



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-LAB-APP-AAA-2018/00036

In the matter between:

**GRUZI ISAAK GOSEB**

**APPELLANT**

and

**USAKOS TOWN COUNCIL**

**FIRST RESPONDENT**

**NDAPEWA HELENA HELMUT N.O**

**SECOND RESPONDENT**

**Neutral citation:** *Goseb v Usakos Town Council* (HC-MD-LAB-APP-AAA-2018/00036) [2019] NALCMD 12 (8 May 2019)

**Coram:** ANGULA DJP

**Heard:** 9 November 2018

**Delivered:** 8 May 2019

**Flynote:** Labour Law – Opposed Labour Appeal – Unfair dismissal – Section 33 of the Labour Act 11 of 2007 – Non-renewal of statutory five year fixed term employment contract without reasons – Non-compliance with the provisions of Article 18 of the Namibian Constitution – In the alternative – Disciplinary action taken against appellant – No valid reasons provided and procedure followed – Unfair labour practice.

**Summary:** Appellant was appointed as Chief Executive Officer for the Council of the Town of Usakos on a statutory fixed term of contract of employment of five years in terms of s 27(1)(a) of the Local Authorities Act, 1992 – First respondent, (the Council for the Town of Usakos) gave due notice to the appellant of its decision not to extend or renew the contract of employment with the appellant after its expiration – Appellant contended that he was entitled to be heard before the decision not to extend the contract was taken – Court holding that appellant was not entitled to be heard before the decision not to extend the contract was made – The fixed term contract came to an end by effluxion of time – Court holding further that the appellant was given notice, three months' prior to the date of termination that the contract, as stipulated by s 27 of the Local Authorities Act, 1992 that the contract would not be extended – Court holding further that the option by the Council either to renew or not to renew the contract did not create a legitimate expectation – Finally, that appellant had failed prove that unfair labour practice had been committed by the Council.

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### **ORDER**

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1. The appeal is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and considered finalized.

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### **JUDGMENT**

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ANGULA DJP:

#### Introduction

[1] This is an opposed labour appeal, in terms whereof the appellant appeals against the arbitration award by the arbitrator.

[2] The appellant Mr Gruzi Isaak Goseb, was employed by the Council for the Town of Usakos, on a five year statutory fixed term contract pursuant to the provisions of s 27 of the Local Authorities Act, 1992 (Act No. 6 of 1992), as its Chief Executive Officer.

#### Brief factual background

[3] On 11 June 2012, appellant and the Council entered into a statutory fixed term contract of employment in terms whereof, the appellant was employed as the Council's Chief Executive Officer for a period of five years. The contract vests the Council with an option to renew the contract at the end of five year period. Clause 7 of the contract provides as follows:

'7.1 Subject to clause 7.2 and clause 13 of this Agreement, this agreement shall endure for a period of five years which shall be deemed to have commenced on . . . and shall expire on . . . .

7.2 The EMPLOYER may renew this agreement for a further period of another five (five) years.

7.3 The EMPLOYER must give the EMPLOYEE at least three (3) calendar months written notice of its intention of whether it will or will not renew this agreement.'

[4] By letter dated 27 February 2017, the Council informed the appellant that it had resolved not to renew the contract and informed the appellant that his last day in office would be 11 June 2017.

[5] Appellant, aggrieved by the Council's decision, approached the Office of the Labour Commissioner and lodged a complaint of unfair dismissal and unfair labour practice against the Council.

#### Arbitration proceedings

[6] The arbitration hearing took place on 13 February 2018 before the second respondent. At the hearing, appellant appeared in person and the Council was represented by Mr Manfred Weskop, an employee of the Council. It was agreed that the issues for determination by the arbitrator were: (a) whether the appellant was unfairly dismissed and (b) whether the second respondent committed an act of unfair labour practice, in not renewing the employment contract.

### Appellant's case

#### *Unfair dismissal and unfair labour practice*

[7] The appellant testified that the Council unfairly dismissed him for the reason that he was not furnished with reasons by the Council for its decision not to renew the contract whilst the contract provided for the option of renewal. The appellant alleged further that such failure amounted to unfair dismissal in terms of s 33(1) of the Labour Act, 2007.

[8] As regards the alleged unfair labour practice, the appellant testified that the Council introduced the phrase 'fixed term contract', whereas there was no mention of a 'fixed term contract' in the contract or in the Local Authorities Act, 1992, which empowers the Council to enter into the employment contract with appellant.

### The Council's case

[9] The Council did not dispute that the appellant was employed as its Chief Executive Officer and that he held that position for a period of five years.

[10] It was however the Council's case that the appellant was employed pursuant to the provisions of s 27(1)(a) of the Local Authorities Act, 1992. The Council argued that in terms of s 27(3)(a)(ii) of the Act, the appellant entered into a five year fixed term employment contract. Furthermore, that, in terms of clause 14.1 of the agreement, the contract was to terminate by effluxion of time, provided that a three months' notice be given to the appellant of the Council's decision to renew or not to renew the contract. Appellant was notified in accordance with the provisions of the Local Authorities Act, 1992 that his term of office would not be renewed. The Council

therefore submitted that it had complied with both the terms of the contract as well as the statutory requirements. The Council therefore denied that the appellant was dismissed at all the Council further denied that it committed an unfair labour practice as alleged by the appellant.

#### *Arbitration award*

[11] Having considered the evidence before her, the arbitrator dismissed the appellant's complaint and made an award in favour of the Council. She found that the appellant was not dismissed, and that the fixed term employment contract came to an end and that on the evidence before her there was no room for a finding that the appellant had harboured a legitimate expectation that the contract would be extended or renewed. The arbitrator finally found that the Council did not commit an unfair labour practice.

[12] Aggrieved by the decision by the arbitrator, the appellant lodged this appeal to this Court. The following are the grounds of appeal:

- 2.1 The arbitrator erred by finding that appellant was not unfairly dismissed in the absence of any evidence being presented of deliberations which took place in order to enable the respondent to exercise a proper discretion and make a decision not to extend appellant's term of employment.
- 2.2 The arbitrator erred by finding that respondent had discharged its *onus* of proof in the absence of any evidence that appellant was provided with the opportunity to respond to any grounds, reasons or allegations, if any, why appellant's Contract of Employment should not be extended.
- 2.3 The arbitrator erred by finding or considering the appellant's Contract of Employment to be a fixed term contract of employment to be terminated *ipso iure* upon the expiry of the term thereof without any obligations on the respondent to exercise its discretion not to extend the contract in a proper and fair manner.
- 2.4 The arbitrator erred by finding that the termination of appellant's Contract of Employment was fair merely by virtue of respondent having given the

appellant three months' written notice as per the provision of section 27(3)(b) (i) of the Local Authorities Act and without any evidence to indicate that such discretion was exercised by the respondent in a proper and fair manner.

- 2.5 The arbitrator erred by finding that there was no evidence before the arbitrator upon which a finding of unfair dismissal and/or unfair labour practice could be made.
- 2.6 The arbitrator erred by finding that respondent had complied with all its obligations in exercising its discretion not to extend the appellant's term of employment or that respondent had no obligations to act fairly in so exercising its discretion.
- 2.7 The arbitrator erred in finding that the appellant could not justify his allegations of unfair dismissal and/or unfair labour practices.
- 2.8 The arbitrator erred in finding that there was no expectation that the appellant's term of employment would be extended or renewed.

[13] Broadly stated, this Court has to determine whether the decision or findings made by the arbitrator in this matter, is a decision or are findings to which a reasonable arbitrator, considering the same facts, would have arrived at. It has been held that 'the test is exacting – is the decision that the arbitrator has reached is one that no reasonable decision-maker could have reached'<sup>1</sup>.

#### *Submissions on behalf of the appellant*

[14] Appellant did not persist with the argument that was before the arbitrator, that is, because the contract was renewable, it was not a fixed term contract which terminated by effluxion of time. Instead, he persisted with the argument that, the notice of non-renewal in terms of s 27(3)(b)(i) of the Local Authorities Act, was an administrative act, which is subject to Article 18 of the Constitution. In other words the Council as an administrative body was under an obligation to act fairly reasonably towards the appellant but failed to do so.

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<sup>1</sup> *Jansen van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR fivefive4.

[15] Ms de Jager who appeared on behalf of the appellant argued that, when the Council gave the notice of non-renewal of the employment contract, it was performing an administrative act and ought to have given reasons for its decision. The failure to do so amounted to a dismissal and the Council bore the *onus* of proving that such dismissal was fair.

[16] It was further argued that the employment contract was not an ordinary fixed term contract, but it was a statutory fixed term contract, which was subject to section 27 of the Local Authorities Act, 1992. Accordingly, the Council's conduct was thus subject to Article 18 of the Constitution; that it was exercising a discretion and reasons had to be given, to show that same was exercised fairly. As a result, there was non-compliance with the *audi alteram partem* rule.

[17] Counsel further submitted that, the appellant was of the opinion that the contract was performance based and that since the appellant had performed satisfactory as evidenced by the fact that the Council commended his performance on two separate occasions in the past, the appellant have had a legitimate expectation of renewal of the contract.

[18] Ms de Jager further submitted that the Labour Act, 2007 does not define 'dismissal', and relied on *Joe Gross t/a Joe's Beer House v Mentjies*<sup>2</sup>, particularly at para (415) where that court accepted 'dismissal' to mean, 'termination of an employment contract at the behest of the employer'. It was submitted that, in the absence of reasons for the decision by the Council, the decision to not extend the employment contract amounted to termination of employment at the behest of the employer.

#### *Submissions on behalf of the Council*

[19] Mr Boltman who appeared on behalf of the Council argued that, the notice given to the appellant did not terminate the employment contract, but it merely informed or notified the appellant that the contract would be terminated at a future date by virtue of effluxion of time and as a result the notice was not a termination at

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<sup>2</sup> 2005 NR 413 (SC).

the behest of the employer. In other words the notice was based on a pre-agreed contractual term.

[20] Counsel further submitted that the appellant cannot be said to have had a legitimate expectation, in that, there was no evidence on record that Council gave the appellant 'a clear, unambiguous and reasonable representations' that the contract would be renewed. Furthermore, there was also no evidence on record that, there was a regular practice on the part of the Council of renewals of the contracts of the Council's previous CEO's which could possibly create a legitimate expectation in the mind of the appellant.

#### Applicable legal principles

[21] Section 27 of the Local Authorities Act, 1992, regulates *inter alia* the duration of the terms of office of a CEO of local authorities. It provides that a CEO shall occupy the office for a period of five years; and that period of five years may be extended at the expiry thereof and the Council must inform the CEO three months before such expiry of the Council's decision to extend or not to extend the contract. Therefore the appointment of such CEO is fixed for a period of five years with an option to extend or not to extend.

[22] It would appear from the contentions raised on behalf of the parties that the following issues stands out for determination: (a) was the arbitrator correct in finding that the appellant was not dismissed; (b) was the arbitrator correct in finding that the appellant did not prove that he had legitimate or reasonable expectation that his contract would be extended or renewed notwithstanding the fact that the contract was for a fixed period of five years; and (c) was there a legal obligation on the Council to grant the appellant an *audi* before it could take a decision not to renew or extend the contract.

[23] As regards to the appellant's argument that he was dismissed and reliance for the submission, is placed on the interpretation of the concepts 'dismissal' and 'dismiss' is concerned, those words were interpreted in the *Joe Gross* matter (*supra*). In that matter the notice in issue was a notice of termination of employment, as



provided for in sections 45 and 46 of the repealed Labour Act, 1992 which is equivalent to section 30 of the current Labour Act, 2007.

[24] In the Court's view, the notice discussed in *Joe Gross* matter is distinguishable from the notice in issue in the present matter, in the sense that the notice given to the appellant did not terminate the employment relationship, as in my view, correctly argued by Mr Boltman. Council was merely giving notice as was previously agreed to and as required in terms of s 27 of the Local Authorities Act of the Council's decision not to renew the contract. In other words, that notice simply notified the appellant, three months before the employment relationship would come to an end, in order to obviate the possibility on the part of the appellant to develop any expectations that the employment relationship would continue beyond the agreed date of termination. In my view, the advance notice embraces or complies with the concept of fairness so that the CEO knows in advance and timeously that his or her contract will not be renewed.

[25] In my judgment, the foregoing conclusion to, finds support on the interpretation of the provisions of s 27 of the Local Authorities Act, by the court in the case of *Hailulu v Council of the Municipality of Windhoek*<sup>3</sup>.

[26] The facts in the *Hailulu* matter were almost similar to the facts in the present matter. Mr Hailulu, like the appellant in the present matter, had been employed as a CEO by the Council for the Municipality of Windhoek. At the end of his five year fixed term, he was given notice pursuant to the provisions of s 27 of the Local Authorities Act, that his contract would not be renewed. He complained that his employment was unlawfully terminated and thus constituted an unlawful termination of his service and therefor amounted to an unfair dismissal.

[27] The Court rejected the appellant's contention and held that not only had the Council complied with the provisions of s 27 of the Local Authorities Act, it had also exercised its discretion properly; and the appellant's fixed statutory contract term had come to an end by effluxion of time and that there was nothing reasonably expected from the Council to do under the circumstances. The learned author, Parker commenting on the *Hailulu* judgment at p. 125 of his work, *Labour Law in Namibia*

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<sup>3</sup> 2002 NR 305.

states that: 'where a fixed-contract is governed by statute, the discretion is exercised properly where the requirements of the statute have been complied with'. In *Overberg Fishing (Pty) Ltd v Docampo*<sup>4</sup> the appellant similarly contended that he had been unfairly dismissed when the fixed term contract terminated by effluxion of time and was not renewed. The court dismissed the appeal and expressed itself in the following words at para 11: 'I have demonstrated previously that *Docampo* was not dismissed by *Overberg*. *Docampo*'s fixed term contract of employment terminated by effluxion of time; and in a fair manner, *Overberg* informed *Docampo* timeously why his fixed term contract would not be renewed upon expiration of the fixed term'.

[28] Taking into account the authorities discussed above, this court is of the considered view that the finding by the arbitrator that the appellant was not dismissed but that his contract expired by effluxion of time in terms of the statutory provisions and the terms of contract was correct and is not perverse. I now move to consider whether the arbitrator erred in her finding that the appellant had failed to prove that he had legitimate expectation that his contract would be extended.

*Whether the appellant harboured a legitimate expectation that his contract could be extended.*

[29] The arbitrator found that the appellant had failed to prove that he had legitimate expectation that the contract would be renewed after its fixed term had expired.

[30] It has been held that a legitimate expectation arises either from an express promise given or from an existence of a regular practice which the claimant can reasonably expect to continue<sup>5</sup>. In support of his claim, the appellant alleged that he worked very hard during his term, and that in this regard in the notice of non-renewal of the contract the Council praised his hard work and commitment. Furthermore, the Council had issued him with a certificate of appreciation for his services for the period 2012 to 2014. The appellant therefore claimed that he had a legitimate expectation that the contract would be renewed.

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<sup>4</sup> 2012 (1) NR 283.

<sup>5</sup> *Minister of Health and Social Services v Lisses* 2006 (2) NR 739 (SC)

[31] The arbitrator, correctly in my view, found that the appellant had been, all along aware that his term of employment was for five years and that it would come to an end after the five years period; and that he knew or was aware that the Council might extend or might not extend the contract, as long as it notifies him three months before the five year period comes to an end. It is common cause that the appellant was notified three months before the contract came to an end pursuant to both the provisions of s 27 of the Local Authorities Act, 1992 and in terms of the terms and conditions of the contract.

[32] The certificate of appreciation the appellant relied on to justify his alleged expectation was for the period 11 June 2012 – 31 November 2014 almost two years before the end of the contract. The presentation of a certificate for good service cannot, objectively viewed, create an expectation, particularly a legitimate one in the mind of a reasonable person that the contract would be extended. In my view, the certificate merely served as an appreciation for the service rendered as long as the employment contract was in place. It was in my view unreasonable for the appellant to have entertained expectation that his contract would be extended based on a mere certificate of appreciation. He was in the middle of the term of the contract and almost two years more remained when he was presented with the certificate. It has been held that not every expectation is worthy of protection. The expectation would be worthy of protection, where it is legitimate. It is legitimate if a representation is made and such representation is clear, unambiguous and devoid of relevant qualification<sup>6</sup>. If the argument is accepted, employers with employees on contract would be loath to commend their employees for work done well in the fear, that they could thereby be creating a legitimate expectation that the contracts would be renewed. It was not the appellant's case that he was promised that the contract would be renewed.

[33] This Court is of the considered view that neither the certificate of appreciation of service nor the letter dated 2 June 2017, which confirmed the date on which the five year contract would end, could be said to have created a legitimate expectation that the contract would be renewed. The arbitrator's finding that the appellant should not have entertained such expectation, cannot be said to be perverse. I turn to

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<sup>6</sup> *Minister of Defence & Others v Dunn* 2007 (6) SA 52 (SCA) at [31].

consider the next issue whether there was an obligation on the Council to hear the appellant before the decision not to renew the contract was taken.

*Was there an obligation on the Council to hear the appellant before the decision not to extend the contract was taken?*

[34] The appellant complained that he was not given an opportunity to negotiate for the extension of his contract. This, he contended, was in violation of his Article 18 right of the Constitution. The arbitrator dismissed that claim and found in essence that there was no obligation of the Council to afford the appellant an *audi* before the decision not to extend the contract was taken.

[35] It was argued before this Court that the Council as an administrative body exercising a discretion was obliged by Article 18, to give reasons for its decision. In support of this submission Counsel referred the Court to *Chairperson of the Immigration Selection Board v Frank and Another*<sup>7</sup>. Counsel further submitted that Article 18 requires fair and reasonable acts and that the decision must be rationally justified. Reference was made to *Mostert v The Minister of Justice*<sup>8</sup>. It was then argued that the Council had failed to provide reasons for its decision and furthermore had failed to follow fair procedure in arriving at its decision.

[36] In my view, the legal principles referred to by Counsel are not applicable to the facts of the present matter. It has been held that the *audi* rule is applied in cases where governmental organs are authorised by statute to make decisions prejudicially affecting the rights of an individual<sup>9</sup>. It has further been said that in order for a court 'to determine whether a power or a function is public is a notoriously difficult exercise and that there is no simple definition or clear test to be applied'<sup>10</sup>. It is unnecessary for me to embark on such exercise to determine whether when the Council gave notice of termination of the contract it was exercising a public function or not; that would further determine whether Article 18 is applicable or not.

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<sup>7</sup> 2001 NR 107 (SC).

<sup>8</sup> 2003 NR 11 (SC).

<sup>9</sup> *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A)

<sup>10</sup> *Chirwa v Transnet Ltd an Others* 2008 (4) SA 367 (CC) (2008) (3) BCLR 251; (2008) 29 ILJ 73; [2008] 2 BLLR 97.

[37] I have already found that the appellant was not dismissed but his fixed term contract came to an end by effluxion of time. I am of the further view that the decision by the Council not to extend or renew the contract was not an adverse decision that affected any existing right of the appellant and for that reason there was no obligation on the Council to have granted the appellant an *audi*. I find support for my conclusion in *Tjihoreko v Omaheke Regional Council*<sup>11</sup>.

[38] In that matter, the Court was faced with also similar facts like in the present matter. Although in that matter, the Court had to consider the provisions of the Regional Councils Act, 22 of 1992, with regard to the termination of the contract of employment of a Chief Regional Officer, the relevant provisions are almost identical to the provisions of s 27 of the Local Authorities Act 1992, which govern the appointment of a Chief Executive Officer of a Town Council and the duration of the contract of employment.

[39] In that matter, B Usiku J found that, 'once the decision not to retain the appellant in service is taken, and the notice to that effect is given, the respondent has fulfilled its statutory obligation of section 24(2)(a)(xii) of the Act. I am therefore of the view that the *audi* principle applies only where adverse decisions are taken that prejudicially affect an individual in his existing rights or where a legitimate expectation has been established. The decision not to extend a fixed term contract of employment is not an adverse decision, nor does it prejudicially affect existing rights of the incumbent whose term has come to an end by effluxion of time. The incumbent is not entitled legally to have his or her fixed contract extended<sup>12</sup>.

[40] I am in full agreement with the learned judge's conclusion and have adopted his approach as demonstrated earlier in this judgment.

[41] In the light of my finding that the appellant had not been dismissed, it is not necessary to consider appellant's ground of appeal that the Council committed an unfair labour practice. It follows therefore that the arbitrator's finding in this regard stands and is not perverse.

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<sup>11</sup> (LC43/2015) [2017] NALCMD 35 (17 November 2017).

<sup>12</sup> *Tjihoreko v Omaheke Regional Council* (LC 43/2015) [2017] NALCMD 35 (17 November 2017) at para [31] - [32].

Conclusion

[42] For the foregoing findings and conclusions, the appeal stands to be dismissed.

[43] In the result, I make the following order:

1. The appeal is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and considered finalized.

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H Angula  
Deputy-Judge President

APPEARANCES:

APPELLANT:

B DE JAGER

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FIRST RESPONDENT:

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