



NOT REPORTABLE

CASE NO: SA 34/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Appellant

and

**NAMIBIA NATIONAL TEACHERS UNION
LABOUR COMMISSIONER
NICHOLAS MOUERS N.O.**

**First Respondent
Second Respondent
Third Respondent**

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 19 June 2020

Delivered: 29 April 2021

Summary: In a dispute between the parties, the first respondent's interpretation of the documents forming the foundation of the agreements took the position that its members are entitled to benefits under a collective agreement initially reached between the parties as well as the same benefits under a subsequent collective agreement. The appellant eschewed a different position namely that the first agreement lapsed on the implementation of the subsequent agreement 'thus

harmonising the two incentives into one' and that the members of the first respondent are therefore not entitled to double benefits.

The approach by this court, in considering the interpretation of contracts or other instruments, is that a contextual interpretation is to be preferred, is confirmed.

Interpretation is a unitary exercise in which both text and context are relevant to construing the contract. Interpretation is a matter for the court and not for witnesses.

Held, in successive collective agreements, a later agreement as a matter of common sense and logic supersedes or replaces a previous agreement where the agreements deal with exactly the same subject matter.

Held, in the circumstances the members of the first respondent are not entitled to benefits under both agreements – ie not entitled to double benefits.

Held, the appeal succeeds with costs and the order of the court *a quo* is set aside.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and SMUTS JA concurring):

[1] This is an appeal against the order of the Labour Court, sitting as an appeal court against an arbitrator's award, reversing the award.

[2] The first respondent lodged a dispute with the Office of the Labour Commissioner regarding the interpretation/application of two collective agreements on behalf of its members claiming outstanding payments for certain incentives. The

arbitrator, after hearing evidence, dismissed the dispute. The appeal by the first respondent against the arbitrator's finding succeeded and the Labour Court ordered the present appellant to pay certain incentives in terms of the collective agreements between the parties. Dissatisfied with the orders of the Labour Court, the appellant appealed against those orders.

Condonation applications

[3] The appellant filed three condonation applications in respect of its non-compliance with the rules of this court as well as an application for the reinstatement of the appeal.

[4] Firstly, appellant sought an order granting the appellant leave to file the exhibits' volume of the appeal record which was inadvertently not filed.

[5] Appellant's instructing attorney, Mr Ncube, in his accompanying affidavit stated that on 7 February 2020, when he consulted with appellant's instructed legal practitioner, his attention was drawn to 12 pages of the record which were missing. He explained that the missing documents are contained in a separate exhibits' volume which was not in his possession and had inadvertently not been filed as part of the appeal record. He stated that the appeal is of considerable importance to the parties and indeed the public and that the first respondent would not be materially prejudiced by the oversight. It was alleged that during a meeting with the legal practitioner of the first respondent, Mr Beukes, the latter had no objection to the filing

of the missing exhibits' volume and the annexures. Mr Ncube apologised for the oversight and for any inconvenience caused by the oversight.

[6] Secondly, appellant sought an order granting it leave to file the application for leave to appeal dated 8 March 2018 and the notice to oppose dated 19 March 2018.

[7] Mr Ncube explained in his affidavit that on 7 February 2020 during his consultation with the appellant's instructed legal practitioner, the exclusion of these pages were drawn to his attention. On 10 February 2020, during his meeting with Mr Beukes, the latter, had no objection to the filing of the application for condonation for failing to file the application for leave to appeal and notice to oppose the application for leave to appeal.

[8] Thirdly, the appellant sought an order granting the appellant leave to file page 33, Exhibit F, which was omitted from the exhibits' volume. Mr Ncube in his affidavit stated that on 18 March 2020 Mr Beukes advised him that page 33 (Exhibit F) was missing from the record and that this exhibit would be cited in their heads of argument. Mr Ncube stated that this was another unfortunate and accidental omission for which he took full responsibility for, apologised for the error and inconvenience caused to members of this court. He stated that in the circumstances, the interests of justice favour the condonation of this oversight.

[9] Fourthly, the appellant sought an order granting it leave to reinstate the appeal. Mr Ncube explained in his accompanying affidavit that after he had filed the

application for condonation in respect of the exhibits' volume in February 2020 he was of the opinion that the defect in the record would be cured if an order was made giving leave to file the exhibits' volume.

[10] He has however noted that the first respondent in its heads of argument has taken the position that the appeal has lapsed because the exhibits' volume was not separately certified by the registrar of the court *a quo*. He stated that the first respondent does not contend that the exhibits' volume is not the record of the exhibits which were before the court *a quo*.

[11] It was alleged by Mr Ncube that prior to filing the various condonation applications, Mr Beukes 'highlighted' that he had no objection to the filing of the missing exhibits' volume and the annexures and he was therefore surprised that Mr Beukes had raised the issue in the heads of argument. It was stated by Mr Ncube that this application was brought *ex abundanti cautela* and apologised for the oversight and inconvenience it may cause to members of this court.

[12] The first respondent opposed the condonation applications.

[13] Mr Beukes pointed out in his opposing affidavit that first respondent in its heads of argument filed on 19 March 2020 raised the point that the record filed did not comply with rule 11(1)(a) in that the exhibits' volume filed has not been certified as correct by the registrar of the court *a quo* and that the appellant has not attempted to comply with rule 11(1)(a) nor does it seek condonation for its non-compliance.

[14] The first respondent in its heads of argument pointed out that the appellant in the first two condonation applications failed to file an application for the reinstatement of the appeal for the late filing of the complete record and that the appeal had lapsed because of appellant's failure to file the complete record timeously.

[15] Mr Beukes stated that on 10 February 2020 he had a meeting with Mr Ncube during which he informed Mr Ncube that Exhibit C was missing from the record, that the exhibits' volume had not been filed, and that the application for leave to appeal is not part of the record and further that page 36 is missing from the exhibits' volume. Mr Beukes stated that he undertook to provide Mr Ncube with his complete record which he subsequently did provide.

[16] Mr Beukes confirmed that he informed appellant's legal practitioner that he would have no objection in respect of the filing of a condonation application, but added that he would only be able to make a decision once they have had regard to the condonation application, had discussed it with the instructed legal practitioner and had obtained instructions from the client.

[17] According to Mr Beukes, on 17 February 2020, he received an application for condonation from appellant for the late filing of the exhibits' volume and he on the same day informed Mr Ncube that the latter had not sought condonation for the application for leave to appeal, resulting in the subsequent filing of a second condonation application.

[18] Mr Beukes stated that on 18 March 2020 he informed Mr Ncube that page 33 was still missing from the exhibits' volume and enquired whether appellant had filed a bundle of authorities for first respondent. This prompted Mr Ncube on 19 March 2020 to file a third condonation application for leave to file page 33, Exhibit F, which was omitted from the exhibits' volume.

[19] Mr Beukes pointed out that appellant failed to deal with the condonation applications in its heads of argument.

[20] It must be mentioned that the registrar on 23 March 2020 informed the parties that the appeal hearing would be postponed and was later set down for 19 June 2020.

[21] Mr Beukes further stated that appellant failed to comply with rule 21(1) of the Rules of the Supreme Court which provides that the appellant must lodge a bundle of authorities simultaneously with the lodging of its heads of argument which heads of argument was originally filed on 24 February 2020. Mr Beukes contended that only on 3 June 2020 did the appellant file its properly bound heads of argument and bundle of authorities but failed to seek condonation for its non-compliance with rule 21(1).

[22] Mr Beukes contended that the condonation application lacks the basic requirements for a party to be successful since the appellant firstly, failed to seek condonation for non-compliance, secondly, failed to offer an acceptable and reasonable explanation for the delay, including the timing of the application for

reinstatement, and lastly appellant failed to deal with the prospects of success in the appeal. Mr Beukes submitted that a case had not been made out for condonation for the non-compliance with rule 11(1)(a) and prayed for an order dismissing the reinstatement application with costs.

[23] Mr Beukes, however, confirmed that first respondent would not be materially prejudiced by the appeal being reinstated, save for the fact that the appellant having filed at least four interlocutory applications with the last one being filed at the 11th hour, resulting in first respondent having to consider same and address same instead of focusing on proper preparation for the appeal hearing.

[24] Mr Budlender, who appeared on behalf of the appellant, submitted with reference to Mr Ncube's affidavit, that the exhibits' volume was served timeously on the first respondent but through an oversight was not filed at the court when the rest of the record was filed. It was submitted that as soon as the oversight was discovered the appellant applied for condonation for leave to file the exhibits' volume. He submitted that there are reasonable prospects of success on the merits of the appeal and submitted that the appeal is of major public importance and that the first respondent has not opposed the admission of the exhibits' volume. Mr Budlender tendered costs on an unopposed basis because it was contended that the application was not opposed.

[25] Dealing with the point taken in first respondent's heads of argument that the appeal has lapsed and there is no application for reinstatement of the appeal, based

on the fact that the exhibits' volume had not been separately certified by the registrar of the court *a quo*, Mr Budlender submitted that there could hardly be a more technical and non-material complaint than this complaint by the first respondent. In this regard it was submitted, in the first instance, that the initial record was certified by the court *a quo*, secondly, if the first application is granted, the exhibits' volume will be part of the appeal record before this court. It was submitted that it is not disputed that this exhibits' volume was part of the exhibits before the court *a quo* and it is common cause that the first respondent suffered no prejudice. It was further submitted that this oversight was not of such a nature that it was so glaring, flagrant, and inexplicable that condonation should be refused without the need to consider the merits of the appeal.

[26] Mr MacWilliam who appeared on behalf of the first respondent referred to the litany of breaches of the Rules of Court but conceded that if the condonation is granted and the appeal reinstated, first respondent cannot say that it has been prejudiced. Costs had been tendered with the result that the decision in respect of the three applications for condonation and the application for reinstatement is left in the hands of this court.

[27] I shall now proceed to consider the prospects of success on appeal as the second leg of the condonation application and shall first deal with the factual background which is common cause.

Factual background

[28] The first respondent is the exclusive bargaining agent on behalf of teachers at primary and secondary levels, principals as well as educators at colleges and training centres. The first respondent and the appellant together with the Namibian Public Workers Union (NAPWU) entered into a Memorandum of Understanding (MoU) on 23 January 2009 in terms of which the parties agreed and endorsed that 'the matter of School Principals and incentives for teachers submitted to the Office of the Prime Minister be finalised and implemented from 1 April 2009'. Subsequently, the Office of the Prime Minister issued a circular dated 11 September 2009 introducing a monthly recruitment and retention incentive for qualified teachers at rural schools in specific amounts.¹

[29] As a result of the non-implementation of the MoU read with the circular from the Office of the Prime Minister, the first respondent declared a dispute with the Office of the Labour Commissioner. The proceedings before the Labour Commissioner culminated in a document which was referred to by the parties as a 'collective settlement agreement' and was signed by the parties on 10 November 2010. The terms of this agreement insofar as it relates to the recruitment and retention incentives for qualified teachers reads as follows:

Implementation:

¹ Group A – remotest – N\$1750 per month; Group B – remote – N\$1150 per month and Group C – least remote – N\$750 per month.

- 1.1 that the GRN² will implement (pay) the recruitment and retention incentives to qualified teachers for fifteen (15) months (1st April 2009 – 31st June 2010) as a once off payment before **20th October 2010**,
- 1.2 that the remaining nine (9) months (July 2010 – March 2011) recruitment and retention incentives payment will be implemented (paid) **on or before the 20th June 2011 provided that the National Budget is approved a month before this date**, and
- 1.3 that as from the 1st April 2011, incentives to qualified teachers will be incorporated into the Ministry's Budget 2011/2012 and be paid on a monthly basis.'

[30] The incentive payable to qualified teachers was to recruit and retain qualified teachers in remote areas. The incentive did not accrue to all teachers such as those who were unqualified or to public service members or to other educators.

[31] Thereafter, on 8 November 2012 the parties³ entered into a collective agreement in terms of which the parties agreed to introduce a monthly incentive allowance for all public service staff members stationed at duty stations classified as remote and hardship areas according to certain categories with effect from 1 November 2012. These categories and the amounts payable thereunder were exactly the same as the amounts and categories for the incentives which had been agreed during 2009 in respect of qualified teachers. This collective agreement did not contain any express provision excluding qualified teachers.

² The Government of the Republic of Namibia.

³ The appellant and first respondent, together with NAPWU.

[32] This collective agreement was not implemented as initially agreed and on 7 October 2015 the parties signed an addendum to the November 2012 agreement to the effect that the effective date for the payment of the remoteness and hardship allowance would be 1 April 2015.

[33] In a letter dated 5 October 2015 to the Prime Minister the first respondent sought confirmation of its understanding of the collective agreement of 8 November 2012, namely that the 'envisaged incentive is for all staff members, including qualified teachers'. It was also stated that the enquiry was intended to ensure that the November 2012 incentive was not to be 'confused' with the 2009 incentive which applied specifically to qualified teachers.

[34] The Prime Minister responded to the first respondent's letter a month later on 5 November 2015 pointing out that the November 2012 agreement extended the incentive awarded to teachers in 2009, to all staff members stationed at duty stations classified as remote and hardship areas 'thus harmonising the two incentives into one'.

[35] The letter further stated that both incentives were tailored to address the same concern namely the employer's concern relating to the attraction and retention of staff members in remote areas and concluded that the envisaged 2012 incentive was for all staff members including qualified teachers and further that the 2009 incentive lapsed on the implementation of the 2012 incentive.

[36] In the Public Service Management Circular no. 3 of 2016 dated 26 February 2016, the Office of the Prime Minister announced the introduction of new public service staff rules on the remoteness and hardship allowance in terms of the 7 October 2015 addendum retroactively from 1 April 2015. One of the implementation measures stated in the circular was that the back-pay for eligible staff members would be paid by the end of February 2016 and thereafter the appropriate allowance would be paid monthly effective from the end of March 2016.

[37] The first respondent in its summary of dispute attached to the referral of dispute to conciliation or arbitration⁴ stated that the qualified teachers, effective from 1 March 2016, no longer received the 2009 incentive allowance as it had lapsed but commenced receiving the 2012 remote and hardship allowance.

[38] The first respondent did not agree with the interpretation of the agreements by the Office of the Prime Minister and through its legal representative in correspondence pointed out that it 'does not appear after a thorough reading of the 2012 agreement that qualified teachers who are also public service "staff members" are omitted from the agreement, and that the 2009 Recruitment and Retention incentive of qualified teachers in remote areas lapses on the implementation of the 2012 incentive'. Further correspondence exchanged with the Office of the Prime Minister amounted to naught and as a result the first respondent filed a complaint with the Office of the Labour Commissioner.

⁴ Form LC 21.

Findings of the Labour Court

[39] The court *a quo* referred to the view the arbitrator took of questions posed to him by the parties during the arbitration proceedings, namely whether the 2009 agreement had been complied with and how and when did the 2009 agreement and incentives lapse? The court *a quo* observed that the arbitrator concluded that the 2009 agreement only pertained to the 2009/2010 and 2010/2011 financial years; that the qualified teachers continuously received their incentives as per the 2009 agreement up and until the 2012 agreement came into effect and that the 2009 agreement lapsed after the appellant had complied with it and when the 2012 agreement came into force; the arbitrator also held that there was no unilateral change of conditions of employment by the appellant.

[40] The issues for determination in the court *a quo* was summed up as follows: firstly whether the qualified teachers' incentives became a term and condition of the qualified teachers' employment; and secondly whether the terms which became the qualified teachers' conditions of employment are capable of being varied unilaterally through the introduction of the remoteness allowance in 2012. If not, the next question is whether the incentives lapsed. If the incentives did not lapse, the further question is whether the Government (appellant) must be ordered to pay the qualified teachers' incentives from 1 April 2009 to date of determination of that question.

[41] In respect of the first question the court *a quo* agreed with the view of the arbitrator where the arbitrator relying on the matter of *SAMWU v City of Tshwane & another*⁵ stated:

‘ . . . it became clear that neither the applicant nor respondent disputed the fact that the 2009 incentive became a condition of employment and thus accrued as a right to the employee.’

[42] The only issue for determination, as formulated by the court *a quo*, was thus whether the qualified teachers’ incentives were capable of being amended after being incorporated into their conditions of employment.

[43] The first respondent (as appellant, in the court *a quo*), relying on case law contended that the appellant (as first respondent, in the court *a quo*) unlawfully and unilaterally changed the conditions of employment by introducing the second remoteness allowance without the consent of the qualified teachers.

[44] The appellant on the other hand contended that the incentives granted to the qualified teachers were not unilaterally changed when the incentives were extended to all staff members because ‘the two benefits were harmonised and became one benefit’.

⁵ (2014) 35 ILJ 241 (LC) (30 May 2013) para 18.

[45] In considering the second question posed, the court *a quo* reasoned that the starting point was to enquire into the purpose of the two benefits when they were introduced.

[46] The court *a quo* pointed out that in respect of the 2009 incentives for qualified teachers the purpose as stated in the circular was 'intended to support the recruitment and retention of qualified teachers to rural schools'.

[47] In respect of the remoteness allowance policy of 2012, it was described as: 'a remoteness and hardship allowance paid to a staff member stationed at a duty station in an area specified as remote in recognition of the hardship he or she endures as a result of the limited availability of basic services, amenities and infrastructures'. Furthermore another reason for the incentive was added namely, 'the geographical distance from the main service centres'.

[48] The court *a quo* reasoned that the purposes were not the same, since the rationale in respect of the qualified teachers was to address the Government's problem in recruiting and retaining qualified teachers in the rural schools; that the incentive formed part of a comprehensive package with the express aim of encouraging qualified teachers to go to schools in the rural areas and in doing so improve the standard of education in such areas to the national level; and that the success or failure of this incentive was to be evaluated on an annual basis with a complete review to take place by the end of the 2010/2011 financial year.

[49] The court *a quo* further reasoned that in contra-distinction the purpose of the remoteness allowance payable to public staff members, as articulated in the letter from the Office of the Prime Minister dated 26 February 2016, was 'premised on the recognition of the hardship endured by staff members stationed at duty stations that are identified and classified as remote due to limited availability of basic services, amenities, facilities and infrastructure as well as the geographic distance from the main centres'.

[50] The court *a quo* concluded that the qualified teachers' incentives were separate and distinct from the remoteness allowance payable to all staff members of the public service stationed in remote areas. It was reasoned that the one was 'an incentive' and the other 'an allowance' and that the allowance was not aimed to entice or incentivise a staff member to move and stay in the remote area. He or she is already stationed there and is thus paid an allowance for the hardship he or she is enduring.

[51] In respect of whether or not the incentive in respect of qualified teachers lapsed, the court *a quo* pointed out that the 2009 agreement contained no expiry date, ie no time for lapsing of the agreement was stipulated and furthermore that the agreement contained a non-variation clause thus the agreement could not be amended without the written consent of the first respondent. The 2009 agreement therefore did not lapse.

[52] In respect of the question whether the 2009 agreement was amended by or harmonised with the 2012 collective agreement, the court *a quo* concluded that it was not the case, since there is no clause in the 2012 agreement proposing or purporting to replace or amend the 2009 agreement. No reference at all was made in the 2012 agreement to the 2009 agreement. The 2009 agreement was thus not amended by the 2012 agreement. The court *a quo* concluded that the Government (appellant in this appeal) was obliged to pay the qualified teachers their incentives in terms of the 2009 agreement and to pay outstanding incentives due to the qualified teachers from 1 April 2015 to date of judgment.

Issues on appeal

[53] In its heads of argument the appellant has narrowed down the appeal to the following three issues:

- firstly, whether the 2009/2010 agreement lapsed;
- secondly, if it had not lapsed, whether the 2012/2015 agreement incorporated or superseded the 2009/2010 agreement; and
- thirdly, whether the 2012/2015 agreement imposed an obligation on the Government which is additional to the 2009/2010 agreement in respect of qualified teachers in remote and hardship areas.

Submissions by the appellant

[54] Mr Budlender on behalf of the appellant addressed the court on what he termed as five 'core' issues.

[55] Firstly, the respondent sued on the 2009 MoU which was entered into by the parties on 23 January 2009 – that was its cause of action.

[56] In order to underscore this proposition Mr Budlender submitted that in para 5.1 of the first respondent's summary of dispute which served before the arbitrator, the first respondent stated that the parties agreed and endorsed the matter of school principals and incentives for teachers be finalised and implemented from 1 April 2009. Para 5.2 of the summary of dispute stated that the MoU was implemented by a collective agreement concluded between the parties on 10 November 2010. This was an agreement how to implement the 2009 agreement.

[57] The relief sought by the first respondent as contained in the summary of dispute, it was submitted by Mr Budlender, firstly, an order declaring that the collective agreement dated 23 January 2009 was a valid and existing agreement; secondly, an order declaring that the collective agreement dated 23 January 2009 did not lapse on the implementation of the 2012 collective agreement; thirdly, that the appellant pays the qualified teachers in remote areas their recruitment and retention incentive as per the 2009 collective agreement read with the 2010 implementation collective agreement as from 1 March 2016. From the aforementioned it should be clear, it was submitted, that what the first respondent sought to do was to enforce the 2009 agreement, an agreement which had lapsed. This agreement, it was submitted, in the alternative, was excipiable because it was silent in respect of the amount payable by the appellant.

[58] The second core issue, it was submitted, was that on its own terms the 2009 agreement was to govern two years, ie 2009/2010 and 2010/2011. It was submitted that in para 2 of the 2009 MoU the 'governing clause' stated that the parties concluded negotiations for 2009/2010 and 2010/2011 financial years. The negotiations were therefore only for those two financial years.

[59] The letter from the Office of the Prime Minister dated 11 September 2009, it was submitted, transformed the principle commitments of the 2009 memorandum of agreement into a legally binding agreement and undertaking. This letter underlined the duration of the commitment and under the heading, 'Duration' in paragraph (d) it is stated that: 'As the allowance is an incentive to support the recruitment and retention of qualified Teachers to rural schools, the success or failure therefore needs to be evaluated on an annual basis with a complete review to take place by the end of the 2010/11 financial year'. It was submitted that this suggests that this is not a permanent arrangement – it was to be reviewed after two years.

[60] It was further pointed out that the letter from the Office of the Prime Minister stated in para (e) of that letter, that the incentive is not permanent in nature and that a complete review would be needed at the end of the validity of the current MoU. This it was submitted was another recognition that the MoU is limited in period and does not run forever.

[61] There was a delay in implementing the incentives and the first respondent declared a dispute. This resulted in a collective settlement agreement between the parties. In terms of the collective settlement agreement dated 10 November 2010 and under the topic 'Implementation' the parties, it was submitted, recognised that the 2009 memorandum of agreement would come to an end at the close of the 2010/2011 financial year, but Government nevertheless undertook that it would continue to pay⁶ for the incentives as from 1 April 2011.⁷ It was submitted that paras 1.1 and 1.2 under the heading 'Implementation' underlines that the parties agreed that the agreement would cover a period of only two years. In para 1.3 the Government (the appellant) undertook to continue to pay the incentives to qualified teachers. This undertaking it was submitted was not part of the 2009 agreement.

[62] In respect of the third core issue counsel submitted that there are seven clear statements in the documents before court regarding the fact that the 2009 agreement was not permanent, was not indefinite and came to an end in March 2011. Counsel referred the court to the relevant statements to substantiate this core issue. It was submitted that these statements appear in the heads of argument of the appellant, none of which was answered by the first respondent in their heads of argument – this was so, it was contended, because there is no answer to it (ie to the aforementioned seven statements).

[63] The fourth core issue, it was submitted, was that the 2012 collective agreement dealt, as far as the incentive allowance for qualified teachers in remote

⁶ As reflected in para 1.3 of the collective settlement agreement.

⁷ The terms of the 'implementation' are set out in para [29] *supra* of this judgment.

areas is concerned, with the same amounts of money, the same areas are covered, it was for the same purpose – it was the same benefit as the 2009 agreement. The only difference was that the 2012 agreement extended the benefit now to all public service employees.

[64] The fifth core issue was that if the 2009 agreement had not lapsed but had some sort of ‘afterlife after March 2011’, it was superseded by the new collective agreement in 2012 and that the 2012 collective agreement did not provide for a second identical benefit in addition to what was provided in the 2009 agreement. It simply confirmed and repeated the 2009 benefits and extended it to all public servants in rural areas. It was submitted that in the nature of collective agreements, and as a matter of common sense where two collective agreements dealt with the same matter, as in this instance, the latter agreement supersedes a prior agreement. An employee or staff member is thus not entitled to a double benefit, as the first respondent contended.

Submissions by the first respondent

[65] Mr MacWilliam on behalf of the first respondent referred to relevant legal principles which support the finding of the court *a quo* that the 2009 incentives became part of the conditions of employment of the qualified teachers working in remote areas, and which was unsurprisingly, so it was submitted, not challenged on appeal, as well as the finding that such a condition of employment may not be unilaterally altered by an employer.⁸

⁸ Section 50(1)(e) of the Labour Act 11 of 2007, *SAMWU v City of Tshwane & another* (2014) 35 ILJ 241 para 18 and *Smit v Standard Bank of Namibia* 1994 NR 366 (LC) at 370J-371A.

[66] It was submitted that a basic term and condition of employment is not capable of being 'incorporated or superseded' by another agreement without having complied with the provisions of the earlier agreement. It was further submitted on the authority of *Smit v Standard Bank (supra)* that the only way in which a change in the contract of employment could be lawfully effected between the parties was by way of negotiation and mutual agreement.

[67] It was submitted that whilst para 2.1 of the MoU sets out the salary increments and allowances for the following two years, that could not have meant all staff members were on expiry of the two year period simply no longer entitled to those salaries and allowances with effect from 1 April 2009. Furthermore, the origin of the incentive, found in para 2.5.1 of the MoU, provided that it had been agreed by the parties that the incentive would be effective from 1 April 2009.

[68] In respect of the collective settlement agreement of 2012 it was pointed out that that agreement provided for 'the improvement of salaries and benefits for staff members'. Thus it was submitted that for a benefit to be *improved*⁹ an additional or increased benefit had to be provided and this was precisely what the 2012 agreement did – by introducing a new allowance. The improvement was that the qualified teachers got an allowance in addition to the incentive.

⁹ Emphasis provided.

[69] It was submitted on behalf of the first respondent that the purpose of the allowance and the reason for it being paid to all staff members was expressly stated to be 'in recognition of the hardship he or she endures as a result of the limited availability of basic services, amenities and infrastructure' in contra-distinction to the purpose of the incentive, which was to attract qualified teachers to rural schools.

[70] It was submitted that in the 2012 agreement there is not the slightest suggestion that the pre-existing incentive had been incorporated into or superseded by the allowance or that the 2012 agreement took anything away from the 2009 agreement.

[71] Regarding the question whether the 2009 agreement had lapsed, it was submitted that there was nothing in any of the agreements that the 2009 agreement had lapsed ie there was no provision in the 2009 agreement as to when it would terminate.

[72] It was submitted in respect of the question whether the 2009 agreement had been superseded by or incorporated into the 2012 agreement, that the appellant effectively argued novation which is essentially a question of intention and consensus. Novation it was submitted occurs when parties intend to replace a valid contract with another valid contract. In this regard, in the context of the 2012 agreement there is no indication that this agreement replaced or amended the 2009 agreement. It was submitted that no case of novation had been made out by the appellant.

[73] In respect of the question whether the 2012 agreement imposed an additional obligation it was submitted that it is plain that the 2012 agreement did not in any way detract from the incentive which was created by the 2009 agreement and that the 2012 agreement introduced a new benefit for all staff members in remote areas and that both agreements apply for an indefinite period. The qualified teachers were therefore entitled to a double benefit – under the 2009 agreement as well as under the expanded 2012 benefit.

Contextual interpretation

[74] In interpreting the two agreements under discussion, Mr Budlender as well as Mr MacWilliam are protagonists for a contextual interpretation of the relevant documents, however in the light of their own respective interpretations, with divergent results.

[75] This court in *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & another*¹⁰ adopted the approach in the South African case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹ where the following passages appear:

[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the

¹⁰ 2017 (3) NR 853 (SC) para 39. See also *Torbitt & others v International University of Management* 2017 (2) NR 323 (SC) para 26.

¹¹ 2012 (4) SA 593 (SCA) para 18-19.

ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the “emerging trend in statutory construction”. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other.¹²

[76] In *Egerer & others NO v Executrust (Pty) Ltd & others*¹³ Damaseb DCJ stated the following:¹⁴

‘The construction of a contract such as a trust deed is a matter of law, and not of fact. Its interpretation is therefore a matter for the court and not for witnesses. Interpretation is “essentially one unitary exercise” in which both text and context are relevant to construing the contract. The court engaged upon its construction must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document itself. Consideration of the background and context is an important part of interpretation of a contract. Since

¹² Footnotes omitted.

¹³ 2018 (1) NR 230 (SC) para 34.

¹⁴ Only part of the paragraph quoted.

context is an important determinant of meaning, when constructing a contract, the knowledge that the contracting parties had at the time the contract was concluded is a relevant consideration.'

[77] The parties seem to be *ad idem* that the 2009 agreement read together with the letter from the Office of the Prime Minister dated 11 September 2009, introduced an incentive to qualified teachers in remote rural areas, and that such an incentive became a condition of employment of the teachers in question. Furthermore that a term of such incentive is that it may not lawfully be varied unilaterally, only by way of negotiation and mutual agreement as provided for in the non-variation clause.

[78] In order to answer the question whether the qualified teachers' incentives were amended by the 2012 agreement or had lapsed or was harmonised with the 2009 agreement, the court *a quo* was of the view that the starting point would be to enquire into the purpose of the two benefits as they were introduced.

[79] The court *a quo* found that the 2009 and 2012 agreements served different purposes. The one incentive 'was aimed at enhancing the quality of education at the schools situated in the remote rural areas. It was aimed at attracting and retaining qualified teachers in the remote rural schools'. The other one, an allowance, was 'premised on the recognition of the hardship endured by staff members stationed at duty station(s) that are identified and classified as remote . . .'. The 'purpose of the allowance was to compensate a staff member for the hardship he or she endures by being stationed at a remote duty station. The allowance was not aimed not enticed or incentivised a staff member to move and stay in the remote area'.

[80] The court *a quo* underlined these differences by stating that even the designation of the two benefits clearly indicates the difference. The one is ‘an incentive’ and the other ‘an allowance’ and with reference to a dictionary¹⁵ pointed out the meaning of each appellation.

[81] As stated in *Endumeni (supra)* and *Egerer* a court of law must in the interpretation of instruments consider ‘the context and language together, with neither dominating over the other’.

[82] Considering the 2012 agreement as well as the remoteness allowance policy¹⁶ for public servants the following is apparent:

Firstly, in the 2012 collective agreement (para 2.3) reference is made to ‘an *incentive allowance*¹⁷ for staff members’. The inference is clear, in my view, namely that the incentive is an allowance. The MoU and the collective settlement agreement of November 2010 refers just to an ‘incentive’ without stating the nature of the incentive. As a matter of common sense an incentive must be qualified and one would naturally ask oneself: what is this incentive? The answer is stated unambiguously in the letter dated 11 September 2009 from the Office of the Prime Minister that it ‘is an *allowance*¹⁸ payable on a monthly basis . . .’. There is in my view no substance in

¹⁵ Collins Dictionary of the English language.

¹⁶ To which the court *a quo* in its judgment also referred to.

¹⁷ Emphasis provided.

¹⁸ Emphasis provided in para (b) of the letter.

differentiating between an 'allowance' and an 'incentive'. The 2012 agreement does not do so.

[83] In the remoteness allowance policy¹⁹ the following is stated:

'The working and living conditions of staff members at duty stations in remote areas are challenging, which tend to cause a certain degree of hardship. These challenges refer to the availability of various types of services. An incentive recognises this and *encourages staff members to go to and continue to serve in these areas.*'²⁰

[84] The view held by the court *a quo* that an allowance was not aimed at enticing a staff member to move and to stay in the remote area, and that a staff member received an allowance because he or she is 'already stationed there' is gainsaid by this provision of the remoteness allowance policy (emphasised above) namely that it was designed to encourage staff members to go to these remote rural areas. Staff members include all public servants, not only qualified teachers – this much is common cause.

[85] In my considered view it must be recognised that the 2009 and 2012 agreements deal with the same matter and in the same terms. On the one hand, the MoU read with the collective settlement agreement and further read with the letter from the Office of the Prime Minister (dated 11 September 2009), and on the other hand the 2012 collective agreement, deal with the same benefit, with exactly the same amounts of money, the same parties are involved, the same areas are covered, the beneficiaries are the same as far as these teachers are concerned and it is for the

¹⁹ Exhibit G1, p 37 of the policy para 5.21 under the heading 'Guiding Principles'.

²⁰ Emphasis provided.

same purpose. These similarities undermine the very foundation of the finding of the court *a quo* namely that it is premised on two separate things for two separate purposes. The only difference between these agreements was that the 2012 collective agreement extended the benefit to all public service employees.

[86] The submission on behalf of the first respondent that the 2012 collective agreement refers to an *improvement* of benefits which implies that the qualified teachers are entitled to the benefits under both agreements is misconceived. This is so because of the language used in the 2012 agreement. Under the heading 'Agreements' the 2012 agreement reads as follows:

'The parties agreed to the improvement of salaries and benefits for staff members as follows:'

[87] The improvement of benefits was not exclusively for qualified teachers. There was therefore in my view an *improvement* of benefits for all staff members since the existing benefit received by a relatively small number of public servants (teachers) was now extended to a larger number ie to all public servants.

[88] In respect of the question whether the 2009 collective settlement agreement had lapsed there is in view of the provisions of paras 1.1 and 1.2 of the agreement read together and in isolation from the submission by Mr Budlender that the parties had agreed that the duration of this agreement would be limited to 24 months ie until the end of March 2011 and this agreement had thus lapsed at the expiration of the 24 months period.

[89] However para 1.3 of the agreement which provides 'that as from 1 April 2011, incentives to qualified teachers will be incorporated into the Ministry's Budget 2011/2012 and be paid on a monthly basis' leaves the door open for an interpretation that the intention of the parties was that the provisions of the 2009 agreement should extend beyond the 24 month period referred to in paras 1.1 and 1.2.

[90] However because of the view I take on the question whether or not the 2012 agreement incorporated or superseded the 2009 agreement, it is not necessary to decide whether or not the 2009 agreement had lapsed.

[91] The lack of any reference to the 2009 agreement in the 2012 agreement does not justify an interpretation that the qualified teachers were entitled to a benefit under each agreement. I have pointed out (*supra*) that the similarities between the two agreements took away the very foundation of the finding of the court *a quo* that the two agreements served different purposes.

[92] My finding that the purpose of the two agreements was the same, greatly undermines the contention of an entitlement to a double benefit. If one were to develop the submission by Mr MacWilliam in respect of the contention that the 'allowance' and the 'incentive' co-exist for an indefinite period because nothing was taken away from the 2009 agreement, then in a situation where the parties would subsequent to the signing of the addendum eg agree to an increase doubling the monthly payments, the qualified teachers would be entitled not only to the 'incentive'

as well as the 'allowance', but also to a third payment in respect of the monthly increase which may be agreed by the parties. Therefore since the 2009 agreement was in effect a lifetime incentive, it may be argued, the first respondent may never agree to abandon it – this would perpetuate a most extraordinary and unfortunate result.

[93] The submission that the incentive allowance referred to in the 2012 agreement is applicable only to staff members who are already stationed at remote rural areas means that staff members (including qualified teachers) enticed afterwards (after the date of 1 April 2015 referred to in the addendum) to go and work at those remote stations are disqualified from receiving this allowance. This is an untenable situation since it would discriminate against qualified teachers who were not already stationed at those duty stations but who are eager to go and work there.

[94] If in the 2012 agreement the words 'incentive allowance' are applicable to staff members *already at remote duty stations* then how, if it is not an incentive to go and work at remote duty stations, is one to interpret the word 'incentive'? The court *a quo* correctly, but in relation to the 2009 agreement, stated that the purpose of the incentive was 'intended to support the recruitment and retention of qualified teachers to rural schools'. The incentive allowance applicable to all staff members must of necessity and as a matter of interpretation bear the same meaning. The purpose of the reference to the word 'incentive' in the 2009 collective settlement agreement and that in the 2012 collective agreement, logically, must be the same. The word 'incentive' in my view is capable of only one meaning in both agreements and that is

to encourage staff members to work at a place which is harsh and inhospitable as far as services are concerned.

[95] In my view, the submission by Mr Budlender, that it is implicit in the nature of periodic collective labour agreements that they are superseded or replaced by their successors where they deal with exactly the same subject matter, as a matter of common sense and logic, has merit.

[96] If the 2012 agreement had been intended to bring about the anomalous result that some staff members (qualified teachers) in remote areas were to receive double the incentive received by their colleagues (who are not qualified teachers) in those areas, this would have been made clear.

[97] Regarding the contention on behalf of the first respondent that the appellant had unilaterally changed the conditions of employment in respect of the qualified teachers, it should be apparent from the view I took in the interpretation of the provisions in the relevant documents, that the parties had agreed in writing, evidenced by the 2012 collective agreement,²¹ to alter or amend the 2009 agreement. The conditions of employment contained in the 2009 agreement was thus not unilaterally changed by the appellant. In my view, it is entirely an opportunistic approach by the first respondent to advance the argument that because in the 2012 collective agreement the incentive benefit was extended to all public servants in remote areas they are entitled to a double benefit.

²¹ In particular para 2.3.

[98] I endorse the approach in *Endumeni Municipality*²² and in *Egerer* in which a contextual interpretation is favoured and where the court held that a 'sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'. In my view, it would be insensible and unbusinesslike to accord an interpretation advanced by and on behalf of the first respondent, to the documents under consideration.

[99] It is trite that in condonation applications an applicant must provide a full, detailed and accurate explanation for non-compliance with the rules of this court and must deal with the prospects of success on appeal regarding the merits of the appeal.

Factors which are relevant in the consideration of a condonation application include:

' . . . the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.'²³

[100] It has been held that these 'factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case.'²⁴

²² *Supra* at p 18.

²³ *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 68.

²⁴ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 8.

[101] In the present applications, although the matter could have been dealt with in a better way by appellant's instructing legal practitioner, he has given an explanation for the non-compliance with the rules and has soon after the non-compliances had been brought to his attention filed a condonation application. In respect of the exhibits' volume, the first respondent does not take issue with the fact that this was the exhibits' volume before the court *a quo* and the *bona fides* of the application is not in question. Counsel appearing on behalf of the first respondent frankly conceded that the first respondent would not be prejudiced should the appeal be reinstated, and counsel appears to be satisfied with the costs tendered by the appellant.

[102] Even if one accepts the criticism against the conduct of Mr Ncube, as justified, the non-compliance cannot be characterised as glaring, flagrant, and inexplicable.

[103] As indicated (*supra*) the prospects of success on the merits of the case are good and there is no reason in my view to non-suit the appellant. The case is of importance to both appellant which would need to expend public funds as well as to the first respondent as representative of the qualified teachers who expect substantial arrear payments of allowances.

[104] I am of the view that in the circumstances the condonation applications should be granted and to the extent necessary the appeal is reinstated.

[105] In respect of the narrowed-down issues in this appeal the following are the findings of this court:

- (a) It is not necessary to decide whether or not the 2009 agreement lapsed.
- (b) Whether or not the 2009 agreement had lapsed, it was incorporated or superseded by the 2012 agreement because it deals with exactly the same subject matter, and
- (c) The 2012 agreement, because of the conclusion reached in para [105] (b) imposed no additional obligation on the appellant in respect of qualified teachers in remote and hardship areas.

[106] In view of the fact that there are prospects of success on appeal the following orders are made:

- (a) The non-compliance with the provisions of the rules of court is condoned and the appeal is reinstated.
- (b) The appeal is upheld, with costs, including the costs of one instructing legal practitioner and one instructed legal practitioner.
- (c) The order by the Labour Court is set aside and replaced with the following:

'The claim is dismissed.'

HOFF JA

MAINGA JA

SMUTS JA

APPEARANCES

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Instructed by Government Attorney

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