REPUBLIC OF NAMIBIA

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

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2023/00087

In the matter between:

JOSEPH ANTONIO **APPELLANT**

and

NAMIBIA BROADCASTING CORPORATION **1st RESPONDENT**

NDAPEWA HELMUT **2nd RESPONDENT**

THE LABOUR COMMISSIONER **3rd RESPONDENT**

Neutral Citation: *Antonio v Namibia Broadcasting Corporation* (HC-MD-LAB-APP-AAA-2023/00087) [2024] NAHCMD 30 (9 August 2024)

CORAM: PRINSLOO J

Heard: **8 May 2024**

Delivered: **9 August 2024**

Flynote: Labour – Appeal – Arbitration award – Employment agreement – Labour Act No. 11 of 2007– Condonation – Heads of arguments are for the convenience of the court – *Pacta sunt servanda* doctrine

Summary: The appellant has been employed by the first respondent since 3 June 2013 as Manager: Management Accounting and Reporting. On 12 October 2022, the

appellant referred a dispute of unfair labour practice and unilateral change of terms and conditions of employment to the Office of the Labour Commissioner due to the first respondent's refusal to grant the appellant a housing subsidy after he purchased his second house while still in the employ of the first respondent.

The arbitrator ruled that the letter dated 2 November 2015 was valid and formed part of the employment contract concluded in June 2013, together with the first respondent's conditions of employment and other rules and regulations. Thus, it was ruled that there was no unfair labour practice.

The appellant, not satisfied with the arbitrator's award, appealed that award and brought the current labour appeal application.

Held the doctrine of *pacta sunt servanda* as highlighted in the above matter, exemplifies the importance that a party must comply with undertakings they have committed themselves to.

Held that it cannot be said that the respondent unilaterally changed or altered the employee's conditions of employment.

Held that the appeal is dismissed.

ORDER

1. The condonation application is granted with costs.

2. The appeal is dismissed.
3. No order as to costs.

JUDGMENT

PRINSLOO J:

Introduction

[1] The appellant brought an appeal in terms of s117 (1) (*a*) (ii), read together with s 89(1)*(a*) of the Labour Act No 11 of 2007 (the Labour Act), against the entire arbitration awarded, awarded by the arbitrator on 21 November 2023 under case number CRWK 953-22. Seeking the following relief:

> ‘ a) Upholding the Appellant’s appeal and setting aside the arbitration award;
>
> b) That the letter dated 2 November 2015 be declared null and void;
>
> c) That the first respondent compensates the appellant 60% of the housing subsidy backdated from 1 April 2023 to date;
>
> d) Any further and/or alternative relief that the court may deem fit.’[1]

The parties

[2] The parties are as follows:

2.1 The appellant is Joseph Antonio, employed by the first respondent as HOD Finance/ Financial Controller and currently residing at Erf 1231, Tauben Street, Hochland Park, Windhoek, Republic of Namibia.

[1] Appellant Notice of Motion at 2.

2.2 The first respondent is Namibia Broadcasting Corporation, a juristic person established as such in terms of the applicable provisions of the Namibian Broadcasting Corporation Act No 9 of 1991, with its principal place of business situated at 11, Cullinan Street, Windhoek, Republic of Namibia.

2.3 The second respondent is Ndapewa Helmut, an adult female employed as an Arbitrator at the office of the Labour Commissioner, with its place of business at 32 Mercedes Street, Khomasdal, Windhoek.

2.4 The third respondent is the Labour Commissioner, appointed in terms of the Labour Act and having his place of business at 32 Mercedes Street, Khomasdal, Windhoek. No relief is sought against the third respondent, and he is cited herein for the interest he might have in the matter.

[3] Only the first respondent opposed the matter.

Background

[4] In order to put the current appeal into context, it is necessary to regard the background of the matter and what has occurred since the appellant's appointment. The appellant's complaint that had to be considered during the arbitration was that the first respondent unilaterally changed the appellant’s conditions of employment.

[5] The background facts I set out hereunder appear to be common cause between the parties.

[6] The appellant has been employed by the first respondent since 3 June 2013 as Manager: Management Accounting and Reporting. Prior to his appointment in 2013, the appellant signed an employment agreement regulating the terms and conditions of his employment.

[7] In 2015, an issue arose between the appellant and the first respondent regarding the interpretation of the appellant's employment contract, specifically regarding the appellant's eligibility to receive a housing subsidy. The appellant escalated the dispute to the office of the Labour Commissioner on the basis that the first respondent unilaterally changed the conditions of employment as contained in the Agreement of Employment. The matter was referred for arbitration, and the appellant received a reward requiring the first respondent to pay a 60 per cent portion of his housing subsidy backdated to April 2015. The arbitration award was honoured by the first respondent.

[8] In September 2015, the appellant and the first respondent signed a schedule setting out his salary adjustment, and the appellant received his remuneration according to the said schedule since 2015.

[9] The first respondent further apparently issued a revised employment offer to the appellant on 2 November 2015, in which the appellant was offered an all-inclusive total cost-to-company remuneration package, reflecting the salary structure agreed to in September 2015. This document became a bone of contention between the parties during the 2023 arbitration proceedings, as the appellant contended that he was unaware of the letter. I will return to this issue later in this judgment.

[10] On 11 August 2022, the appellant was promoted to the position of HOD Finance/Financial Controller (Job Grade 4). In the letter of 11 August 2022, the appellant was informed that his annual total remuneration package would be adjusted from N$918 361,92 per annum to an all-inclusive N$966 507,24 per annum. The appellant accepted the promotion.

[11] During or about March 2022, the appellant purchased a second home through a home loan financed by Standard Bank of Namibia. The appellant has been making the bond payments since April 2022 without any housing and/ or allowance subsidy from the first respondent. When the appellant tried to obtain the subsidy letter from the

relevant department in the first respondent's institution, it was refused on the basis that the appellant receives a total cost-to-company (all-inclusive) remuneration package.

[12] As the appellant did not receive an acceptable outcome during the internal grievance procedure, he approached the offices of the Labour Commissioner for assistance.

[13] In the papers of record, the appellant alleges unfair labour practice and unilateral change of terms and conditions of employment, as the first respondent refused to grant the appellant a housing subsidy after he purchased his second house in 2022.

[14] On 12 October 2022, the appellant referred the dispute for Conciliation and/or Arbitration. On 8 May 2023, at the office of the Labour Commissioner in Windhoek, a conciliation hearing took place but failed, and the matter was referred to arbitration by the arbitrator.

The findings of the arbitrator and the award

[15] On 19 September 2023, the arbitration took place at the office of the Labour Commissioners in Windhoek.

[16] In her analysis of the evidence and arguments, the arbitrator (second respondent) stated as follows (which I replicate verbatim):

> '[39] I have read the letter dated 11 August 2022, the applicant has accepted and signed off the offer of a promotional position of HOD Finance/Financial Controller. His remuneration is in the limits of the Public Enterprises remuneration guidelines and or NBC remuneration guideline, his remuneration will be an all-inclusive N$966 507.24 per annum.
>
> [40] The applicant denied having knowledge of the letter dated 02 November 2015, which was accompanied by the salary structure that the applicant had signed. The applicant further submits that he never came across some of the respondent's policies and guidelines.

[41] It is my view that the applicant is in a supervisory position of trust and the application was supposed to acquaint himself with all the relevant policies, guidelines, procedures, rules and regulations of the respondent. On 3 June 2013, the applicant agreed that the relationship shall not only subjected to the terms and conditions of the employment contract but also the respondents policies, rules, regulations and procedures. One of these policies are dealing with the Total Cost To Company indicated in the Policy and Guidelines Remuneration and Benefits page 4, clause 2. The last paragraph states that “all new managerial appointments will be based on the TCTC approach”.

[42] I turn to agree with the respondent that there is an acceptance due to the fact that the applicant has signed the salary structure which was accompanied by the letter dated 2 November 2015. No complaint was received after the applicant structured his pay, the figure that appeared in both the letter of 02 November 2015 and the salary structure is the same.

[43] The witness of the respondent further states that the pay slips were issued to the applicant and no complaints were received.

[44] On 11 August 2022, the applicant was promoted and the salary was increased to all-inclusive to total cost to company. Therefore, I agree with the respondent that the applicant has accepted that the total cost to company by signing the salary structure dated 22 September 2015 and the letter dated 11 August 2022.

[45] It is my view that, there was no unfair labour practice as alleged by the applicant, of breach of contract. The Letter dated 2 November 2015 and the letter dated 11 August 2022 are all part of the NBC Condition of Employment and other rules and regulations which the applicant had signed on 3 June 2013.

[46] Furthermore, it is my view that the applicant as a senior manager acted in a frivolous and vexatious manner by interpreting the employment contract contrary as to the initial meaning.’

[17] The arbitrator proceeded to issue the following award on 21 November 2023:

‘1. The Letter dated 2 November 2015 is valid.

2. No compensation will be made regarding the house subsidy.
3. No cost as to order.
4. The matter is struck off the roll.'

Grounds of appeal

[18] In summary, the appellant's six main grounds of appeal are as follows:

i) The arbitrator misdirected and/or erred in law in finding that the first respondent did not unilaterally alter the terms and conditions of his employment because no reasonable arbitrator would have concluded that the revised offer letter dated 2 November 2015 showed that the appellant's acceptance of new terms and conditions of his employment contract.

ii) The arbitrator misdirected herself and/or erred in law in finding that clause 16 of the contract should be interpreted to mean that the contract was subject to the company policies (para 42 of the arbitration award).

iii) Clause 16 of the contract states that the policies only form part of the contract 'as if incorporated', but not that the policies trump the clear and express terms of the contract. Any reasonable arbitrator would have concluded that the policies supplement the contract's terms and conditions.

iv) The arbitrator further misdirected herself and/or erred in law by considering irrelevant evidence when she decided that the promotion offer letter dated 11 August meant that the appellant accepted his housing subsidy to be changed in 2015 (para 44 of the arbitration award).

v) The arbitrator misdirected herself and/or erred in law when she misinterpreted the Policy and Guidelines on Remuneration and Benefits because the total costs to the company only applied to 'all new managerial appointments' whereas the appellant was not a new managerial appointment.

vi) The arbitrator misdirected herself and/or erred in law when she failed and/or refused to consider the arbitration award of 05 August 2015, together with the appellant's employment contract dated 03 June 2013.

Opposition to the appeal

[19] The first respondent's main contention is that the appellant agreed to and accepted the employment contract and to abide by the internal policies, rules, regulations, and procedures and that he holds a supervisory position in the company. It is further contended that the salary scope of all managerial positions falls within the scope of the ‘Guidelines Remuneration and Benefits Policy’ approved on 17 June 2015.

[20] The first respondent further contended that the arbitrator was correct in her analyses of the evidence and her subsequent findings.

[21] In response to the grounds of appeal set out above the first respondent stated as follows:

i) Ad first ground: The revised offer letter dated 2 November 2015 was reflective of the salary structure that the appellant agreed on 22 September 2015, which is all-inclusive of all benefits, and both parties signed this salary structure as required by clause 2 of the appellant’s employment contract. The arbitrator was thus correct in finding that the appellant enjoyed the salary benefits on the all-inclusive remuneration package per the revised offer letter. The appellant never complained about the new and revised contractual terms and conditions until he applied for a bond on his second house.

ii) Ad ground two: The arbitrator correctly interpreted clause 16 of the employment contract to say that the appellant is subject to the policies and procedures contained in the first respondent’s Conditions of Employment and other rules and regulations. The appellant signed the employment contract, consented to it, and is bound thereby.

iii) Ad ground three: The arbitrator correctly disregarded clause 2.3.3 of the housing policy that provides for a 60 per cent housing subsidy to employees as it is separate from the monthly housing allowance the appellant receives. The arbitrator correctly pronounced herself when she found that clause 2 of the 'Guidelines Remuneration and Benefits Policy Approval on 17 June 2015' applies to the appellant, which provides that all new managerial appointments will be based on the total cost-to-company approach.

iv) Ad ground four: The appellant signed the promotional letter dated 11 August 2022 on 17 October 2022, wherein he yet again agreed to the all-inclusive annual remuneration package, which is in line with the salary structure of September 2015, which is also all-inclusive. This salary structure was agreed to and signed by the appellant and was formalised by a letter dated 2 November 2015 issued by the Director General. The new salary structure followed the arbitration award issued in favour of the appellant in 2015.

v) Ad ground five: The arbitrator correctly found that the remuneration structure of the appellant as a manager fell within the ambit of the Policy and Guidelines on Remuneration and Benefits, which applies to managerial appointments.

vi) Ad ground six: The arbitrator correctly considered the evidence in connection to the issues set out in the Rule 20 agreement. The appellant accepted and agreed to the change in his contractual terms when he signed the salary structure in September 2015, which was presented to him in the offer letter dated 2 November 2015.

Arguments advanced

[22] It is the appellant's case that he has been in the employ of the first respondent since 2013, and prior to his commencement of employment, the appellant signed an employment contract, which, in terms of clause 6 of his employment contract, his remuneration package excluded housing subsidy and housing allowance. The appellant further argues that, in terms of clause 7(iv) of his employment contract, he would be eligible to participate in the first respondent's housing scheme after the completion of one year of service and would qualify for a housing loan calculated at 3.5 times his annual basic salary. [2]

[23] The appellant further argues that it is clearly stated in clause 2 of his employment agreement that, any amendment or changes to the contract will only be valid and effective if both parties agree in writing and the amendments or changes have been signed off by both parties. In furtherance, the appellant argues that the said clause provides that the parties' employment relationship is regulated by the terms and conditions set out in the contract and all other conditions of employment not specified therein are contained in the first respondent's personnel regulations, policies and procedures and the annual performance agreements.

[24] The appellant argues that he never received the letter dated 2 November 2015 and denied accepting the revised offer from the first respondent. The appellant argues that he only signed the adjusted salary structure in 2015.

[25] In addition, the appellant argues that the remuneration policy came into force after the appellant had already been appointed as manager and thus did not fall within

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[2] Clause 7(iv):'The employee will be eligible to participate in the Employer's Housing Scheme once he/she complete one year of pensionable service and whose appointment to the Corporation has been confirmed. The qualifying amount for such a housing loan is calculated at 3.5 times the annual basic salary. The Employer subsidizes 60% of the home loan premium while the Employee pays 40% of the financial institution's monthly premium only for amounts advanced for purposes of purchase or improvement of home. In addition, the Employee will also qualify for a monthly home owner's /housing allowance of N$14640 p.a (N$1220 p.m)'.

the remuneration package of the total cost-to-company as the new managerial appointments did.

[26] Further to the above, the appellant argues that the first respondent unilaterally altered and changed his employment contract of 13 June 2013 without his knowledge or consent.

[27] Wherefore, the appellant seeks that:

a) The appeal is upheld.
b) The letter dated 2 November 2015 is declared null and void.
c) The respondent pays the appellant 60 per cent of the housing subsidy from 1 April 2022 to date.

The first respondent's case

[28] It is the first respondent's contention that the appellant initially purchased his first house, and after purchasing the said home, the appellant applied for housing benefit, which the first respondent refused.

[29] The appellant then referred the matter to the Labour Commissioner in August 2015. The Arbitrator upheld the conditions of the contract and ordered that the first respondent pay the amounts as per the benefit in the contract.

[30] Subsequent to the above, in September 2015, the parties signed the adjusted salary structure, in which the appellant agreed that the housing allowance would be inclusive of his total cost-to-company package. This was followed by the revised employment offer letter dated 2 November 2015.

[31] Thereafter, in March 2022, the appellant purchased his second home. Once again, after the purchase of his home, he applied for the housing benefit, which was

also refused. The first respondent contends that such refusal was based on the fact that the appellant's employment contract had been revised, and the appellant had agreed to the revised employment terms and conditions by signing the revised employment offer letter.

[32] Subsequently, the first respondent argues that the first respondent referred the matter to the Office of the Labour Commissioner, who made an order as set out in para [17] herein.

[33] Additionally, the first respondent argues that in terms of the appellant's contract of employment, he agreed to abide by the first respondent's policies, rules, regulations and policies. This included the Guidelines Remuneration and Benefits Policy, which outlines that all managerial positions fall within the remuneration package of the total cost to the company, which meant that the appellant's basic salary and all benefits, including housing, are covered by this amount.

[34] Moreover, the first respondent argues that the appellant never repudiated the revised offer and 'went on to enjoy the new salary structure'.

Preliminary issue

Condonation

[35] The matter was initially set down for a hearing on 26 April 2024. However, on even date, the appellant's legal practitioner, Mr Comalie, took issue with the late filing of the first respondent's heads of arguments. Mr Comalie argued that the first respondent filed the application later without seeking condonation first. The matter was postponed to enable the first respondent to bring a formal condonation application.

[36] The first respondent’s legal practitioner brought a formal condonation application, in which Ms Janser submitted that she left the country on 18 April 2024 and returned on 21 April 2024. Despite being out of the office, Ms Janser finalised the first respondent's heads of arguments. Ms Janser submits that she was under the mistaken impression that she filed the heads of arguments on 19 April 202, when they were due for filing.

[37] Thereafter, on 23 April 2024, whilst Ms Janser was preparing for the hearing, it came to her knowledge that the heads of arguments did not reflect on ejustice, and she proceeded to immediately file it on ejustice.

[38] Ms Janser further submits that the heads of arguments were filed only one day late. In furtherance to the above, Ms Janser submits that on the hearing date of 26 April 2024, Mr Comalie indicated that he was ready to proceed with the hearing and thus did not suffer any prejudice to proceed with the matter on the said date.

[39] In his answering affidavit, the appellant took issue with Ms Janser's authorisation to institute the condonation application and argued that Ms Janser is neither a party to the proceedings nor an employee of the first respondent and that no supporting document was annexed to the appellant's condonation affidavit deposed to by Ms Janser.

[40] The first respondent argues that due to the aforementioned, the condonation application was not properly filed before the court as the affidavit was deposed to by the first respondent’s legal practitioner.

[41] The first respondent further argues that he is not satisfied with the explanation advanced by Ms Janser for failure to file her heads or arguments timeously.

[42] The first respondent further argues that they are entitled to wasted costs occasioned by this condonation application.

Discussion on condonation

[43] In dealing with the issue of condonation, Usiku J in *Roads Authority v Hangula*[3] held that:

> 'In an application for condonation, the court is required to have regard to two general considerations. Firstly, there must be a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of success on the merits of the main application.'

[44] I am satisfied that the explanation advanced by Ms Janser is both reasonable and acceptable. During the month of April 2024, ejustice had multiple glitches, which have been resolved in the interim. The explanation advanced is highly probable, and further to the above, the first respondent's heads of arguments were signed and dated 19 April 2024.

[45] In furtherance of the second requirement laid out in *Hangula*, Ms. Janser illustrated that the first respondent has reasonable grounds for success. This will be discussed further below.

[46] On the issue of prejudice, I agree with Ms Janser that the appellant had not suffered any prejudice and was ready to proceed with the hearing on the abovementioned date but insisted on opposing the application for condonation, which resulted in the postponement of the matter in order for the respondent to file a substantive application for condonation.

[47] In any event, heads of arguments are for the convenience of the court. Ueitele J made this clear in *Standard Bank Namibia Limited v Nekwaya*[4] when he commented that:

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[3] *Roads Authority v Hangula* (HC-MD-LAB-MOT-GEN-2021/00291) [2023] NALCMD 43 (8 September 2023) at para 13.

[4] *Standard Bank Namibia Limited v Nekwaya* (HC-MD-CIV-ACT-CON- 2017/01164) [2018] NAHCMD 172 (15 June 2018) at para 15.

'...as to the heads of argument, it is my view that heads of argument are for the convenience of the presiding judge. The heads of arguments, in this matter, were filed one day out of time, the defendant did not place before me any facts which demonstrate how the late filing of the heads of arguments prejudiced him….'

[48] Similarly, the appellant failed to present facts before the court that would demonstrate how the first respondent's one-day late filing of their heads of arguments prejudiced the appellant.

[49] For the reasons set out above, the first respondent's condonation application for the late filing of their heads of arguments is granted, and the general rule of costs applies. Costs in labour matters are further discussed hereunder.

The merits of the appeal

Issues for determination and discussion

[50] This court has to decide whether the arbitrator was correct in concluding that the letter dated 2 November 2015 is valid and that no compensation will be made regarding the housing subsidy.

[51] Labour matters are dealt with by the Labour Act, the Act under s 85[5] bestows the arbitrator with certain powers and obligations, the court in *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd,*[6] held:

'The Act requires the arbitrator who has been appointed to resolve the dispute, first to attempt to resolve it by conciliation, and if that fails, to commence the arbitration. Subject to any

[5] Section 85 (2)- Arbitration tribunals operate under the auspices of the Labour Commissioner, and have jurisdiction to - (a) hear and determine any dispute or any other matter arising from the interpretation, implementation or application of this Act; and

(3) make any order that they are empowered to make in terms of any provision of this Act. Subject to the laws governing the public service, the Minister may appoint arbitrators to perform the duties and functions or to exercise the powers conferred on arbitrators in terms of this Act.

[6] *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (2) (33 of 2013) [2016] NASC 3 (11 April 2016) at para 30.

rules promulgated in terms of the Act, the arbitrator has the power to 'conduct the matter in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly' and the arbitrator 'must deal with the substantial merits of the dispute with the minimum of legal formalities'. Within thirty days of concluding the arbitration proceedings, the arbitrator must issue an award giving 'concise reasons.'

[52] The court further held:[7]

'Given the statutory provisions outlined above, the key questions for an arbitrator to determine in a dispute concerning alleged unfair disciplinary action will be whether there was a valid and fair reason for the disciplinary action and whether a fair procedure was followed in imposing the disciplinary action. If the arbitrator finds that there was no valid or fair reason for the disciplinary action, or that the process followed was unfair, the arbitrator will uphold the unfair labour practice challenge.'

[53] Hoff J in *House and Home v Majiedt and Others*[8] also discussed the duty of an arbitrator and held as follows:

'The question is therefore whether on all the available evidence, in respect of a specific finding, when viewed collectively and applying the legal principles relevant to the evaluation of evidence, the factual conclusion by the arbitrator was a reasonable one in the circumstances.'

Did the appellant accept the revised remuneration structure?

[54] Masuku J, in *First National Bank of Namibia v Katjatao*[9] found that:

'In this sphere of contract, there the principle referred to as the *pacta sunt servanda* principle, which dictates that contracts be enforced, regardless of however informal they may

[7] Ibid at para 31.

[8] *House and Home v Majiedt and Others* (LCA 45/2011) [2012] NALC 31 (22 August 2013) at para 8. Also see *Swakop Uranium (Pty) Ltd v Calitz* (SA-103/2021) [2023] (22 November 2023) at para 37.

[9] *First National Bank of Namibia v Katjatao* (HC-MD-CIV-ACT-CON-2022/00064) [2022] NAHCMD 289 (10 June 2022) at para 26.

be. In this regard parties must comply with undertakings they have committed themselves to, particularly those that have been reduced to writing.'

[55] I am compelled to agree with the arbitrator that the appellant accepted and signed the offer of a promotional position of HOD Finance/ Financial Controller dated 11 August 2022. This letter clearly indicates that the appellant's remuneration package will comprise the total cost to the company.

[56] In addition, I agree with the arbitrators' reasoning that although the appellant denies knowing about the letter dated 2 November 2015, such a letter was accompanied by the salary structure, which was signed by the appellant.

[57] Further to the above, I accept the arbitrator's findings regarding the appellant's denials of being aware of the first respondents' policies and guidelines and cannot find that another reasonable arbitrator, faced with the current evidence, would have ruled any differently.

[58] The appellant signed the salary structure that accompanied the letter dated 2 November 2015. When the appellant was promoted and his salary was increased to the total cost to the company, there was no objection when the appellant received his salary advice, which clearly illustrates the above.

[59] The doctrine of *pacta sunt servanda, as* highlighted in the above matter, exemplifies the importance of a party complying with undertakings they have committed themselves to, particularly those that have been reduced to writing.

[60] Shivute CJ in *Hugo v Council of Municipality of Grootfontein*[10] stated the following:

'It is a trite principle of the law of contract that a person who has signed a contractual document thereby signifies his assent to the contents of the document.'

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

[61] Furthermore, the appellant duly signed the remuneration structure dated 22 September 2015 and the offer of promotion, both of which clearly stipulated the new payment structure. In fact, the offer of promotion stated in as many words that the remuneration structure is an all-inclusive package. The appellant has been paid according to this structure since 2015. The appellant's remuneration was revised to be in line with the 2015 arbitration award.

[62] Maritz JA in *Namibia Broadcasting Corporation v Kruger and others*[11] 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.'

[63] Parker, in his book *Labour Law in Namibia,*[12] 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,*[13] 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'. (own emphasis)

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

[12] C Parker: *Labour Law in Namibia* 1st Ed Unam Press, at 32.

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

[64] I am of the view that after considering the facts of the matter, it cannot be said that there was a unilateral change or altering of the appellant's conditions of employment. I am further of the view that nothing in the finding of the arbitrator was wrong or perverse or that any other reasonable arbitrator would not reach the same conclusion as the arbitrator in casu.

Costs

[65] On the issue of costs, s 118 of the Labour Act[14] reads as follows:

'Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'

[66] Having considered s 118 and the fact the appellant is employed in a managerial position, it can be argued that the appellant acted in a frivolous and vexatious manner as was held by the arbitrator. However, the fact that the appellant hold a managerial position is not sufficient to make a finding that he acted frivolously or vexatiously. I will thus not make an adverse cost order against the appellant as per s118.

[67] I make the following order:

1. The condonation application is granted with costs.
2. The appeal is dismissed.
3. No order as to costs.

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J S Prinsloo

Judge

[14] Act 11 of 2007.

APPEARANCES:

APPELLANT:	J Comalie On behalf of F Bangamwabo Of FB Law Chambers, Windhoek
FIRST RESPONDENT:	J Janser Of Shikongo Law Chambers, Windhoek