

REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: SHOPRITE NAMIBIA (PTY) LTD APPELLANT and JUSTINA MARTIN 1 ST RESPONDENT KEOPAS GAINGOB 2 ND RESPONDENT OFFICE OF THE LABOUR COMMISSIONER 3 RD RESPONDENT	Case No: HC-MD-LAB-APP-AAA-2021/00041
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 15 March 2024
	Delivered on: 29 April 2024
Neutral citation: <i>Shoprite Namibia (Pty) Ltd v Martin</i> (HC-MD-LAB-APP-AAA-2021/00041) [2024] NALCMD 16 (29 April 2024)	
Results on merits: Merits not considered.	
The order: 1. The appeal succeeds. 2. The arbitration award dated 1 June 2021 is hereby set aside. 3. There is no order as to costs.	

4. The matter is finalised and removed from the roll.

Reasons for orders:

Prinsloo J:

Introduction

[1] The appellant appeals against the entire award handed down by the arbitrator, Mr Kleofas Gaingob, on 1 June 2021, under case number CROT 83-20.

[2] The appellant is Shoprite Namibia (Pty) Ltd, a company with limited liability incorporated in terms of the company laws of the Republic of Namibia, with its place of business located at No. 6 Diehl Street, Southern Industry, Windhoek, in the Republic of Namibia.

[3] The first respondent is Justina Martin, a major female. A former employee of the appellant residing at No. 38, DRC 11002, Windhoek, in the Republic of Namibia. Ms Martin was previously employed by the appellant at its Checkers outlet at the Dunes (Walvis Bay) in her capacity as Non-Foods General Assistant.

[4] The second respondent is Kleofas Gaingob N.O. (the arbitrator), a major male person with his place of business at the c/o the Office of The Labour Commissioner, 32 Mercedes Street, Khomasdal, in the Republic of Namibia.

[5] The third respondent is the Office of the Labour Commissioner situated at the Office of The Labour Commissioner, 32 Mercedes Street, Khomasdal, Republic of Namibia. In this judgment, I will refer to the parties as appellant and respondent/Ms Martin.

Background facts

[6] The first respondent requested to be transferred to Otjiwarongo and was so transferred. She was employed in the position of Non-Foods Groceries Controller (Controller), a position more senior than the position of Non-Foods General Assistant, this being her previously held position. At the time when Ms Martin was employed as a Controller, she earned N\$3 218 per month.

[7] It became apparent that during the course of Ms Martin's employment as Controller, she failed to meet the standard of work required for the position of Controller. Subsequently, Ms Martin, on 9 January 2020, via correspondence to the appellant, requested that she be downgraded from the position of Controller to that of normal staff as Shelf Packer. In principle, Ms Martin sought a demotion in position and salary, too.

[8] Following the correspondence by Ms Martin and at her instance, the appellant executed the downgrading in rank from that of Controller to Groceries Shelf Packer and accordingly also reduced her salary from N\$3 218 to N\$2 190.

[9] As a result of the aforesaid demotion or downgrading in rank, on 10 June 2020, the respondent referred a dispute of unfair labour practice and unilateral change of the terms and conditions of the employment contract to the Office of the Labour Commissioner.

[10] The dispute lodged by Ms Martin of unfair labour practice and unilateral change of the terms and conditions of employment was heard on 3 February 2021, and on 1 June 2021, the arbitrator handed down an arbitration award in favour of Ms Martin in the following terms: I quote verbatim from the arbitration award.

'6. Order

6.1. The respondent to this matter hereby ordered to effect the payment in lieu for unlawful deduction no later than 30th June 2021, calculated as follows:

N\$ 3218-00, initial salary – N\$ 2190-00 (reduced salary)

= N\$ 1028-00 (difference)

February 2020 to June 2021 _ 17 Months

N\$ 1028-00 x 17 Months = N\$ 17,476.00

6.2. The respondent to this matter is also ordered to adjust the increment based on the maximum salary of N\$ 3218-00. In case any increases took place during the period 1st February 2021 and 30th June 2021...'

[11] As I indicated earlier in this judgment, the appellant is aggrieved by the arbitrator's order dated 1 June 2021 and prays that this order be set aside.

Grounds of appeal

[12] The appellant 's grounds of appeal can be summarised as follows:

12.1 Whether, on the evidence adduced, the dispute constitutes an unfair Labour practice in terms of the Labour Act 11 of 2007 (the Act).

12.2. Whether, on the evidence adduced, the dispute constitutes a unilateral change of terms and conditions of employment under the Act.

12.3 Did the appellant commit an unfair labour practice as provided in terms of s 50 of the Act?

12.4. Could the arbitrator, on the whole of the evidence tendered and considered against the overall spectrum of the case, find that the sanction was so unreasonable that no reasonable employer would have imposed such sanction?

12.5. Whether or not the relief granted by the arbitrator was substantively proven and appropriate in the circumstances, considering that the respondent had participated in a protected strike during the period 23 December 2020 until 25 January 2021 and was not entitled to any remuneration.

12.6 Whether the respondent has discharged the onus in respect of proving her damages and entitlement to compensation.

Opposition

[13] On 1 September 2023, Mr Silungwe filed a notice of intention to oppose; however, no grounds of opposition were filed as is required by the rules, more specifically, rule 17(16)(a), which is phrased in peremptory terms. On the date of the hearing, Mr Silungwe did not offer the court the courtesy of appearing.

[14] Consequent to Mr Silungwe's non-appearance and his failure to file the grounds of opposition, the appellant requested that the respondent's opposition be struck and that the matter proceed on an unopposed basis. The court acceded to the request, and after the respondent's opposition was struck, the matter accordingly proceeded unopposed.

Questions for determination

[15] The questions for determination are as follows:

15.1 Whether or not the arbitrator erred in his finding that the actions of the appellant to demote the respondent amounts to a unilateral change of conditions of employment in violation of s 50 (1)(e) of the Act.

15.2 Whether the relief granted by the arbitrator was substantively proven and appropriate in the circumstances considering that the respondent had participated in a protected strike during the period 23 December 2020 until 25 January 2021 and was not entitled to any remuneration?

15.3 Whether the respondent has discharged the onus in respect of proving her damages and entitlement to compensation?

Appellant's submissions

[16] Ms Ihalwa submitted that a litigant who intends to oppose an appeal must comply with the relevant rules, and when there is non-compliance, an application for condonation must be brought without delay. In the current circumstances, where a notice of intention was filed but no grounds of opposition, she submits that the respondent's notice of intention to oppose must be struck, and the appeal must be determined without opposition or as if it is unopposed.

[17] It is further Ms Ihalwa's submission that the appellant's policy on disciplinary code and procedures does not make provision for a demotion initiated by an employee without such an employee going through disciplinary proceedings but rather for demotion as an alternative to dismissal for performance-related offences. According to her, the respondent did not go through a disciplinary hearing, she opted for a demotion out of her own accord. The reduction in salary is a consequence of the demotion. The consequences of the demotion were explained to the respondent, and she accepted it.

[18] Ms Ihalwa submitted that it is clear that the respondent requested the demotion after failing to perform her duties as a Controller with the standard required by the appellant. The court was referred to the respondent's letter dated 9 January 2020, wherein she expressly

requested a demotion. According to the appellant, the respondent further, during cross-examination at the arbitration proceedings, confirmed that she, out of her own volition, consented to the demotion as set out in the letter.

[19] In bolstering her argument, Ms Ihalwa submitted that the sanction is fair and reasonable under the circumstances, and the downgrading in rank, therefore, does not fall within the ambit of s 50 (1)(e) of the Act. She contended that the change in the contract of employment between the applicant and the respondent was by way of negotiation and mutual agreement and that the respondent agreed to the changes effected to her employment conditions – particularly to the position and salary. It can thus not be said that the appellant unilaterally changed those conditions as the respondent signed the demotion letter.

[20] Ms Ihalwa further submitted with respect to the compensatory relief awarded to the respondent, stating that the arbitrator erred in computing and granting an amount due to the respondent. According to the appellant, the respondent participated in a protected strike during the period 23 December 2020 to 25 January 2021. The rule of ‘no work, no pay’ applied to the strike, and no staff member, including the respondent, was entitled to receive payment of remuneration for that particular period. For this reason, the respondent is not entitled to remuneration for that particular period, as the arbitrator wrongly concluded.

[21] Having briefly set out the submissions advanced by the appellant, I now turn to the applicable legal principles and discussion.

Applicable legal principles and discussion

[22] The relevant section in the Act, which deals with the unilateral change of employment conditions, is s 50(1)(e), which provides as follows:

‘It is unfair labour practice for an employer or an employers’ organisation (e) to unilaterally alter any term or condition of employment.’

[23] Shivute CJ in *Hugo v Council of Municipality of Grootfontein*¹ stated the following:

‘It is a trite principle of law of contract that a person who has signed a contractual document

¹ *Hugo v Council of Municipality of Grootfontein* (SA 68/2012) [2014] NASC (27 October 2014).

thereby signifies his assent to the contents of the document.'

[24] Further, Maritz JA in *Namibia Broadcasting Corporation v Kruger and others*² said the following about signing documentation:

'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.'

10. Absent credible allegation of misrepresentation, subterfuge, dishonest concealment, duress, fraud or the other exceptions to the general rule, the second to 22nd respondents are bound by qualification of the severance payments reflected in their respective deeds of settlement with the appellant. They agreed to receive them in full and final settlement of their respective claims and, in that sense, their signatures not only sealed the quantum of their severance entitlements but also the fate of their application.' (my emphasis)

[25] Parker, in his book *Labour Law in Namibia*,³ states that there is generally only one lawful way in which terms of a contract of employment may be varied and that is through agreement between the employer and employee. In *Smith v Standard Bank Namibia*,⁴ the Labour Court held that:

'The only way in which a change in the contract of employment between the applicant and the respondent could be effected lawfully was by way of negotiation and mutual agreement'. (my emphasis)

[26] After careful consideration of the legal principles postulated above and applying same to the facts before the court, it can be accepted that the parties were ad idem as to the terms of the demotion. The respondent was well aware of her rights and obligations at the time of signing the letter when she applied for a demotion. Consequently, she intended to be bound by the terms of the demotion letter.

[27] In *Country Fair Foods (Pty) Ltd v CCMA & Others*,⁵ the court stated that 'it remains part of our law that it lies within the province of the employer to determine sanctions in relation to non-compliance with standards set by the employer. The court further stated that 'interference with

² *Namibia Broadcasting Corporation v Kruger and others* 2009 (1) NR 196 (SC) paras 9-10.

³ C Parker: *Labour Law in Namibia* 1st Ed Unam Press, at p 32.

⁴ *Smith v Standard Bank Namibia* 1994 NR 366 (LC) at 371 A-B.

⁵ *Country Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 ILJ 1701 (LAC).

such sanctions is only justified in cases of unreasonableness and unfairness.’ The court went on to state that “interference would only be justified if the sanction is so excessive or lenient that in all good conscience it cannot be allowed to stand.’⁶

[28] The contention that the respondent’s demotion amounted to a unilateral change of terms of employment is misplaced. I say so because the respondent requested and signed the demotion letter on 9 January 2020. For purposes of completeness, the contents of the letter read, I quote verbatim:

‘9 January 2020

Dear Sir/madam

I am Justina Nangula Martin 1401211, Shoprite Otjiwarongo. The aims of this letter I am requesting the Company to Demotion position as non-food controller and demotion salary too. To become a normal staff as shelf packer.

Thank you

Justina Nangula Martin

Signed’ (sic)

[29] As I indicated earlier in this judgment, the appellant accepted the respondent’s request for a demotion. Subsequently, after the demotion was effected, Ms Martin referred a dispute of unfair labour practice and unilateral change of terms of employment to the office of the Labour Commissioner.

[30] I am of the view that ‘the sanction’, if one can call it that, is fair and reasonable under the circumstances and, therefore, does not fall within the ambit of s 50(1)(e) of the Act in that the respondent agreed to the changes being made to her employment conditions. The appellant did not unilaterally change those conditions as alleged by the respondent because she, out of her own accord and at her own instance, drafted and signed the demotion letter.

[31] In light of the above, the court finds that no reasonable arbitrator could have found that the actions of the appellant amounted to a unilateral change of conditions of employment in violation of s 50(1)(e) of the Act.

⁶ Supra at para 11.

[32] With respect to the compensatory relief awarded to the respondent by the arbitrator, which, on the appellant's version, the arbitrator erred in computing and granting an amount due to the respondent. According to the appellant, the respondent participated in a protected strike during the period 23 December 2020 to 25 January 2021. From the perusal of the arbitration record, I do not see that this evidence was canvassed or dealt with at the arbitration proceedings. In the absence of that, I do not intend to address the issue.

[33] For the above-stated reasons, the appeal succeeds, and the Arbitrator's award dated 1 June 2021 is set aside.

Order

[34] My order is set out above.

	Note to the parties:
	Not applicable.
Counsel:	
Appellant	First Respondent
L Ihalwa (assisted by K Haraseb) Instructed by ENS Africa Windhoek	No appearance