bethuel Tjirera was the regional manager and Mr Mike Beaurain the head personal and business banking;
- The line of responsibilities was from the branch manager (Mr Uys/Mr Garoeb) to the regional manager (Mr Tjirera) to the head: personal and business banking (Mr Mike Beaurain) and, if necessary, to the Managing Director;
- Recommendations are made in respect of i.e. promotions along this line until it is finally decided and signed off.
- Mr Uys, the respondent's branch manager at the time, recommended on 9 October 2008 that he be promoted to grade SBG 11, but it was unsuccessful;
- The respondent's continued grievances of not being promoted, although he acted in the particular post, were often discussed, but although the post was upgraded to SBG 11, he was never formally promoted;
- A forensic audit was conducted at the Ausspanplatz branch and Mr Mike Beaurain held the respondent responsible for several shortcomings at the branch;

- In March 2009 the respondent was transferred to the Home Loan department of the appellant and in the letter of transfer Mr Beaurain made certain allegations regarding the respondent's ability and conduct;
- The respondent filed what is known as a grievance procedure and a meeting was held with Mr Beaurain and others in that regard;
- On 16 November 2009 the respondent filed a claim with the Labour Commissioner for "*unilateral change of terms*", "*unfair discrimination*" and "*unfair labour practice*";
- Arbitration proceedings were held on 23 February and 30 March 2010;
- On 29 April 2010 the arbitrator made his award in favour of the respondent.
- The appellant appealed against this award.

[4] In the appellant's original heads of argument it was submitted that the respondent's approach was based on a fundamental flaw, namely, that the upgrading of a position, in this case to SBG 11, automatically resulted in the promotion of the incumbent in that post to the same grade. It was further submitted that the respondent (as claimant) premised his alleged promotion to the SBG 11 level on a promise in that regard by the regional manager, Mr Tjirera, and that the arbitrator made his award on that basis. During the hearing of the appeal, Mr Tjitemisa confirmed that it is accepted by the respondent that the upgrading of the position to SBG 11 is not in dispute. Although Mr Coleman, as mentioned before, approached the appeal on another basis as set out in his supplementary heads, with which shall deal hereunder, I understand Mr Tjitemisa to still rely on the abovementioned premise, namely that the respondent had in

fact been promoted to the SBG 11 level and that the arbitrator made the correct decision in his award in this regard. Mr Tjitemisa also differed from the submission that the arbitrator usurped the appellant's function by promoting the respondent in his award. Mr Tjitemisa further disagreed with the submissions made by Mr Coleman in the appellant's supplementary heads and oral submissions in this count.

Promotion

[5] As mentioned before it is common cause that the post occupied by the respondent was upgraded on 6 October 2008.

[6] It is further not in dispute that the respondent applied for a promotion to the same level as the post he occupied. Exhibit 3 was completed and his promotion in that regard was recommended by his branch manager at the time, Mr Jimmy Uys. The promotion was further recommended by Mr Tjirera the Regional manager, but not approved by Mr Beaurain. In his evidence the respondent testified before the arbitrator that Mr Tjirera promised him the promotion, which the latter denied. Mr Uys confirmed the recommendation for promotion and testified that when a post is upgraded the incumbent in that post is automatically promoted to the same grade as the post. The submission is that because the respondent was the incumbent in that post for more than 3 years before it was upgraded, he was thus personally also upgraded when the post was upgraded. Mr Tjirera relied on Exhibit 3, the recommendation for promotion in support of his submission. From the evidence of Mr Garoeb, who succeeded Mr Uys as the

respondent's branch manager, it also appears that in his opinion it was unfair towards the respondent to refuse his promotion.

[7] I find the submission that the incumbent in a post which is upgraded, is automatically promoted and personally upgraded to the same level, difficult to understand while there is a specific procedure of recommendations along the line. In particular, in this instance I fail to see the sense in using that procedure if the respondent is entitled to be automatically promoted when the post which he occupies, is upgraded. The fact that his branch manager used form Exhibit 3 to recommend his promotion, is an indication to the contrary. The allegation that he was promised promotion by Mr Tjirera (which he denied) also militates against the submission of an automatic promotion.

[8] Finally in respect of the promotion-argument, is it evident that the promotion by the procedure adopted, was never granted. Even if the respondent had been promised a promotion and recommendations followed, the responsible person to grant it, never promoted him. Exhibit 3 shows it was not signed off or approved.

[9] The arbitrator made an order in this regard in the following words: (unedited)

"That the respondent, Standard Bank of Namibia Limited did practice an unfair labour practice and unfair discrimination against the applicant Mr Francois Charles Grace, as the respondent it is hereby order to appoint/confirm the applicant in the post of SBG 11 with effect from 6th

October 2008. The appointment must go along with all the accompanying salary notches and benefits."

[10] Mr Coleman now submits in his supplementary heads and in this court that the arbitrator, being a creature of statute, derives his jurisdiction from the provisions of the Labour Act, No. 11 of 2007 (the Labour Act) and consequently did not have the jurisdiction to hear and adjudicate on a dispute relating to promotion. The submission, as I understand it, therefore is that on that ground alone the appeal must succeed. Mr Tjitemisa's counter argument in that regard is that this is a new point which was not raised before the arbitrator and although the appeal against respondents "promotion" is a ground of appeal in the amended notice of appeal, it is a new point of law and cannot be entertained now.

[11] I disagree with Mr Tjitemisa's submission that this point cannot be raised now. It is clearly a legal point and goes to the root of the arbitrator's jurisdiction to hear and adjudicate an issue like promotion. I shall consequently consider Mr Coleman's argument and determine whether it has any merit.

[12] Mr Coleman bases his submission thereon that an issue such as promotion should be regarded on the same footing as a employee's housing subsidy, which is a dispute of interest. ¹In S1, the definition section of the Labour Act, a dispute of interest is defined as:

¹Smit v Standard Bank of Namibia 1994 NR 366 (LC) at 372 F-G

“dispute of interest” means any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that this Act or any other Act requires to be resolved by –

a) adjudication in the labour court or other court of law; or

b) arbitration.”

The submission is then that a complaint regarding promotion is not a dispute that an arbitrator can deal with. In this regard the court was referred to s 84 of the Labour Act, which section defines what a dispute to be referred to arbitration means and that clearly does not include the respondent’s complaint with regard to promotion. Such a dispute (of interest) has to be dealt with in terms of section 28 and not section 86 of the Act, i.e. conciliation and not arbitration

[13] Mr Coleman contended further that from the arbitrator’s award it is evident that the arbitrator regarded the refusal of the respondent’s promotion as an unfair labour practice, which falls under chapter 5 of the Act, but that does not cover the respondent’s complaint. Consequently, it is submitted that the arbitrator also contravened the applicable provisions in the Labour Act in making that finding.

[14] The submissions advanced by Mr Coleman in his supplementary heads and in this court were not dealt with by Mr Tjitemisa, save that he argued that these submissions should have been raised before the arbitrator and not for the first time on appeal. As I understand it, the substance of Mr Tjitemisa’s argument is that the issue is

not necessary a refusal of promotion should automatically follow if the post occupied by the complainant is upgraded, but that the respondent was in the position when the post was upgraded and his salary and benefits should be commensurate to that upgraded position.

[15] Even the South African Labour Court conceded that the CCMS did not have jurisdiction to arbitrate on disputes regarding remuneration-related claims. ²In Namibia it has been held that a court must be cautious not to place too much reliance on South African decisions based on South African Labour Law because the applicable Labour Acts differ. ³However, the labour principles are mainly the same. An example in point regarding the differences between the South African Labour Act and that of Namibia is that the former contains a definition of “*unfair labour practice*” and its Namibian equivalent not. When the provisions regarding unfair labour practice in our Act are considered, it is evident that the respondent’s complaint does not resort thereunder and in particular not the arbitrator’s decision that an unfair labour practice had been committed.

[16] The evidence regarding the respondent’s alleged entitlement to be promoted does not support this contention. Mr Tjirera denied that he promised him promotion and it is clear that even if he did, he could only recommend it. Thereafter it was out of his hands. Mr Uys apparently believed that the respondent was entitled to automatic promotion when the post was upgraded. This is not how I understood Mr Tjitemisa’s

²Lander v Grobler Resorts Set (2000) 21 ILJ 1009 (CCMA)

³Du Toit v The Office of the Prime Minister NLLP 1998 (1) SA NLC

submission. Be it as it may, the same Mr Uys followed the procedure of recommendations up to the final decision-maker. On this evidence, even if the arbitrator could arbitrate in respect of the promotion issue, he could not have come to the conclusion that the respondent was entitled to promotion.

[17] I am in agreement with Mr Coleman's submission that the promotion issue is a dispute of interest and that the arbitrator did not have the jurisdiction to deal with it. The argument advanced that because this contention had not been raised at that junction, it cannot be submitted now on appeal, is untenable. The appellant is entitled to raise any issue, such as lack of jurisdiction on appeal. The provisions of the Labour Act are clear and if the correct procedure was not followed at the time, the appellant is not prevented to raise it now. In this particular matter the parties were not represented by counsel as they were in this appeal.

[18] On this point the appeal must succeed.

Transfer

[19] Although the respondent's transfer to the Home Loans section of the appellant was also extensively covered during the evidence, the appellant, as I understand it, concedes that this issue does not form part of its grounds of appeal. Mr Tjitemisa submitted that the respondents complaint was in fact based on the promotion issue and if this court decides that the appeal should fail in that regard, the assumption of unfair

legal practice in respect of the other issues, should also fail. I agree that the promotion issue is in fact the crux of the respondent's complaint and the arguments in respect of an unfair labour practice was based on that issue. The issue of the respondent's transfer, falling within the prerogative of the employer, was only relied upon to indicate that the respondent considered the treatment he received after not being promoted as an unfair labour practice and discriminatory. That is borne out by Form LC 21. The respondent's complaint could not be adjudicated by way of arbitration.

[20] In the result the appeal succeeds and the arbitrator's award is set aside.

MULLER, J.

ON BEHALF OF THE APPLICANT:

MR. COLEMAN

INSTRUCTED BY:

LORENTZ ANGULA INC.

ON BEHALF OF THE RESPONDENT:

MR. TJITEMISA

INSTRUCTED BY:

TJITEMISA & ASSOCIATES