



CASE NO.: LC 97/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

METHEALTH NAMIBIA ADMINISTRATORS (PTY) LTD

APPLICANT

And

MWANAWINA SONNYBOY MBENGELA NO

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

NICOLAAS SWARTBOOI

3RD RESPONDENT

MARIA GAES

4TH RESPONDENT

CORAM: MILLER, AJ

Heard on: 13 August 2012

Delivered on: 23 August 2012

JUDGMENT

MILLER, AJ. [1] In this matter the applicant approached the Court by way of application. It claims the following relief:

“

1. Reviewing and setting aside of the First Respondent's arbitration award dated the 18 July 2011, under arbitration case number CRWK 50710;
2. Substituting its finding for that of the First Respondent by holding that the Third and Fourth Respondents dismissal was fair;
3. Directing that any party who opposes this application be ordered to pay the costs thereof;
4. Granting such further and/or further relief as the above Honourable Court deems appropriate.”

[2] The matter was initially opposed by all of the respondents. Shortly before the hearing, however, the first and second respondents withdrew their opposition.

[3] Before me Mr. de Beer appeared for the applicant. Mr. Philander appeared for the third and fourth respondents.

[4] The applicant was appointed to administer the Public Service Medical Aid Fund. In order to fulfil its mandate, it appointed the third and fourth respondents as employees. The third and fourth respondents were employed in terms of a fixed term contract, which commenced on 01 April 2007 which would have expired on 31 March 2010.

[5] As matters turned out, however, the applicant's contract was renewed and is to endure until 31 March 2015. In the light of this development the applicant addressed letters to the third and fourth respondents which were similarly worded.

[6] I refer therefor only to the letter addressed to the third respondent. It reads as follows:

“

05 May 2010

Mr. N. Swartbooi

Methealth Namibia Administrators

Windhoek

Dear Nicolaas

EXTENSION OF PSEMAS CONTRACT

Kindly be advised that your contract with Methealth Namibia Administrators (Pty) Ltd for the administration of PSEMAS ended on the 31st of March 2010.

Methealth has once again awarded the contract to administer PSEMAS for the next five years, from 01 April 2010 until the 31st of March 2015.

In lieu of this, all positions have been re-advertised internally and externally.

Your contract will therefore be extended until the 31st of May 2010, whilst the process of administration, recruitment and selection is ongoing.

Yours faithfully

T. Opperman

Managing Director “

[7] As a further development, the third and fourth respondents were charged before a disciplinary hearing which was conducted on 20 May 2010.

[8] Pursuant to that hearing the third and fourth respondents were dismissed. They did however receive their salaries up to the 31st May 2010.

[9] The third and fourth respondents then lodged a complaint of unfair dismissal with the office of the second respondent.

[10] An arbitration hearing was convened over which the first respondent presided.

[11] On 18 July 2011 the first respondent made the following award:

“

Award:

From the aforementioned reasoning and conclusion, I accordingly make the following order:-

- (i) That the respondent is ordered to re-instate the two applicants, Mr. N. Swartbooi and Ms. M. Gaes in their previous employment and/or alternative employment similar to their previous work as from the 01st of August 2011.
- (ii) That the respondent is further ordered to pay all benefits that they would have received have they not been dismissed and to compensation them for twelve (12) months salaries of N\$6 999.00 for Mr. Swartbooi and N\$8 769.45 for Ms. Gaes that they could have received if they could not be dismissed,

Mr. N. Swartbooi = N\$83 988.00 (less income taxable)

Ms. M. Gaes = N\$ 105 233.40 (less income taxable)

(iii) The above amounts should be paid on or before the 31st of July 2011, and a proof of payment should be forwarded to the Labour Commissioner's Office in Windhoek.

(iv) No costs in this matter is ordered."

[12] Although various grounds were advanced in the papers of the applicant, only one was persisted with in argument before me. That relates to the fact as the applicant contended that, the period of employment had expired though the effusion of time. By the time the award was made, as third and fourth respondents were no longer employed and could not be re-instated it was contended.

[13] Mr. Philander sought to meet this argument by submitting that the relocation of the employment agreement was on the same terms and conditions as the initial contract. As I understood this submission the result would be that the agreements with the third and fourth respondents were by operation of law extended for a further period of three years. Consequently it followed that they were still employees and could have been re-instated upon a finding that their dismissals were not fair.

[14] It was also contended by Mr. Philander in his Heads of Argument that the ground for review upon which the applicant relies is not one contemplated in Section 89 (4) and 89 (5) of the Labour Act, 2007.

[15] It is necessary to deal firstly with this latter argument: The Labour Act, 2007 like all other Acts of Parliament is subject to the Constitution. Article 18 of the Constitution enjoins administrative bodies and officials to act fairly and reasonably. It provides that persons aggrieved by unfair and unreasonable decisions shall have the right to seek redress before a competent Court.

[16] Section 89 (5) of the Labour Act cannot be understood to whittle away the provisions of Article 18 of the Constitution. It must live in harmony with and subject to Article 18 of the Constitution. In my view the submissions based on Section 89 of the Labour Act cannot be upheld.

[17] I turn to consider the remaining argument.

[18] It is correct that as a general principle of law a relocated contract is relocated on the same terms as the initial contract. I have no quarrel with the authorities cited by Mr. Philander. The difficulty I have with the argument lies in the application of the general principle to the facts before me. This was on the facts not a general or unlimited relocation. The letter addressed to the third and fourth respondents made it plain that the relocation was time bound and would come to an end on a specific date.

[19] The letter could not have been understood otherwise. The letters are likewise not *pro non scripto* as Mr. Philander contended.

[20] The first respondent dealt with the matter by saying:

“

41. It is the respondent's contention that the contract was determined by time and that the contract came to an end at the end of March 2010.
42. It is his respectful contention that fixed term contract is determined by time. In this instance the contract was solely based on spes, namely the duration of Methealth Namibia Administrators Service Contract, and not be seen as determined by time. In this instance the contract was solely based on spes, namely the duration of Methealth Namibia Administrators Service Contract, and was not determined by time.”

[21] Under the heading “Analysis and Finding”, the issue is not considered further. I quote this passage in full:

“

Analysis and Finding:

46. Having heard the versions of the parties in this matter, I now turn to the analysis of both *viva voce* and documentary evidence adduced. It is apparent that the issue for determination in this matter is whether or not the dismissals of the applicants were substantively and procedurally fair. I am also required to determine the appropriate relief if any.
47. From the evidence presented to me by parties, it is clear that the participants were dismissed because they were all saving on a final written warnings. I failed to understand the evidence and testimonies of the respondent and its witnesses, because nothing was placed before me to justify that indeed the applicants committed these offences.

48. It is alleged that the applicants were charged for abusing company telephones, poor work performance, insubordination and abusive language towards staff members. I must point out that, I failed to understand the explanations of the alleged charges, simply because nothing was placed before me that could justify that indeed the offences were indeed committed except unsubstantiated claims.
49. Although the applicants acknowledge some of the charges, again nothing was placed before me that could warrant dismissals. On the allegation of poor work performance, it came clear from the hearing that the respondent did not give the applicants opportunity to improve their performance in accordance with the procedural requirements, where the respondent was required to have conducted an investigation to establish reasons for their unsatisfactory performance. Again nothing was placed before me that the applicants have been appraised, counselled or either given opportunity to correct their mistakes.
50. In this incident the owners rests with the respondent to prove that the applicants were aware of the standard and that they did not meet the required standard. However, nothing was placed before me that the applicant indeed failed to satisfy the performance standard that they were aware of it. The respondent also failed to prove that much required standard performance was applied, except for unsubstantiated claims of disamisious.
51. Further to that no evidence was placed before the arbitration to justify that the applicants were given opportunity to improve their performance. In views of the above it was obvious that the respondent in this regard has failed to meet the required procedures for dismissals in the case of poor work performance which requires employees to be

counselled monitored and then to be offered assistance before their services are terminated.

52. In light of the above evidence adduced by the respondent could not convince me that dismissal in this regard was the only appropriate sanction. In James v Waltham Holy Cross Urban District Council 17=973 ICR IRLR 202, the following was pronounced: *“An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the possibilities or likelihood of dismissal on this grant and giving him opportunities of improving his performance.”*
53. Finally the sanction in this case should not have been to punish the applicants but to enhance or improve their performance through various ways, such as reasonable evaluation assessment, clear instructions, proper training, guidance or counselling and reasonable assistance to meet the required standard that could allow the applicants to render a satisfactory service. The sanction should have been a corrective measure rather than a punitive one.
54. Having regard to the evidence placed before me, it is any finding that the dismissal in this matter was inappropriate, it is on this basis that I find the dismissal of the three applicants Mr. Nicolas Swartbooi, Mr. Johannes Losper and Ms. Maria Gaes to be substantively unfair as justice requires that such wrong should be redressed.
55. Before, I could arrive at an appropriate remedy in this matter, I took the following points into account:
- (i) Justice and fairness that requires that such wrong to be addressed.

- (ii) the purpose of the remedy is not to punish the respondent or towards an realistic compensation to the applicants.
- (iii) dismissal is a traumatic experience to many employees that cannot be ignored, and
- (iv) length or period of employment.

Conclusion:

56. In the premise therefore, I am not fully convinced that the dismissal in this regard was the only available option, as the applicants did not deliberately commit the alleged offences.”

[22] Whether or not the third or fourth respondents were unfairly dismissed was, however, not the end of the enquiry.

[23] If the first respondent took the view as he apparently did, that the employment contracts were still in place, he misdirected himself for the reasons I have mentioned. Had he understood the position correctly the award could not have been made.

[24] It follows that the award must be reviewed and be set aside.

[25] Because of my conclusion that the third and fourth respondent’s contract expired on 31 May 2010, I shall add an additional order to that effect.

[26] I make the following order:

- 1) That the first respondent's award dated 18 July 2011 under arbitration case number CRWK 50710 is reviewed and set aside.
- 2) It is declared that the employment of the third and fourth respondents by the applicant expired through effluxion of time on 31 May 2010.
- 3) There shall be no order as to costs.

MILLER AJ

ON BEHALF OF THE APPLICANT:

Mr. de Beer

INSTRUCTED BY:

Du Plessis, Cronje & Roux Inc.

ON BEHALF OF THE RESPONDENT:

Mr. Philander

INSTRUCTED BY:

Lorentz Angula Inc.