

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2021/00034

In the matter between:

VICTOR PUTEHO KANGUMU

APPELLANT

and

**NDATEELELA NDAHAFAMUKWAYA
NAMIBIA INDUSTRIAL DEVELOPMENT AGENCY
RESPONDENT**

**1ST RESPONDENT
2ND**

Neutral citation: *Kangumu v Hamukwaya* (HC-MD-LAB-APP-AAA-2021/00034) [2022]
NALCMD 60 (20 October 2022)

Coram: NDAUENDAPO J

Heard: 5 November 2021 and 3 February 2022

Delivered: 20 October 2022

Flynote: Labour Law — Opposed Labour Appeal — Unfair discrimination — Appellant employed on fixed term contract — Contract terminated by effluxion of time — No notice of termination required.

Summary: The appellant was employed as a Company Secretary by the second respondent on two fixed-term employment contracts. The first contract was from 8 July 2019 to 7 October 2019. The second contract was from 8 October 2019 to 7 September 2020. The second contract terminated on 7 September by effluxion of time. Aggrieved by the termination, the appellant referred a dispute of unfair discrimination to the Labour Commissioner. He complained that he was short-paid on the first contract by an amount of N\$11 767.41. On the second contract he complained that the contract should have been for 12 months and not for 11 months and that the termination on 7 September 2020 amounted to a dismissal. He also claimed he was short-paid an amount of N\$56 167.56 and unpaid leave days on the second contract. Following an arbitration before the first respondent, Ms. Hamukwaya ordered that the second respondent pay the appellant an amount of N\$1 146.87.

Disenchanted with the arbitration award, he noted an appeal to this Court.

Held, the arbitrator did not misdirect herself in finding that the payment on the first employment contract was pro-rated to the number of days he worked.

Held that, the arbitrator did nor err in finding that the second employment contract was for a fixed term of 11 months and it automatically terminated by effluxion of time.

Held further, the appeal is dismissed.

ORDER

1. The appeal is dismissed.
2. There is no order as to costs.

3. The matter is removed from the roll and regarded as finalized.

JUDGMENT

NDAUENDAPO J:

Introduction

[1] Before me is an opposed labour appeal against the arbitration award by the arbitrator.

Background facts

[2] The appellant was employed by the second respondent as a Company Secretary for 2 fixed terms. The first contract of employment was from 8 July 2019 to 7 October 2019.

The second contract of employment was from 8 October 2019 to 7 September 2020. The second contract was terminated by effluxion of time on 7 September 2020. Dissatisfied with the termination of the employment contract, he referred a dispute of unfair discrimination to the labour commissioner. The complaints were that: (a) he was short-paid in the amount of N\$11 767.41 on the first contract; (b) the second contract was for a period of 12 months and not 11 months and therefore he was dismissed when the contract was terminated on 7 September 2020 without notice and he was short paid on the second contract in the amount of N\$56 167.56; and (c) he also claimed that he was entitled to be paid severance pay and leave days. Following an arbitration before the first respondent, Ms. Hamukwaya, ordered the second respondent to pay the appellant an amount of N\$1146.87. Disenchanted with the arbitration award, the appellant launched the appeal before this Court.

[3] In the notice of appeal, the appellant seeks an order that; (a) the appeal is upheld; (b) an order that the arbitrator's orders be set aside; (c) an order that the appellant's termination of service on 7 September 2019 was not in compliance with his fixed terms of second employment contract and hence the appellant was dismissed; (d) an order that the respondent pay the appellant the following: (1) N\$11 767.41 being the shortfall from the first contract of employment; N\$56 167.56 being the shortfall from the second contract, as per sub clause 5.1; N\$5114.04 being the shortfall of the leave days from 8 July 2019 to 8 October 2020.

Application for condonation for filing notice to oppose and grounds of opposition late

[4] Before dealing with the merits of the appeal, the second respondent applied for condonation for the late filing of the notice to oppose and delivering of the grounds of opposition. Mr. Wessel !Nanuseb, Senior Manager: Corporate Services and Human Resources of the second respondent, deposed to the founding affidavit in support of the condonation application. He submitted that he was seized with the matter from the very beginning and when the notice of appeal and other documents were served on second respondent, he had contracted COVID-19 and was hospitalized for a considerable period of time and by the time when he was discharged from the hospital, the time period within which to file the notice to oppose and the grounds of opposition had expired/lapsed, hence the application for condonation. The explanation was satisfactory and acceptable and I granted the condonation application.

The questions of law appealed against are:

- (a) Whether the Arbitrator erred in law by disregarding *caveat subscriptor* rule insofar as the terms of the fixed-term contracts of employment signed by both parties are concerned.
- (b) Whether the Arbitrator erred in law by finding that the appellant was not entitled to leave days for a period of 15 months.
- (c) Whether the Arbitrator erred in law by finding that the appellant's termination on the 7th of September 2020, was as a result of the employment contract coming to an end by the effluxion of time.

- (d) Whether the Arbitrator erred in law by finding that the appellant was not underpaid, in the first and second fixed-term contracts.
- (e) Whether the Arbitrator erred in law by finding in finding that the appellant's remuneration was subject to pro-rata basis.

The grounds of appeal, in summary, are the following:

- (a) The arbitrator erred in law in that she did not correctly apply her mind to the facts, and she did not decide the matter on balance of probabilities.
- (b) The arbitrator erred in law and facts by not finding that the initial contract of the appellant was not paid in full rather it was pro-rated, hence recording a shortfall of N\$11767.41
- (c) The arbitrator erred in law in finding that the appellant was not entitled to a week severance payment, in the amount of N\$15341.81 because of the dismissal.
- (d) The arbitrator erred in law in that she did not consider that the fixed term of contract as contained in clause 1.5 respectively were subject to the provisions of the Labour Act 11 of 2007.
- (e) The arbitrator erred in law in finding that the caveat subscriptor rule did not apply in the matter in question.
- (f) The arbitrator made an error in law and fact by not finding that the appellant's leave days' pay out was in shortfall of N\$5 114.04.

Issues for determination

- (a) The first issue is whether the arbitrator misdirected herself and or erred in her finding when she found that the appellant was paid his full salary under the first contract of employment?
- (b) The second issue is whether the arbitrator misdirected herself when she found that the second contract of employment was for a period of 11 months and not for 12 months as contended by the appellant and terminated by effluxion of time?

Appellant's principal submissions

[5] On the first contract, the appellant (who appeared in person) submitted that the first contract was for a period of 3 months, commencing on 8 July 2019 to 7 October 2019, with a remuneration of N\$51 000 per month. The appellant submitted that he received payment as follows: July N\$39 232.59; August N\$ N\$ 51 000; September N\$ 51 000, which equals N\$141 232.59 the shortfall is N\$11 767.41 according to the appellant. He contended that the arbitrator misdirected herself in finding that he was paid for the 3 months.

[6] On the second contract, the appellant contended that the arbitrator erred in law and misdirected herself by concluding that the second respondent complied with clause 5.1 of the contract employment. The basis of that submission is the fact that clause 5.1 provides that 'the employee shall be paid N\$809 713 (Eight Hundred and Nine Thousand, Seven Hundred and Thirteen Namibian Dollars) per annum, deposited in monthly equal instalments of N\$67 476.08 (Sixty Seven Thousand, Four hundred and Seventy Six, Eight cents Namibian Dollars) into his personal bank account', and according to appellant, per annum is a period of 12 months and the contract should have been for a period of 12 months and not 11 months .

[7] He further submitted that the arbitrator erred in finding that the contract terminated by effluxion of time and that by not being given one month's notice of termination of his employment contract, he was dismissed and he is entitled to severance payment. He also contended that the arbitrator erred in not finding that he had accrued 21 leave days for which he was entitled to be paid an amount of N\$5114.04.

Submissions on behalf of the second respondent

[8] Ms. Nambinga who appeared on behalf of the second respondent submitted, on the first contract, that the arbitrator did not err in finding that the appellant was paid his full 3 months' salary. On the second contract, counsel submitted that the arbitrator did not misdirect herself in finding that the contract was terminated by effluxion of time as clause 1.1 of the employment contract clearly stipulates that the contract will automatically terminate on 7 September 2020, without notice being given to the appellant. It was further contended that the appellant was not dismissed and therefore not entitled to a severance pay.

Discussion

[9] The first contract was for a period of three (3) months, commencing on 8 July 2019 to 7 October 2019, with a remuneration of N\$51 000 per month. The appellant submitted that he received payment as follows: July N\$39 232. 59; August N\$51 000; September N\$51 000, which equals N\$141 232.59 the shortfall is N\$11 767.41 according to the appellant. Those payments were confirmed by Ms. Munenguni, the HR payroll officer of the second respondent, who testified at the arbitration hearing. She testified that during the first period in the first month of July, because Mr. Kangumu started on the 8th, he was paid total earnings of N\$39 232. 59 and for the next two months, August and September, he was paid the full N\$51 000. Ms. Munenguni testified that the payment for July was pro rata because the appellant started working on 8 July and paid on 28 July (which is the pay date for the employees of the second respondent). The appellant contended that the arbitrator misdirected herself in concluding that the appellant was paid his full three (3) months' salary of the first contract as there is no such evidence on record, hence the appellant submits that he is owed N\$11 767.41 by the second respondent. The evidence by Ms. Mungumeni that the appellant for the month of July was paid N\$39 232. 59 (pro rata) because he commenced working on 8 July and paid on 28 July and thus not a full month payment makes sense in my view. The finding by the arbitrator that the appellant was paid what was due to him as per the first contract cannot be faulted.

[10] The second contract of employment signed by the appellant and the second respondent provides (the relevant clauses):

'1 .LIMITED DURATION CONTRACT

1.1 This contract commences on 08th October 2019 and will terminate automatically, without any notice to that effect having to be given, on 07th September 2020.

1.2 The termination of this contract upon expiry of the contract period stipulated in sub-clause shall not be construed as either termination or dismissal on grounds of operational requirements.”

From the above quoted clauses, it is abundantly clear that the contract was for a limited period, commencing on the 8 October 2019 and ending on 7 September 2020. Both parties signed the contract. The contract period was for 11 months. It was to terminate automatically, without any notice to be given, in other words, by effluxion of time. In *Goseb v Usakos Town Council* (HC-MD-LAB-APP-AAA36 of 2018) [2019] NALCMD 12 (08 May 2019) the court held that under Namibian common law, a fixed contract of employment expires by effluxion of time, and it is not necessary or required to provide notice for the termination of such contract.

[11] The learned author, C Parker, in his work, *Labour Law in Namibia* p 120 par 7.2.1. States the following:

'Expiration of contract

As a general rule, where an employee is engaged for a specific period expressed in his contract of employment, the contract comes to an end of that period, i.e. by effluxion of time. The contract comes to an end automatically, and, therefore, there is no need for notice to be given. Thus, if the parties agree on a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires at effluxion of time. The upshot of the principle is that since such contract comes to an end by effluxion of time, an employee cannot be heard to say that he has been dismissed, let alone dismissed unfairly.'

[12] The submission by the appellant that clause 1.1 was to inform him that he will not be given a one month termination notice as his contract will terminate automatically did not necessary imply that the contract of employment of the appellant was to terminate on 7th of September, is simply wrong.

[13] The appellant further submitted that the arbitrator erred in law and misdirected herself by concluding that the second respondent complied with clause 5.1 of the contract employment. The basis of the above submission is the fact that clause 5.1 provides that:

“the employee shall be paid N\$ 809 713 (Eight Hundred and Nine Thousand, Seven Hundred and Thirteen Namibian Dollars) per annum, deposited in monthly equal instalments of N\$ 67 476.08(Sixty Seven Thousand, Four hundred and seventy Six, Eight cents Namibian Dollars) into his personal bank account”,

and according to appellant per annum is a period of 12 months and the contract should have been for a period of 12 months and not 11 months .That interpretation is simply wrong. Clause 1.1 stipulates the contract period, which was 11 months and by operation of time, effluxion of time, the contract terminated automatically. There was no misdirection on the part of the arbitrator.

[14] The appellant further contended that the contracts between the appellant and the second respondent were subject to the *caveat subscripto* principle. In *Namibia Broadcasting Corporation v Kruger and Others* (2009(1) NR 196(SC) para 9 Maritz JA said the following about the *caveat subscripto* principle, “... [9] Fagan CJ remarked in *George v Fairmead (Pty) Ltd.*

“When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify ,by doing so ,his assent to whatever words above his signature”,

[15] The parties assented to a fixed contract period of eleven (11) months and not twelve (12) months as contended by the appellant and the contract was terminated by effluxion of time. In terms of section 35 of the Labour Act 11 of 2007 severance pay is only payable to an employee by an employer who has completed twelve (12) months of continuous service, if the employee is dismissed. In this case, the appellant was not dismissed, his contract was terminated by effluxion of time. He is not entitled to any severance payment.

[16] As far as leave days are concerned, the arbitrator did not err when she found that the appellant worked for fourteen (14) months and he was entitled to 23.3338 leave days, minus 3.5 days’ vacation leave that he took. He was entitled to be paid N\$61 772.77 and there is a shortfall of N\$915.48 which she ordered the second respondent to pay.

In the result. I make the following order.

Order

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

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE PLAINTIFF:

V Kangumu (in person),
Windhoek

FOR THE DEFENDANT:

S Nambinga
of Palyeenime Incorporated,
Windhoek