

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LC 1/2012

In the matter between:

DAVID UUYONI KAULINAWA KAMATI

APPLICANT

and

NAMIBIA RIGHTS AND RESPONSIBILITIES INCORPORATED

RESPONDENT

Neutral citation: *Kamati v Namibia Rights and Responsibilities Incorporated* (LC 1-2012) [2013] NALCMD 1 (14 January 2013)

Coram: VAN NIEKERK J

Heard: 20 January 2012

Delivered: 14 January 2013

Flynote: Court – Labour Court – Jurisdiction – Labour Court not having jurisdiction to entertain claims based on non-compliance with or contravention of Chapter 3 of Labour Act – Such disputes should be referred to arbitrator to resolve in accordance with Part C of Chapter 8 of Labour Act

Summary: The Labour Court does not have jurisdiction to entertain a claim for unfair dismissal and non-compliance with basic conditions of employment. In terms of section 38 of the Labour Act, 2007 (Act 11 of 2007), such a dispute may be referred to the Labour Commissioner, who must, in turn, refer it to an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of the Act.

ORDER

- 1.
2. The application is dismissed.
- 3.

JUDGMENT

VAN NIEKERK, J:

[1] The applicant, who is unrepresented, approaches this Court on an urgent basis for the following relief:

- (a)
- (b) The respondent be ordered to pay the applicant a total amount of N\$ 140 516.87 for outstanding remunerations (*sic*), leave gratuity, notice payment, severance

and interests (*sic*) on outstanding remunerations (*sic*) within 3 days of the handing down of the judgment failing of which must lead to the attachment and execution of the assets of the respondent.

- (c) The respondent be ordered to pay to the applicant an amount of money equal to costs inclusive of the tariff costs recoverable by litigants representing themselves.
- (d) Or the Court makes an order which it may consider just and expedient.'

[2] I am satisfied that the application was served. No notice of opposition was filed on behalf of the respondent.

[3] According to the applicant he was employed by the respondent as a human rights defender since 1 April 2005. He alleges that on 8 August 2011 his services were terminated by respondent without a valid and fair reason and without following of a fair procedure. The respondent was at all material times represented by a certain Mr Ya Nangoloh who is the executive director of the respondent. The applicant alleges that the reasons given by the respondent for his dismissal was that he was frequently spitting in the toilet bowl. Mr Ya Nangoloh allegedly also told him that there was no work for him at the respondent and that he should go home.

[4] According to the applicant the respondent did not pay his outstanding remuneration, notice payment, leave gratuity and severance payment. He gives details of all the amounts allegedly owed.

[5] On 14 August 2011 the applicant referred a dispute regarding his unfair dismissal and the respondent's alleged failure to pay him certain amounts due for remuneration, notice, leave and severance to the office of the Labour Commissioner for arbitration. The Labour Commissioner appointed himself as the arbitrator in the matter, which was set down on 21 September 2011 without notice to the applicant. The applicant learnt about this date by chance, but he does not explain what occurred on that date. He

merely states that on 3 October 2011 he filed an urgent application before the Labour Commissioner in which he claimed what appears to be an interim monthly payment and that the main dispute be heard. This application was set down on 13 October 2011. On that date the Labour Commissioner refused to hear the application, but informed the applicant that the respondent's oral version apparently is that it had never dismissed the applicant. The Labour Commissioner demanded that the applicant makes written enquiries from the respondent to clarify the matter.

[6] The applicant did so on 18 October 2011 in a letter addressed to the respondent in which he stated, *inter alia*, that the dispute he referred for arbitration was based thereon that 'you told me that there is no work for me at NamRights and that I should "go home".'

[7] On the same date Mr Ya Nangoloh replied as follows:

'This is to certify that your claims that I have dismissed you unfairly and or that I have dismissed you, at all, are false, though understandable. All I have told you, after having had discussions with you and other NamRights staffers as well as with your mother and uncle, is that, owing to your apparent grave medical condition (as demonstrated by your constant spitting and mental incoherence), I have advised you not to come to work until such time your medical condition improves. Hence, I have strongly advised you, as I am hereby repeating, to urgently seek medical treatment for your condition before I allow you to resume your normal work with NamRights.

Should you persistently refuse to obtain medical treatment, as advised, proceedings may then ensue with the view to relieve you from NamRights employment for serious misconduct as per relevant sections of our Penal Code.'

[8] The applicant states that the tone and wording of the letter clearly indicate that the respondent no longer wants the applicant to continue working for it. Armed with this letter he returned to the Labour Commissioner and requested him to set the dispute

down for hearing, but the latter refused to do so. On 24 November 2011 the applicant made telephonic enquiries about a possible hearing date, but the Labour Commissioner indicated that there is no case for the respondent to answer, it would seem because the applicant had not been dismissed.

[9] The applicant complains at length in his affidavit about the attitude and conduct of the Labour Commissioner who, he alleges, would never have given him a fair hearing. He does not claim any relief against the Labour Commissioner. When this aspect was pertinently raised with the applicant in this Court, he indicated that he deliberately did not do so as it would be a waste of time, that the issue is between him and the respondent and that it would be a waste of resources for the matter to be heard by the Labour Commissioner. The applicant was only intent upon having his dispute with the respondent determined by this Court, and, as the application was unopposed, fervently implored the Court to grant the relief claimed.

[10] In my view the crisp question to be answered in this matter is whether this Court has jurisdiction to entertain the applicant's application for the relief as prayed for in his notice of application.

[11] The applicant's claim in this Court arises from a dispute about the non-compliance with or contravention of Chapter 3 of the Labour Act, 2007 (Act 11 of 2007), which deals with basic conditions of employment. In terms of section 38 such a dispute may be referred to the Labour Commissioner, who must, in turn, refer it to an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of the Labour Act. Chapter 8 provides various mechanisms for the prevention and resolution of disputes between employees and employers. One such mechanism is arbitration, which is dealt with in Part C. Section 86 in Part C sets out the powers and duties of the arbitrator in detail. Section 86(15) of the Act provides that an arbitrator may make any appropriate arbitration award including (i) an interdict; (ii) an order directing the

performance of any act that will remedy a wrong; (iii) a declaratory order; (iv) an order of reinstatement of an employee; (v) an award of compensation; and (vi) in appropriate cases, an order for costs.

[12] Significantly, the Labour Act does not expressly provide that the Labour Court may exercise any of these powers as a court of first instance. Instead, section 89, also contained in Part C of Chapter 8, only provides for appeals and reviews of arbitration awards by the Labour Court. Furthermore, the jurisdiction of the Labour Court as determined by section 117 of the Labour Act does not expressly extend to include the power to hear disputes relating to non-compliance with Chapter 3.

[13] In order to discuss the matter it is convenient to set out section 117 in full:

- '117.** (1) The Labour Court has exclusive jurisdiction to -
- (a) determine appeals from –
 - (i) decisions of the Labour Commissioner made in terms of this Act;
 - (ii) arbitration tribunals' awards, in terms of section 89; and
 - (iii) compliance orders issued in terms of section 126.
 - (b) review –
 - (i) arbitration tribunals' awards in terms of this Act; and
 - (ii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of –
 - (aa) this Act; or
 - (bb) any other Act relating to labour or employment for which the Minister is responsible;
 - (c) review, despite any other provision of any Act, any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;

- (d) grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment or wage order, provided that the declaratory order is the only relief sought;
 - (e) to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;
 - (f) to grant an order to enforce an arbitration agreement;
 - (g) determine any other matter which it is empowered to hear and determine in terms of this Act ;
 - (h) make an order which the circumstances may require in order to give effect to the objects of this Act;
 - (i) generally deal with all matters necessary or incidental to its functions under this Act concerning any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.
- (2) The Labour Court may –
- (a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation in terms of Part C of Chapter 8; or
 - (b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.’

[14] The Applicant submitted that he is approaching this Court on the basis of section 117(1)(e),(h) and (i). As far as the reliance on paragraph (i) is concerned, a similar argument on the issue of jurisdiction was considered by the Labour Court constituted under the repealed Labour Act, 1992 (Act 6 of 1992). In *Drysdale v Namibia Breweries Ltd and another* 1996 NR 301 (LC), the applicant claimed damages for breach of an employment contract, which was held to be a claim for damages for alleged constructive dismissal. On a point *in limine* O’Linn, P dismissed the application after holding (at 302C-G) that the Labour Court did not have jurisdiction to entertain such a claim, which must be lodged in the district labour court to adjudicate same as the court of first

instance. That Court came to this conclusion after considering, *inter alia*, section 18 of the repealed Labour Act, which dealt with the jurisdiction of that Court, section 19 of that Act, which dealt with the jurisdiction of the district labour court, and section 46 of that Act, which expressly provided that the remedy for unfair dismissal is that of lodging a complaint in the district labour court.

[15] It is instructive to compare the relevant parts of the wording of section 18 of the repealed Labour Act, which is similar, and in some instances identical, to section 117 of the current Labour Act:

- 18.** (1) The Labour Court shall have exclusive jurisdiction –
- (a) to hear and determine-
 - (i) any appeal from any district labour court;
 - (ii) any appeal noted in terms of section 54(4), 68(7), 70(6), 95(4), 100(2) or 114(6);
 - (b) to consider and give a decision on -
 - (i) any application made to the Labour Court in accordance with the provisions of this Part in terms of any provisions of this Act;
 - (ii) any application to review and set aside or correct any decision taken by the Minister or the Permanent Secretary, the Commissioner, any inspector or any officer involved in the administration of the provisions of this Act;
 - (c) to review the proceedings of any district labour court brought under review on the grounds *mutatis mutandis* referred to in section 20 of the High Court Act, 1990 (Act 16 of 1990);
 - (d) to grant in any application referred to in paragraph (b) or (c) any urgent interim relief until a final order has been made in terms of the said paragraph (b) or (c) ;
 - (e) to issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;

(f) to make any order which it is authorized to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act;

(g) generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.'

(2)

(3) Subject to the provisions of this section and sections 16 and 22, the Labour Court shall, in the exercise or performance of its powers and functions, have all the powers of the High Court of Namibia under the High Court Act, 1990 (Act 16 of 1990), as if its proceedings were proceedings conducted in, and any order made by it were an order of, the said High Court of Namibia.'

[16] In the *Drysdale* case the applicant relied on the wide powers of that Labour Court, particularly on the powers contained in section 18(1)(g) and Section 18(3). The Court held (at p304F) that subsection 1(g) does not help the applicant because it is not one of the 'functions under this Act' of that Court to hear as a court of first instance, an application for damages arising out of an alleged repudiation or breach of an employment contract. It further held (at 304G) that subsection (3) also does not confer jurisdiction because the adjudication of such an application does not fall within the 'powers and functions' under the relevant statute.

[17] Applying the same approach *in casu* I hold that, as it is not a function of the Labour Court to adjudicate disputes relating to non-compliance with basic conditions of employment, section 117(1)(i) does not confer jurisdiction on the Labour Court to do so.

[18] As far as section 117(1)(e) is concerned, it provides that the Labour Court may grant urgent relief, including an urgent interdict pending resolution of a dispute in terms of Chapter 8. It is significant that provision is expressly made for the Labour Court to grant an urgent interdict pending resolution of a dispute in terms of Chapter 8. In my view this is done precisely because the resolution of a dispute in terms of Chapter 8

does not fall within the jurisdiction of the Labour Court. It seems to me that the 'urgent relief' referred to in the first part of paragraph (e) must relate to a matter which falls within the jurisdiction of the Labour Court.

[19] Turning to section 117(1)(h), it allows the Labour Court to make an order which the circumstances may require in order to give effect to the objects of the Labour Act. It seems to me that it would run counter to the objects of the Labour Act for the Labour Court to allow an employee to sidestep express provisions of the Act and to approach this Court directly to resolve a dispute with his employer which should have been done in terms of the procedure provided for by section 38, read with Part C of Chapter 8. If the applicant is unhappy with the manner in which the Labour Commissioner dealt with the matter, he should have opted for review of the latter's decision(s). This the applicant expressly declined to do.

[20] In the result I make the following order:

The application is dismissed.

1.

K van Niekerk
Judge

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APPEARANCE

For the applicant:

In person