REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 47/2015

In the matter between:

CITY OF WINDHOEK **APPELLANT**

And

KUVERI KATUUO **FIRST RESPONDENT**
PAULUS NGOLOMBE **SECOND RESPONDENT**
ANNA-MARIE NIIPARE **THIRD RESPONDENT**
THE LABOUR COMMISSIONER **FOURTH RESPONDENT**
KAHITIRE KENNETH HUMU **FIFTH RESPONDENT**

Neutral citation: *City of Windhoek v Katuuo* (LCA 47/2015) [2016] NALCMD 11 (17 March 2016)

Coram: PARKER AJ
Heard: **29 January 2016**
Delivered: **17 March 2016**

Flynote: Labour law – Unfair labour practice – Concept was alien to Namibian Labour Law until the Labour Act 11 of 2007 introduced it into Namibian Labour Law by legislative means – List of conduct constituting unfair labour practice is prescribed in the Labour Act, s 50(1)*(a)-(g)*, and the list is exhaustive – A party alleging unfair labour practice must mention the particular paragraph of s 50(1) that the conduct

complained of falls – Failure to do so is fatal – And an arbitrator cannot rule that a conduct amounts to unfair labour practice without considering the particular paragraph of s 50(1) under which such conduct falls – An arbitrator's failure to consider such paragraph constitutes gross irregularly and of the kind that entitles the court to intervene and set aside the arbitrator's decision – Besides, the dispute under the reference was a dispute of interest (as opposed to dispute of right) and so arbitrator was not competent to determine it – Dispute of interest explained.

Summary: Labour law – Unfair labour practice – Concept was alien to Namibian Labour Law until the Labour Act 11 of 2007 introduced it into Namibian Labour Law by legislative means – List of conduct constituting unfair labour practice is prescribed in the Labour Act, s 50(1)*(a)-(g)*, and the list is exhaustive – A party alleging unfair labour practice must mention the particular paragraph of s 50(1) that the conduct complained of falls – Failure to do so is fatal – And an arbitrator cannot rule that a conduct amounts to unfair labour practice without considering the particular paragraph of s 50(1) under which such conduct falls – An arbitrator's failure to consider such paragraph constitutes gross irregularly and of the kind that entitles the court to intervene and set aside the arbitrator's decision – The nature of dispute referred to the Labour Commissioner and was under the reference in the arbitration is unfair labour practice – Arbitrator ruled that the conduct of appellant constituted unfair labour practice but she does not consider the particular paragraph of s 50(1) of the Labour Act under which the conduct falls – If arbitrator had done that she would have realized that the dispute could not fit under any of the paragraphs of s 50(1) of the Labour Act – The evidence establishes that the job grade to which the respondents were appointed was what they contracted for as evidenced by their letters of appointment – In that event the appellant had not altered unilaterally a term or condition of their employment contract – Court found that the dispute was accordingly a dispute of interest which is in contradistinction to dispute of right – Consequently, arbitrator was not competent to enter upon the reference and conduct arbitration – Consequently, court upheld the appeal and set aside the arbitral award.

ORDER

(a) The appeal is upheld.

(b) The arbitration award is set aside.

(c) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is an appeal against an award issued by the arbitrator (fifth respondent) in an arbitration in case no. CRWK 364-14, dated 2 July 2015. The nature of dispute that was referred to arbitration is indicated to be 'unfair labour practice' on Form LC 21.

[2] Two crucial issues raised in the grounds of appeal and whose determination would dispose of the appeal are (a) the issue of unfair labour practice on the part of the appellant (employer) and (b) whether the dispute between the respondents (employees) and the appellant is a dispute of right or dispute of interest.

[3] I have not considered the citation of an entity which has no legal personality and therefore no *locus standi in judicio*. (See *The Council for the Municipality of Walvis Bay v Kangumu* (LCA 76/2011) [2014] NALCMD 8 (21 February 2014).) The respondents did not raise it as a ground for opposing the appeal as they must do if they wished to rely on it in their opposition to the appeal. (See *Transnamib Holdings Limited v Amukwelele* (LCA 61/2014) [2015] NALCMD 21 (17 September 2015.)

Unfair labour practice

[4] In her award, the arbitrator rules that 'there is an unfair labour practice conduct on the part of the respondent company (the appellant) against the three applicants (the respondents) for failing to adjust their job category, as well as their job grading'. The arbitrator does not indicate which of the practices itemized in s 50(1) of the Labour Act 11 of 2007 the appellant was found to be guilty of.

[5] It must be remembered that the concept of 'unfair labour practice' was for the first time introduced into our Labour Law by legislative means by the Act 11 of 2007. Thus, the concept was alien to our Labour Law until Act 11 of 2007 came into operation on 1 November 2008 (except s 128). It is, therefore, not enough for an arbitrator to leave it to a party in an arbitration or *a fortiori*, the Labour Court in an appeal proceeding, to figure out what paragraph of s 50(1) of Act 11 of 2007 the arbitrator had in mind when she or he rules that an employer has committed an unfair labour practice in terms of the Labour Act. The arbitrator's failure constitutes gross irregularity of such a kind that this court is entitled to intervene and set aside the ruling. The arbitrator's ruling is definitely wrong. On this basis alone the appeal should succeed. The award stands to be set aside. However, seeing that arbitration conducted under the auspices of the Labour Commissioner in terms of Part C of Chapter 8 of the Labour Act are conducted by arbitrators who are not legal practitioners and such arbitration is not by a court of law I shall, on the basis of the record, assume that the nature of the dispute under the reference may relate to para (e) of s 50(1) of the Labour Act.

[6] I shall accordingly proceed to consider the appeal on the basis of unfair labour practice as contemplated in para (e) of s 50(1) of the Labour Act. In that event, I proceed to consider the second crucial issue mentioned in para 2 of this judgment.

Dispute of right or dispute of interest

[7] The summary of dispute that was referred to the Labour Commissioner and which formed the reference in the arbitration was, as I have mentioned previously,

'unfair labour practice', and is based on these facts. During their interview for their positions the respondents were given a Job Description in respect of their positions, indicating C3 Job-Grade. But when they took up appointment they were paid on the basis of Job-Grade B3 which is lower than Job-Grade C3.

[8] It is not disputed that in the letter of appointment of each of the respondents, the Job-Grade that each of them accepted is Job-Grade B3. For this reason, Mr Philander, counsel for the appellant, submitted that the dispute is not a dispute of right because no right had been established by the respondents that they are entitled to a grade different from what they were appointed to in terms of their letters of appoint; that is, their contract of employment. Counsel argued further that the dispute was accordingly a dispute of interest; and so, the arbitrator did not have jurisdiction to enter upon the reference and conduct the arbitration. Mr Coetzee did not argue contrariwise. Thus, if I accept Mr Philander's argument, then the appeal stands to be upheld on that basis, too.

[9] Dispute of interest, in contradistinction to dispute of right, arises where, as is in the instant proceeding, there is an agreement with regard to what ought to be the terms or conditions of employment in the contract of employment or a collective agreement. It is therefore dispute as to new and 'wished-for' terms or conditions. The respondents have not established that the employer changed their terms or conditions of employment; and so, the dispute is not a dispute of right capable of being resolved by arbitration or the court: it is a dispute of interest (*Smit v Standard Bank Namibia Ltd* 1994 NR 366 (LC)).

[10] Consequently, I accept Mr Philander's submission that the arbitrator was not competent to conduct the arbitration. A dispute of interest is suited to be resolved by industrial action in compliance with the Labour Act, after industrial collective bargaining has failed. On this basis, too, the appeal should succeed.

[11] Based on these reasons, I make the following order:

(a) The appeal is upheld.

(b) The arbitration award is set aside.

(c) There is no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPELLANT:	S R Philander Of ENSAfrica|Namibia (Incorporated as LorentzAngula Inc., Windhoek
FIRST, SECOND, THIRD RESPONDENTS:	E E Coetzee Of Tjitemisa & Associates, Windhoek