REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 36/2012

In the matter between:

ROSH PINAH ZINC CORPORATION (PTY) LTD **APPELLANT**

and

JOSEF MURONGA **RESPONDENT**

Neutral citation: *Rosh Pinah Zinc Corporation (Pty) Ltd v Murongo* (LCA 36/2012) [2013] NALCMD 3 (24 January 2013)

Coram: MILLER AJ

Heard: **21 September 2012**

Delivered: **24 January 2013**

Flynote: It is not substantially unfair to offer an employee who was injured in a non-work related accident, an alternative position at a lower remuneration if as a result of the accident the employee can no longer do the work he did prior to the accident.

Summary: Employee employed as a loader driver – As a result of a non-work related accident, employee no longer capable of work as a loader driver – Employer retained employee in other temporary positions at his former salary – New posts then created by employer to accommodate employee but at a lower salary – Employee declined to accept appointment – Employee then dismissed – Finding by

the court a quo that the dismissal was unfair – Employer appealed against the decision – Held on appeal that dismissal not unfair – Appeal upheld.

ORDER

The appeal against the judgment of the learned chairperson B T Mudhara given in the District Labour Court on 15 December 2011 under case number DLC 4/2008 (in that court) is upheld. The judgment of the learned chairperson B T Mudhara given in the District Labour Court on 15 December 2011 under case number DLC 4/2008 (in that court) is set aside. No order as to costs.

JUDGMENT

MILLER AJ :

[1]

[2] [1] This is an appeal against the judgment of the learned chairperson B T Mudhara in the District Labour Court on 15 December 2011 under case number DLC 4/2008.

a)

[3] [2] The appellant's notice of appeal reads as follows:

[4]

'KINDLY TAKE NOTICE that the Appellant (Respondent in the abovementioned case) hereby gives notice of appeal against the entire judgment signed on 15 December 2011 by the honourable chairperson Mr. B.T. Mudhara.

The grounds of appeal are as follows:

That the learned chairperson erred in fact and/or law in by (sic):

- Misdirected himself by concluding that Appellant would go against a precedent if the application of Appellant's ill health policy would result in down grading of Respondent's employment;

- Misdirecting him (sic) that one Abraham Isaac was in a comparable situation to that of the Respondent;

- He erred by concluding that the evidence by Mrs. Januarie, particularly with regard to exhibit "E" did not agree with the other evidence presented for Appellant, alternatively if there were differences in evidence he erred by accepting that such differences were material;

- Erred by concluding that Mrs. Januarie was not an honest or truthful witness and a witness on which the Court a quo could not rely;

- Erred by concluding that Appellant did not accommodate an employee who had been affected by disability;

- Misdirecting himself that the conduct and treatment of Respondent by Appellant were not reasonable under the circumstances;

- Erred by concluding that Appellant had an obligation to accommodate Respondent because it was a very "profitable enterprise";

- Misdirected himself by drawing the conclusion, which he based a decision on, that Appellant was a very profitable enterprise: while no such evidence was presented and in doing so did not apply his mind only to the facts presented in evidence;

- Erred by accepting an employer had a duty to try and create an enabling environment under which an employee with a disability can perform his duties, and concluding that the Appellant has not done what a reasonable employer would have done under the circumstances;

- Erred by concluding that Respondent's employment was terminated unfairly and that the procedure adopted was unfair;

- Erred by concluding that the efforts made by Appellant was a simply (sic) lip service and lacked bona fides;

- Erred by concluding that Appellant should pay Respondent an amount equal to 24 months salary, which order is excessive and inappropriate in the circumstances, particularly, but not limited to, that the honourable chairperson failed to consider that several delays in the matter were not as a result of the Appellant.'

[5]

[6] [3] To my mind the important ground of appeal, into which all the other grounds fall, is the ground that the learned chairperson erred by concluding that the respondent's employment was terminated unfairly and that the procedure adopted was unfair.

[7]

[8] [4] It is common cause that the dismissal in this matter was as a result of incapacity arising out of injury.

[9] [5] The Labour Act, 1992 (Act No. 6 of 1992) has been repealed by section 142(1) of the Labour Act, 2007 (Act No. 11 of 2007) and the Labour Act, 2004 (Act No. 15 of 2004) has been repealed by section 142(2) of the Labour Act, 2007 (Act No. 11 of 2007).

[10] [6] In the Labour Act, 2007 (Act No. 11 of 2007), Schedule 1, Transitional Provisions, section 15 thereof states:

'**Pending disputes**

15. (1) In this item, 'pending' means that a matter has been filed with the registrar of a district Labour Court, or the Labour Court, as the case may be, and has been issued a case number in terms of the laws governing the operation of that court.

(4) A matter that, immediately before the effective date, was pending before a District Labour Court, or the Labour Court, in terms of any section of the previous Act, must be concluded by that court as if the previous Act had not been repealed.

(5) Any appeal or review allowed from a matter described in sub-item (4), must be proceeded with in terms of the provisions of the previous Act, as if it had not been repealed.'

[11] [7] It follows that I am bound to proceed and adjudicate the matter in accordance with the provisions of the Labour Act, 1992 (Act No. 6 of 1992).

[12]

[13] [8] Under the Labour Act, 1992 (Act No. 6 of 1992) at section 45 the following is stated:

'**45 Meaning of unfair dismissals and unfair disciplinary actions**

(1) For purposes of the provisions of section 46, but subject to the provisions of subsection (2)-

(a) any employee dismissed, whether or not notice has been given in accordance with any provision of this Act or any term and condition of a contract of employment or of a collective agreement;

(b) any disciplinary action taken against any employee,

without a valid and fair reason and not in compliance with a fair procedure, shall be regarded to have been dismissed unfairly or to have been taken unfairly, as the case may be.'

[14] [9] The learned chairperson states in his judgment:

[15]

'It is this court's view that complainant's employment was terminated unfairly since the procedure adopted was unfair.'

[16]

[17] [10] In making the aforesaid judgment the learned chairperson should have taken into consideration everything listed in section 46(4) of the Labour Act, 1992 (Act No. 6 of 1992) which stipulates what the chairperson must take into

account in assessing whether an employee has been dismissed unfairly. For the sake of completeness I quote the provisions of section 46(4)(a)(i) – (iv).

[18]

'(4) In considering-

(a) whether an employee has been dismissed unfairly or whether any disciplinary action has been taken unfairly against such employee, the district labour court shall have regard-

(i) to the procedure in accordance with which the employer has reached his or her decision to dismiss the employee concerned or to take such disciplinary action against such employee;

(ii) to the manner in which such procedure has been followed in comparable circumstances in respect of other employees before and after such employee has been dismissed or such disciplinary action has been taken against such employee;

(iii) to the conduct and capability of the employee concerned during the period of his or her employment;

(iv) to the extent to which the employer concerned has complied with the relevant provisions of this Act and any terms and conditions contained in the contract of employment or a collective agreement;', the underlining is my own emphasis.

[19]

[20] [11] The learned chairperson found the dismissal to be procedurally unfair. Nowhere in his judgment does he find that the dismissal was substantively unfair.

[21]

[22] [12] The crux of this appeal therefore lies in the question as to whether the learned chairperson erred in finding that the procedure adopted by the appellant in dismissing the respondent was fair or not.

[23]

[24] ***The law as it relates to dismissals for incapacity arising out of injury***

[25] [13] C Parker *Labour Law in Namibia* states at 126 to 127:

[26]

'As a general rule, the sickness or incapacity of an employee can discharge the contract of employment. The employer's right may be governed by the express term (sic) of the

contract, under which, for instance, the employer may have the right to cancel the contract, if the employee is absent from work due to sickness or incapacity for a certain period of time. In the absence of express terms, a contract is determined if the sickness would put an end, in a business sense, to their business engagement because it impedes the object of that engagement. Whether the illness or incapacity is capable of discharging the contract depends on a number of factors, notably, the nature of the sickness or incapacity and the duration of the absence from work, as well as the nature of service the employee performs in the employer's business.'

[27]

[28] [14] Counsel did not refer me to, nor am I aware of any case heard by this court on the issue of dismissal for incapacity arising out of sickness or injury. I accordingly turned to the South African law on the issue for clarity.

[29]

[30] [15] J Grogan *Dismissal Discrimination & Unfair Labour Practices* (2007) at 353, summarises the procedure as follows (and I agree with the learned author):

[31]

'The following principles have emerged from South African case law involving dismissals for incapacity arising out of illness or injury:

- the employer must ascertain whether the employee is capable of performing the work for which he or she was employed;
- if employees are unable to fully perform their normal duties, the extent of their incapacity, and its likely duration must be established;
- the employer is then obliged to investigate whether the employee's duties can be adapted to accommodate the disability;
- if employees cannot be placed in their former position, their employers must ascertain whether alternative work can be found for them, even at a reduced remuneration.

Only once these steps are taken will dismissal of an injured or sick employee be deemed substantively fair.'

[32]

[33]

[34] ***The nature of the incapacity***

[35]

[36] [16] It is common cause in this matter the nature of the incapacity is injury.

[37]

[38] [17] In relation hereto it is significant that the employee was not injured at work. The learned chairperson found this fact to be insignificant. I do not agree.

[39] [18] I agree with that stated by Grogan at 354:

‘Special consideration must be given to work-related illness or injury. Employees injured off duty, or who have contracted an illness unconnected with the workplace, are less deserving of consideration – still less, it is suggested, where the injury or illness arises from the employee’s negligent or intentional conduct.’

[40]

[41] ***Ascertaining whether the employee is capable of doing the job***

[42]

[43] [20] Grogan at 354 states:

‘The employer is required to determine the nature and severity of the employee’s incapacity and the employee’s prognosis.’

[44] [21] It is common cause that the respondent could no longer do the work he was employed for prior to sustaining his injuries.

[45]

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[47] ***The seriousness of the incapacity***

[48] [22] It is common cause that the employee’s injuries were of a permanent nature and that he had no prospects of recovering from them fully.

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[49] [23] It is further common cause that the injuries were serious enough so as to render the employee incapable of performing his day-to-day duties.

[50]

[51]

[52] *Alternative/adapted employment*

[53]

[54] [24] Grogan at 357 states:

[55]

‘Possible alternatives to dismissal include adapting employees’ current duties so that they are able to perform them in spite of their disabilities, providing employees with reasonable assistance and/or equipment to help them cope with those duties, or finding employees alternative work with which they can cope notwithstanding the disability. If the latter course is adopted, it is acceptable to reduce the employee’s remuneration to that normally attached to the alternative position.’

(My emphasis)

[56]

[57] [25] In this regard I again agree with the learned author.

[58]

[59]

[60] ***The facts of this matter***

[61]

[62]

[63] [26] The facts of this matter are as follows:

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[65] In 1982 the respondent was employed as a loader driver by the appellant;

[66] In July 2001 respondent was injured in a non-work related motor vehicle accident;

[67] Respondent was hospitalised for four months and remained on sick leave for a further two months while recovering;

[68] On 9 March 2005 a specialist medical practitioner confirmed that respondent’s injuries were permanent;

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[69] On 24 January 2006 respondent was redeployed to another position by appellant;

[70] During July 2007 a newly created (lower) position was advertised by appellant internally and respondent applied;

[71] Respondent's application was successful and the position was offered to respondent. The respondent declined the offer on the basis that the remuneration was lower than his remuneration since loader driver;

[72] On 7 February 2008 appellant offered respondent two alternatives, namely to accept the alternative position (with lower remuneration) or termination of employment on the grounds of injury;

[73] On 26 June 2008 respondent was informed by letter that all efforts to find alternative employment acceptable to him have failed and as such his services would be terminated;

[74] The respondent's services were terminated by appellant on 30 June 2008.

a)

b)

[75] ***Finding***

[76]

[77] [27] Counsel for the appellant submits that the procedure followed in this matter was fair, with which counsel for the respondent disagrees.

[78]

[79] [28] It is submitted on behalf of the respondent that the appellant had found an alternative position for the respondent which is the position that was eventually

[80]

[81] formally created by the appellant and offered to the respondent. The respondent in essence contends that a permanent solution was found and should have been retained, ie the non-existent position (not existing on the grading system) but at the pre-accident remuneration. Respondent contends that the actions of the appellant in offering that position at a lower remuneration are unfair.

[82] [29] All that the appellant did was to accommodate the respondent in a series of non-existent positions. This was an temporary solution. Appellant then went further and formally created the position on its grading system, thus finding alternative and adapted employment for the respondent on a permanent basis. The position was graded at a lower grade than the position that the respondent occupied prior to sustaining his injuries and the remuneration was accordingly lower. The respondent was offered the remuneration on the scale for which the position was graded. This, counsel for the respondent contends was unfair.

[83] [30] The respondent therefore argues that the appellant is obliged to accommodate the respondent in an alternative position taking into consideration his injuries sustained in an accident (for which the appellant is not to blame) and even if the alternative found is a lower position the respondent should retain his pre-accident (higher) remuneration. The respondent therefore expects to receive the same remuneration in exchange for labour of a lesser value. This argument is flawed.

[84] [31] Further, if the appellant had created and offered that position to the respondent immediately after the accident (at the graded remuneration normally attached to the position) and had the respondent then refused that offer, the termination of his services would have been fair in those circumstances.

[85] [32] I see no justifiable reason to differentiate between the above hypothetical set of facts from those in this matter, other than to commend the employer for accommodating the employee in non-existent positions - all the while retaining him on his pre-accident remuneration.

[86]

[87] [33] Further, with regards to the remuneration offered, the appellant would create various problems for itself, were appellant to remunerate the respondent on a higher grade than the position for which he is employed. The appellant would then be differentiating between employees on the same grade as

the respondent by paying them at a lower grade than the respondent for the same ‘grade’ of work.

[88] [34] In closing, the sadness of an accident lies in the consequences thereof. As employees are normally in more vulnerable positions than employers the law endeavours to soften the blow on employees by placing certain duties on employers, which they are bound to follow. What the law does in this regard is to try and limit the negative consequences the injury has on the employee. It does not impute the detrimental losses of the employee to the employer.

[89] [35] In the premises I find that the learned chairperson erred in finding that the procedure adopted by the appellant was unfair and that the dismissal was unfair.

[90] [36] The appeal is accordingly upheld.

a)

[91] [37] I accordingly issue the following order:

[92] The appeal against the judgment of the learned chairperson B T Mudhara given in the District Labour Court on 15 December 2011 under case number DLC4/2008 (in that court) is upheld.

a)

[93] The judgment of the learned chairperson B T Mudhara given in the District Labour Court on 15 December 2011 under case number DLC4/2008 (in that court) is set aside.

[94] I make no order as to costs.

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P J MILLER

Judge

APPEARANCES

APPELLANT:	P J de Beer Of de Beer-Keulder Legal Practitioners, Windhoek.
RESPONDENT:	A Vaatz Of Andreas Vaatz & Partners, Windhoek