REPORTABLE

CASE NO: LC 38/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NATIONAL HOUSING ENTERPRISES	**APPELLANT**
and	
EDWIN BEUKES	**FIRST RESPONDENT**
LAUPLEZWI SLUYSEN SAMUPOFU	**SECOND RESPONDENT**
GOTTFRIED MBAHIMUA UAENDERE	**THIRD RESPONDENT**
AARON HAGE STEPHANUS	**FOURTH RESPONDENT**
A L ISAAK N O	**FIFTH RESPONDENT**
SIMON PHILLEMON NUUJOMA	**SIXTH RESPONDENT**
TJIJANDEUA DIMETRIUS KAMUNDU	**SEVENTH RESPONDENT**
EVELYNE UANIVI	**EIGHTH RESPONDENT**
LORETTE PHILANDER	**NINTH RESPONDENT**
CATHLEEN EILEEN MULLER	**TENTH RESPONDENT**
GUSTAV HANGANEE MUPURUA	**ELEVENTH RESPONDENT**

CORAM: SMUTS, J

Heard on: 05 May 2011

Delivered on: 13 May 2011

JUDGMENT

SMUTS, J [1] This is an appeal against the judgments and orders of the Chairperson of the District of Labour Court (DLC), Windhoek, Ms L Shaanika, given in respect of an unfair dismissal complaint brought by the respondents in this appeal, whom I shall refer to as the complainants, against the appellant, the National Housing Enterprise (NHE). As its name suggests, it is a parastatal engaged in the provision of housing in Namibia. The Chairperson of the DLC fond in favour of the complainants. The appeal is directed against her findings, primarily on the basis that NHE was denied its right to a fair trial by reason of the manner in which those proceedings were conducted by the Chairperson.

[2] The complainants approached the District Labour Court with a claim of unfair dismissal following a retrenchment exercise conducted by NHE over an extended period. Shortly stated, the objectives of the retrenchment exercise were to re-organise the structures of the NHE to provide for a more streamlined and efficient organisation where qualifications appropriate for those positions were set. As a consequence of this exercise, several positions became redundant and employees could apply for posts within the resultant new structure. Although the number of posts ultimately increased within the new structure, the structure itself was different and NHE's employment costs were reduced by 12 – 13%. Several management positions in what was described as a top heavy structure, were done away with. Consequently, the salary bill for the management cadre was reduced by 20%.

[3] These retrenched employees essentially fell into two categories although there would appear to have been an overlap between the two. Some positions became redundant and fell away entirely, whilst some redundant positions were replaced by new positions within the structure with specific minimum qualifications attached to them. The

complainants were affected either by their positions failing away entirely or being unable to meet the qualifications for new or equivalent positions within the new structure.

[4] It was open to affected employees to apply for positions within the new structure. If they did not do so or they did not meet the qualifications of those positions, they were consequently retrenched and their services terminated by the NHE.

[5] The complainants fell into different categories. Some were members of the management whose positions fell away whilst others were employees within bargaining unit who were unable to meet the qualifications for new positions within the structure which may or may not been equivalent to the positions they previously occupied. There was at third category which included an employee whose position had fallen away but had been offered an alternative position within the new structure at the same salary and benefits of her previous position, but the new position had not as yet been graded.

[6] Certain of the complainants initiated their proceedings by way of a joint complaint. The cause of action referred to in the complaint was merely stated as “unfair dismissal” but there is reference to an attachment which sets out certain complaints about the retrenchment exercise. The relief claimed in the compliant was only reflected as re-instatement, although with reference to the sum of money claimed on the complaint form, it was however stated on the form that these are to be determined. The complaint is thus one for re-instatement without properly specifying whether compensation is also claimed. This complaint was prepared prior to those complainants referred to in it becoming legally represented. It was dated 7 March 2007. But despite their subsequent representation, it was not amended and no further specificity was provided.

[7] The reply by the NHE not only denied the complaint on the merits but also took issue with the paucity of information concerning the cause of action and complained that the complaint was vague and embarrassing by not setting out grounds why the collective termination constituted an unfair dismissal.

[8] Subsequently, there was an application for a joinder of certain further complainants. Their joinder application does not provide further specificity concerning the complaint. I was unable to trace in the record any order granting joinder. But this would appear to have occurred.

[9] When the hearing proceeded, the complainants comprised most, but not all, of the original complainants listed in the joint complaint together with a vastly reduced number of complainants referred to in the joinder application. There were at one stage 28 complainants. There was a series of withdrawals as complainants settled their complaints. According to the record, the legal representatives of NHE complained that it was not clear to them until the date of hearing precisely which of the complainants remained. They complained that their preparation was hampered by not knowing the identity of all complainants until the proceedings were about to start. As a consequence they sought a postponement of the hearing. This was opposed and refused by the Chairperson.

[10] When the hearing proceeded, the complaint was not any further specified even though the complainants were by then all legally represented. The NHE also sought more particularity at the outset. Even though the rules of the District Labour Court and of this Court contemplate less formality with regard to the conduct of proceedings, it would seem to me that a respondent would be entitled to a far greater degree of specificity than was provided with regard to the cause of action to enable it to properly prepare and to understand the nature of the complaints raised against it, particularly in the context of a retrenchment exercise whose fairness was impugned. Any non-compliance with the provisions of s 50 of the Labour Act, of the former Labour Act, 6 of 1992 should be alleged. The termination of an employee's services would need to be examined in its totality in order to determine whether the termination was without a fair and valid reason and without a fair procedure. Any non-compliance with s 50 would be considered in that context.

[11] There may be circumstances where the appropriate remedy for an employee in the event of non-compliance with certain requirements of s 50 would be to seek an

order compelling compliance. Strict non-compliance would thus not necessarily result in an unfair dismissal especially if there has been substantial compliance and where there is no prejudice to an employee – such as a formal notice being a day late when employees had been previously advised and knew of the retrenchments and the reason(s) for them. Similarly where there is an error in providing the reason for retrenchment in a formal notice – referring to a lack of qualifications where an employee well knew of the real reason – such as a position falling away and becoming redundant – would also not in my view necessarily result in an unfair dismissal. It would further seem to me that an employer whose retrenchment process is impugned in complaint proceedings should be apprised with some particularity as to why the collective terminations would constitute unfair dismissals - whether by way of reference to alleged non-compliance with s 50 or with the terms and conditions of employment regarding retrenchments or in such other respects which may arise.

[12] I respectfully agree with the sentiments expressed by Maritz, P in *De Wee v Ackermans (Pty) Ltd*[1]: where the following was stated:

> *"Whilst I am mindful that these provisions requires less formality that those applicable to pleadings in the Magistrate's Court, the principal purpose thereof nevertheless remains to adequately present to and clarify the true issues between the parties (cf Schultz v Nel, 1947 (2) SA 1060 at 1066, thereby informing –*
>
> *(a) the court of the issues that fall to be adjudicated; and*
> *(b) the litigants of the case each one is required to meet"*

As was submitted by Mr Barnard for NHE, this approach is rooted in the notion of a fair trial so that a party should know the case which it is required to meet. This was also stressed in *Sprangers v FGI Namibia Ltd.*[2]

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[1] 2004 (4) 242 NLC at 244
[2] 2002 NR 128 (HC) at 132J to 133B.

[13] The paucity of information concerning the cause of action and relief claimed was compounded by the fact that it was not clear until the commencement of proceedings precisely which of complainants remained in the proceedings. As I have already pointed out, the circumstances of the different complainants varied considerably and it would be essential for a respondent in the position of NHE to be apprised of the nature of each of their complaints against the retrenchment exercise. This was clearly lacking in the scant information in the original complaint which was not in any way amplified of the further complainants joined and after legal representation had been secured. This should have occurred.

[14] The NHE thus understandably applied for an order at the outset of the proceedings that the complainants comply with rule 4 (c) of the rules of the District Labour Court and sufficiently apprise the NHE of the case it had to meet against the complainants. This application was also opposed and was in my view wrongly refused by the Chairperson of District Labour Court.

[15] The NHE also applied for an order to compel discovery by the complainants. The discovery sought primarily related to documentation concerning or reflecting applications for employment, income received and the financial position of the complainants, given the fact that the hearing occurred some considerable time after the termination of employment and the complainants' duty to mitigate their damages . That application was likewise opposed. It was also wrongly dismissed by the Chairperson of the District Labour Court.

[16] In dismissing this application, the Court below indicated that the proceedings would be conducted in two phases. Although this was not fully explained, it would appear to have been intended that the two phases would comprise firstly an inquiry as to whether the retrenchments amounted to unfair dismissals and then secondly, if that were to be established, an inquiry would then proceed into the remedies which would arise, including compensation.

[17] After dismissing these applications, the Chairperson then proceeded to hear evidence of NHE in accordance with rule 10 of the Rules of the District Labour Court. The proceedings became protracted. The Chief Executive Officer of NHE and a former shop steward of the union gave evidence for NHE whilst the complainants gave evidence together with a few further witnesses.

[18] After the evidence was concluded, the parties were provided with an opportunity to prepare and present submissions. Judgment was reserved and was given in Court and transcribed on 28 October 2008. The judgment given in Court was transcribed and forms part of the record. It can only be described as rambling, incomprehensible and incoherent. The conclusions apparently reached are not supported by proper reasoning. It would appear to conclude that the complainants were unfairly dismissed. There then followed an order for loss of income to the complainants with reference to the salaries of complainants but the awards were for vastly differing periods, even though there was a collective termination and the timing of the proceedings was the same for all of them These differences are neither explained or justified in any way. Nor were the actual findings properly supported in any coherent way. In addition, there was an order of re-instatement for eight of the eleven complainants. This even though there was evidence to effect the positions previously occupied by them no longer existed. The judgment concluded with an explicable reference to s 109 of the Act. It was also stated that a written judgment would be provided. That occurred and is curiously also dated 27 October 2010.

[19] Whilst the written judgment is somewhat less rambling and incoherent, it is however extremely poorly formulated and replete with several errors and is in some places incomprehensible. Most significantly however, the orders are entirely different. Not one of the complainants is re-instated in the written judgment and only six of them received compensatory orders. The written judgment also concludes with an incomprehensible reference to s 109 of the then Labour Act which is not explained nor in anyway justified. The compensatory orders remain inexplicable as they are for differing periods of time for different complainants. There are orders for compensation contained in both the transcribed oral judgment and written despite the intention

expressed by the Chairperson to conduct a two phase enquiry. This is yet a further gross irregularity in the conduct of the proceedings. One could conceivably attempt to construe the two judgments and orders together in a bid to make some sense of what was possibly intended. But in the absence of any proper reasoning in support of the rulings and orders which characterises both, that would be an exercise in futility. The judgments viewed together are plainly not salvageable and cannot stand.

[20] It was not surprising that both sets of counsel agreed that the judgments and orders should be set aside. Both Mr T Barnard who appeared for the NHE (together Mr P Barnard) and Mr Hinda who appeared for the complainants (together with Mr Tjitemisa), described the judgments and orders as incompetent and incoherent and both agreed that they could not stand.

[21] Indeed Mr Barnard referred to several instances in the written judgment where sentences were incomprehensible and where there were grammatical and other errors in formulation. In addition to those he pointed out, I also encountered several others. Mr Hinda also submitted that the differences in the relief granted in the transcribed oral judgment and (subsequently) written judgment were indefensible. He also stressed that parties are entitled to a hearing by competent Court and this had not occurred. I agree with that submission.

[22] Whilst Article 12 (1) of the Constitution clearly entitles parties to a fair hearing by an independent, impartial and competent Court, the term, “competent” would usually be understood as a Court which has jurisdiction and is authorised to hear a matter and is thus properly constituted. But being properly constituted would in my view entail that the Court is presided over by person who is adequately qualified and has sufficient skills to hear a matter. Mr Hinda submitted that this not was the case in this matter.

[23] Having regard not only the judgments and orders given, but also to the entire record of the proceedings, I am inclined to agree with the submission that the Chairperson lacked adequate skill and ability to conduct a hearing of the nature before her. Mr Hinda correctly conceded that not only could the two different judgments not

stand, but that the refusal of the discovery application and of the postponement in the circumstances amounted to a violation of NHE's right to a fair trial. This was the thrust of the attack by the NHE upon the judgments and orders. This concession is in my view correctly made. As I have said, the judgments cannot clearly stand. The proceedings themselves together with the judgments evidence a lack of a fair trial as complained of by NHE. The refusal of discovery in the context of a hearing where the Chairperson had indicated that a two phase hearing would occur which then did not proceed would alone in my view amount to a violation of NHE's right to a fair trial. But this was compounded not only by the refusal to grant a postponement which was justified but also by the refusal on the part of the Chairperson to direct further particularity to be provided to NHE concerning the complainants' cause of action. The cumulative effect of these irregularities in the proceedings would in my view clearly amount to a violation of the NHE's right to a fair trial and should result in the proceedings which occurred before the Chairperson being set aside in their entirety, including the different judgments and orders which she saw fit to give.

[24] Mr Hinda submitted that the matter should be referred back to the District Labour Court so that the proceedings could commence *de novo* before another magistrate, given the incompetence displayed by Ms Shaanika.

[25] Mr Barnard however submitted that the proceedings should be set aside and that the complaint should further be dismissed given the fact that only re-instatement was sought and that this remedy would not be competent after the passage of time and where positions were not longer available and given the failure to comply with Rule 4 (C). He accordingly invited me to dismiss the complaint in addition to setting aside the proceedings which had occurred before Ms Shaanika or to do so by merely upholding the appeal and then replacing the order of the Court below with one of the dismissal of the complaint.

[26] Having found that the proceedings before Ms. Shaanika are to be set aside in their entirety including the judgments and orders which she made, it would not be open to me to then dismiss the complaint on the basis of the matter which was stated in those

proceedings with reference formulation of the complaint and the relief sought in it. That would be a matter for the District Labour Court to consider in the context of an appropriate application or upon the evidence adduced in the complaint proceedings which should occur *de novo.* It would then be a matter for NHE to raise in that forum. NHE's success in this appeal, particularly in the light of the complainants' opposition the discovery and postponement applications, and their resistance to providing further particularity to the imperfectly pleaded complaint with that conduct, would ordinarily give rise to a cost order in applying in the fundamental principles governing costs. Section_____of the 1992 Labour Act only permits costs orders where there has been frivolous or vexations conduct. The opposition to these applications, whilst misplaced or ill advised, would not constitute frivolous or vexatious conduct. Nor was this contended by Mr Barnard.

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

- The entire proceedings before Ms Shaanika as Chairperson of the District Labour Court, including the judgments and orders made by her are set aside.

- Should any of the parties wish to proceed with the complaint, those proceedings would take place before a Chairperson other than Ms Shaanika.

- The Registrar is directed to provide a copy to the Magistrate Commission.

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SMUTS, J

ON BEHALF OF THE APPELLANTS	MR. T BARNARD
Assisted by:	MR. P BARNARD
Instructed by:	KOEP & PARTNERS

ON BEHALF OF RESPONDENTS	MR. G HINDA
Assisted by:	MR. J TJITEMISA
Instructed by:	TJITEMISA & ASSOCIATES