REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-APP-AAA- 2020/00044

In the matter between:

GIBEON VILLAGE COUNCIL **APPELLANT**

and

THE LABOUR COMMISSIONER **1ST RESPONDENT**
DIONYSIUS LOUW **2ND RESPONDENT**
BENICE UAAKA **3RD RESPONDENT**

Neutral citation: *Gibeon Village Council* v *Uaaka* (HC-MD-LAB-APP-AAA-2020-00044) [2021] NALCMD 3 (4 February 2021)

Coram: PARKER AJ
Heard: **29 January 2021**
Delivered: **4 February 2021**

Flynote: Labour Law – Appeal – Prescription raised by appellant based on the Prescription Act 68 of 1969 and the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 – Court finding that those statutes did not apply – The applicable provisions are those in s 86 (2) of the Labour Act 11 of 2007 – Court held that in our statute law where an Act enacts limitation provisions for doing an act

under that statute, it is not open to a court or other tribunal to disregard such provisions and go hunting for a limitation provision in another statute and interpret and apply such external statute, unless the matter was adjudicated on under such external statute – Court held further that in law, the phrase 'cause of action' used in action proceedings under the High Court rules are polar apart in meaning from the phrase 'the dispute arose' under the Labour Act.

Summary: Labour Law – Appeal – Prescription raised by appellant based on the Prescription Act 68 of 1969 and the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 – Court finding that those statutes did not apply – The applicable provisions are those in s 86 (2) of the Labour Act 11 of 2007 – Having been misled by counsel in their submissions about when the cause of action arose the arbitrator undertook, quite unnecessarily, the interpretation of 'when the cause of action arose' and applied Act 68 of 1968 – Court found that the arbitrator misdirected himself leading him to come to a wrong decision – Consequently, court upheld the appeal but on different grounds and set aside the arbitrator's order in the award replacing it.

ORDER

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(1) The appeal succeeds.

(2) The arbitrator's order is set aside and replaced with the following:

(a) Appellant must on or before 26 February 2021 pay to the third respondent, Benice Bronhulda Uaaka, a severance pay that is due to her in terms of s 35 of the Labour Act 11 of 2007; and the amount payable shall attract interest at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment.
(b) There is no order as to costs.
(c) The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ:

Introduction

[1] The appellant, the Village Council of Gibeon ('the Council'), appeals from the entire arbitration award made on 28 July 2020 under case no. SRMA 13-19. Ms Uakuramenua represents the appellant. Third respondent ('respondent') appeared in person. There was no appearance by first and second respondents.

Preliminary points

[2] Third respondent raises some preliminary points which I consider at the threshold. The first is that the appeal is premature because the arbitrator made 'preliminary rulings'. The third respondent is palpably wrong. A judicial or other tribunal decision on jurisdiction is final because it is capable of disposing of the matter finally. (See *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC)). The arbitrator did decide on the issue of jurisdiction touching on prescription finally and he made a final award. The arbitrator says so himself in the award. He says, 'This ruling is binding on both parties but it is appealable and reviewable under section 89 of the Labour Court Act.' Third respondent's preliminary point is rejected.

[3] The second preliminary point is that the Government Attorney who filed the statement on points of law was not authorized to do so. As Ms Uakuramena, counsel for appellant submitted, the Government Attorney did not have to file a power of attorney to permit him to represent a public authority (i.e. the appellant) (see *Minister of Health and Social Services v medical Association of Namibia Ltd and Another 2012 (2) NR566 (SC)* 2016 (2) NR 420 (HC)). The point on lack of authority also fails, and it is also rejected. The third preliminary point is that appellant did not prosecute the appeal within the 90 days' period prescribed by r 17 (25) of the Labour Court rules. The papers filed of record in the instant matter indicate the following. The appeal was noted on 20 August 2020; the notice of case registration on the court was filed on 25 August 2020; and the request for the assignment of a hearing date was filed on 5 November 2020. The number of days between 20 August 2020

and 5 November 2020 is not more than 90 days within the meaning of ‘day’ in r 1, read with r 17 (25), of the Labour court rules. Consequently, the third and last preliminary point, too, is rejected.

The merits

[4] Appellant’s grounds of appeal resolve themselves into one ground essentially, namely, that when respondent referred the dispute to conciliation or arbitration by lodging Form LC21 (Referral of dispute to conciliation or arbitration document) with the Labour Commissioner, as required by the Labour Act 11 of 2007 (‘the Labour Act’), the matter had prescribed in terms of s 86 (2) (b) of the Labour Act. On that basis alone, appellant, argued that the dispute had prescribed; and so, the arbitrator misdirected himself when he or she dealt with the matter. Moreover, according to appellant, the matter has prescribed in terms of the Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, and the Prescription Act 68 of 1969.

[5] The respondent does not deal squarely with the crucial ground that seeks to challenge the entitlement of the arbitrator to have entered upon the reference and considered the dispute. As I see it, the appellant’s ground constitutes a fundamental claim which goes to the root of jurisdiction of the arbitrator; for, if a matter has prescribed, the arbitrator would not have jurisdiction to conciliate or arbitrate in the matter. (See *Roads Contractor Company v Eiseb* (LC 69/2015) [2016] NALCMD 38 (30 September 2016) para 35.) The arbitrator was obliged peremptorily to deal with the challenge by determining whether the matter was properly before him.

Prescription: When the dispute arose

[6] To the credit of the arbitrator, I should say, the arbitrator was alive to this crucial issue of jurisdiction on the basis of prescription. The arbitrator observed that the ‘question that needs to be answered is this: Has Benice Uaaka’s (i.e. respondent’s) claim prescribed, as alleged by the Gibeon Village Council?’ But the arbitrator went off the rails when he said, ‘In order to answer this question, it is very important to determine when did the cause of action of Bernice Uaaka arose’. The arbitrator misdirected himself on the law in that regard. The requirement as to when

cause of action arose in terms of the rules of the High Court and the requirement as to when the dispute arose in terms the Labour Act are not synonymous.

[7] By introducing the 'when the cause of action arose' requirement, the arbitrator, acting ultra vires the Labour Act, editorialized the clear provisions of s 86 of that Act. The Labour Act enacts in s 86:

'(1) unless the collective agreement provides for referral of disputed to private arbitration, any party to a dispute may refer the dispute in writing to-

…

(2) A party may refer a dispute in terms of subsection (1) only-

(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or

(b) within one year after the dispute arising, in any other case.'

[8] The Labour Act does not provide the requirement 'when cause of action arose'. Indeed, in our law, the phrase 'cause of action' used in action proceedings under the rules of the High Court are polar apart in meaning from the phrase 'the dispute arose' under the Labour Act. The arbitrator's wrong turn led him into the maze of having to interpret the clause – quite unnecessarily – 'when a cause of action arose', relying on a number of authorities. Consequently, I hold that *Luckoff v The Municipality of Gobabis* (LCA 46/2014) [2016] NAHCMD 6 (2 March 2016); and *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) are of no assistance on the point under consideration.

[9] By a parity of reasoning, the Prescription Act 68 of 1969 and the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 are not applicable to the instant proceeding. In our statute law, where an Act enacts limitation provisions for the doing of an act under that statute, it is not open to a court or other tribunal to disregard such provision and go hunting for a limitation provision in another statute and interpret and apply such external statute, unless the matter was adjudicated on under such external statute. The instant case was adjudicated on by the arbitrator under the Labour Act; and so, the Labour Act must apply to matters the Act has provisions governing them. The limitation provision provided in s 86 (2) (b) is clear, unambiguous and sufficient. Accordingly, I hold that the arbitrator misdirected himself on the law when he relied on (a) the Limitation of Legal

Proceedings (Provincial and Local Authorities) Act 94 of 1970 and (b) the Prescription Act 68 of 1969; and (c) when he applied the 'cause of action' requirement found in action proceedings, as aforesaid. Based on this ground alone, I conclude that the arbitrator's decision stands to be set aside. It is a wrong decision.

[10] By the way, if the arbitrator could derive any comfort from this observation, I should say the arbitrator was led astray by counsel for the appellant Council in whose point of law statement relied on Act 94 of 1970 and Act 68 of 1969. As a court sitting as an appeal court to the arbitration tribunal, I think we have a duty to sound this warning. Arbitrators are presiding officers of tribunals; and so, they should act as such. They should be careful. They should not allow themselves to be bamboozled by everything legal practitioners present to them on the law. They should try to do their own research on the law they wish to apply. As I have shown previously, the Labour Act provides limitation provisions; and they are clear and unambiguous. That is what should be interpreted and applied in a labour dispute, governed by s 86 of the Labour Act, before the Labour Commissioner, and not any statutory provisions external to the Labour Act, as far as our statute law is concerned, as explained previously.

[11] I turn now to the interpretation and application of s 86 (2) (b) of the Labour Act. The first crucial point to make is this. One cannot determine *in vacuo* whether one year has passed after the dispute in question arose. First of all, the court or other tribunal ought to pinpoint exactly the nature of dispute that is at play in the matter before it. In the scheme of resolving disputes by arbitration through the Labour Commissioner under the Labour Act, the word 'dispute' referred to in s 86 of the Labour Act denotes the dispute that was referred to the Labour Commissioner on Form LC 21: No more; no less. In the instant matter, the 'nature of dispute' that respondent referred to the Labour Commissioner is: 'unfair labour practice' and 'severance package'.

[12] Thus in these proceedings, the court ought to determine (a) when the dispute concerning 'unfair labour practice' arose, and (b) when the dispute concerning 'severance package' arose, if at all. The items in (a) and (b) are disparate. These cannot be conflated when considering the 'when dispute arose' requirement with

regard to them. The arbitrator missed this critical phase of the determination of the reference he entered upon, and went about on a long excursion, discussing issues, statutes, principles of law, and case law that have no bearing on the reference that he was seized with, leading him to arrive at wrong conclusions. That, of course, is not surprising in the least. The route taken by the arbitrator is, with the greatest deference to the arbitrator, perverse, as I demonstrate.

Unfair labour practice

[13] Now the question appears to be this. Did the third respondent refer to the Labour Commissioner a dispute of 'unfair labour practice' within one year after the dispute arose? With the greatest deference to the arbitrator and the respondent, I shall not waste my time considering in any detail the dispute of 'unfair labour practice' for this simple reason. The 'summary of dispute' accompanying the completed Form LC 21 does not in any way support the allegation of 'unfair labour practice'. There is no allegation in the 'summary of dispute' that tends to establish that any of appellant's alleged conduct against third respondent fell under any of the practices itemised in s 50 (1) of the Labour Act (see *City of Windhoek v Katuuo and Others* 2016 (2) NR 529 (LC) para 5). Therefore, as a matter of law and logic, the limitation provision in s 86 (2) (b) of the Labour Act cannot in the instant matter be applied to 'unfair labour practice', which is one of the 'nature of dispute' that respondent referred to the Labour Commissioner, but which did not exist.

[14] It follows as a matter of course that the limitation clause in s 86 (2) (b) is inapplicable in the instant proceeding to the allegation of 'dispute' over 'unfair labour practice' because no unfair labour practice is alleged. No dispute over 'unfair labour practice' existed on the part of appellant for it to be referred to the Labour Commissioner in terms of the time limit prescribed by s 86 (2) (b) of the Labour Act. I pass to consider the 'dispute' of 'severance package' to see whether respondent referred a dispute over 'severance package' to the Labour Commissioner within one year after such dispute arose.

Severance package

[15] The payment of severance pay is governed by s 35 of the Labour Act. In these proceedings it is not disputed that third respondent resigned as an employee of the appellant Council on 25 July 2017; and so in the normal run of things she is entitled to severance pay in terms of s 35 of the Labour Act. There is not one iota of evidence that third respondent asked for payment of severance pay and the Council refused to make due payment, and the refusal aggrieved third respondent. Therefore, as a matter of the law of the Labour Act, it cannot be said that there existed a dispute as to the third respondent's entitlement to severance pay. There is no evidence apparent on the record indicating any such disagreement. The fact that third respondent says in LC 21 that there is a dispute regarding what she characterized as 'severance package' does not lead to the conclusion in law that there was, indeed, such a dispute. If there was no dispute; then it cannot be argued that the dispute prescribed in terms of s 86 (2) (b) of the Labour Act. And s 35 of the Labour Act which governs the payment of severance pay does not prescribe when payment should be demanded by a deserving separating employee and when the requested employer should make payment. Of course in the interest of fairness, it ought to be paid within a reasonable time after payment becomes due or is demanded.

Conclusion

[16] Keeping these facts and the law in my mental spectacle, I should say this. It has been over three years since third respondent resigned from the Council, as aforesaid. Labour matters ought to be disposed of expeditiously and justly (see *National Housing Enterprise v Hinda Mbazira* 2013 (1) NR 19 (LC)). All the facts to make a decision concerning the respondent's entitlement to severance pay are before the court; and so, this court is in as a good position as the arbitrator to make an order about the payment of severance pay to third respondent. It serves no useful purpose to order simply that the demand for severance pay has not prescribed and that third respondent should be paid what is due to her, and then remit the matter back to the Labour Commissioner to appoint an arbitrator to arbitrate such uncontroversial issue on which the law is clear (see s 35 of the Labour Act).

[1] I have discussed in great detail that the arbitrator, with respect, misdirected himself on the law leading him to decide wrongly, as I have concluded previously. The order in paras 67.2 and 67.3 of the award is, with the greatest deference to the arbitrator, wrong and, indeed, meaningless, as a matter of law, as I have demonstrated. The arbitrator's award cannot be allowed to stand. It is wrong, but, of course, for different reasons that are discussed above.

[17] Based on these reasons, I make the following order:

1. The appeal succeeds.

2. The arbitrator's order is set aside and replaced with the following:

(a) Appellant must on or before 26 February 2021 pay to the third respondent, Benice Bronhulda Uaaka, a severance pay that is due to her in terms of s 35 of the Labour Act 11 of 2007; and the amount payable shall attract interest at the rate of 20 per cent per annum, calculated from the date of this judgment to the date of full and final payment.

(b) There is no order as to costs.

(c) The matter is finalized and is removed from the roll.

C Parker

Acting Judge

APPEARANCES:

APPELLANT:	W UAKURAMENDUA Government Attorney, Windhoek
RESPONDENT:	B UAAKA In person