REPUBLIC OF NAMIBIA

NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

Case Title:		**Case No:**
Else Kakorokoro	1st Applicant	HC-MD-CIV-MOT-REV-2022/00300
Simon Hamalwa	2nd Applicant	
Jerobeam Magongo	3rd Applicant	**Division of Court:**
Jona Nangolo Naengwenga	4th Applicant	Main Division
Ottilie Mungomba	5th Applicant	
Emgard Novengi	6th Applicant	
Kanyumara Gelasius	7th Applicant	
Jefta Kapukua	8th Applicant	
Maria Dickman	9th Applicant	
Eva Booysen	10th Applicant	
Petrina Gawases	11th Applicant	
Thusnelde Kheibes	12th Applicant	
Ngaandjekuani Nderura	13th Applicant	
Mevelyn Katjaimo	14th Applicant	
Migal Mujazu	15th Applicant	

Markazeda Plaatjies 16th Applicant Metodius Shipingana 17th Applicant Frieda Kapukua 18th Applicant Ei-Fas Mbemukenga 19th Applicant Simuku Nathanael 20th Applicant Wilhemina Neites 21st Applicant and Labour Commissioner: Nicolas Mouers 1st Respondent Labour Commissioner 2nd Respondent Namibia Wildlife Resort 3rd Respondent Namibia Public Workers Union 4th Respondent Cleophas Katuuo 5th Respondent	
Heard before: Honourable Lady Justice Claasen	**Date of hearing:** 18 April 2023 **Delivered on:** 12 July 2023
Neutral citation: *Kakorokoro v Labour Commissioner* (HC-MD-CIV-MOT-REV-2022/00300) [2023] NAHCMD 395 (12 July 2023)	
The order: 1. The applicant's application for review is struck from the roll for being prosecuted out of the prescribed period of time in terms of s 89(4) of the Labour Act 11 of 2007. 2. There is no order as to costs.	

3. The matter is removed from the roll and regarded as finalised.

Reasons for the order:

CLAASEN J:

[1] This is a labour review instituted by the applicant on 11 July 2022. The relief as prayed for in the notice of motion and founding affidavit is for the reviewing and setting aside of the first respondent's arbitration award to withdraw the applicant's application, dated 22 February 2022, under case number CRWK 309-21. The founding affidavit describes the purpose of the applications is to review the arbitration proceedings in terms of s 89(4) and (5) of the Labour Act 11 of 2007, (the Act). It is unclear on what basis the first applicant has included the second to the twenty first applicants as the authority for that is not evident from her papers, nor were they formally joined.

[2] Shortly after the issuance of the notice of motion, the applicant filed a condonation application for that application as it was filed outside the time period permitted in terms of s 89(4) of the Act. The review application was opposed by the third respondent only, who followed suit with a condonation application for the notice of intention to defend[1], an answering affidavit to the main application[2] and an opposing affidavit to the condonation application of the applicant.

[3] By the time the matter had been set down for hearing before this court, the filing of affidavits and heads of arguments had been ordered by different courts who also sanctioned the proposal by the parties to argue the interlocutory matters with the main application. Thus this court made an order on 18 April 2023 removing the interlocutory application generated under case number INT-HC-OTH-2022/00286 as these applications are dealt with herein simultaneously.

[4] Belatedly, on the 14 April 2023, the applicant filed a further application to vacate the hearing dates, to amend their notice of motion and to file a supplementary affidavit, which application was asked to be determined on a truncated time period. That application was opposed by the third respondent who filed opposing papers on the 17 April 2023 and the matter was heard on the 18 April 2023.

[1] Rule 14(5)(*b*) of Labour Court Rules.
[2] Rule 14(10)(*b*) of Labour Court Rules.

[5] It is this application in the preceding paragraph, which I will start with. Ms Chinheya argued for the applicant and Mr Boltman for the third respondent.

[6] Counsel for the applicant explained the reason for the vacation of the hearing date is because the applicant brought its application on the wrong sections of the labour legislation. They relied on s 89(4) and subsec (5) of the Act, instead of s 117 of the Act. This realisation dawned on them after having read certain a authority which the third respondent referred to in its heads of argument. Apart from the vacation of the date, she also sought to amend the notice of motion and to file a supplementary affidavit to cure the founding papers. According to her, it was not foreseen circumstances and it would not prejudice the respondents if the court grants the relief sought for in the 'vacation of dates' application.

[7] Counsel for the third respondent had a different impression of the application. He argued that the reason proffered does not constitute unexpected factual or evidentiary issues which the applicant only discovered after the exchange of pleadings, but that it arose because the applicant instituted a case without having equipped themselves with the relevant legal principles. He contended that the applicant was aware what its case was about and that they cannot change the founding papers with a supplementary affidavit, nor was the matter preceded by the processes contemplated for purposes of s 117 of the Act. Finally, he also pointed out the prejudice that will be caused, in that the matter will be further protracted and costly as his client will have to file a new answering affidavit and new heads of arguments.

[8] On the hearing date I did not grant the relief payed for in the notice of motion for the belated vacation of hearing dates application. As regards to an application for vacation of trial dates, it is trite law that a party who wishes to have set down dates vacated must show good cause why the set down dates should be vacated and it should be done on not less than 10 days' notice.[3] In this case the applicant waited until 2 court days before the hearing, affording the respondent a single day to file opposing papers.

[9] Practice direction 62(5) provides as follows:

'The High Court pursues a 100 percent clearance rate policy, and in pursuit of the

[3] Rule 96(3).

policy, the court must, unless there are compelling reasons to adjourn or vacate, apply a strict non-adjournment or non-vacation policy on matters set down for trial or hearing.'

[10] In considering the reason for vacation, stripped of all its frills, it appears that the applicant instituted proceedings without having acquainted itself of the legal basis thereof. Now, at the 11th hour, after having learnt of an apparent error on the papers, the applicant is seeking to vacate the date and change the goal posts altogether. It has to be said that a party who comes to court, unprepared and without having acquainted itself with the relevant legal premises, does so at its own peril. Thus, the reason herein does not constitute good cause for vacation of a hearing date. I agree with counsel for the third respondent that it was a self-created urgency, which does not suffice the test of urgency.[4]

[11] Counsel for the applicant even squeezed in other substantial relief such as to amend the notice of motion and filing of a supplementary affidavit in an attempt to cure its founding papers. This methodology of mix and match applications do not sit well with the court, and the need for that fell away as the court was not inclined to grant the vacation of hearing dates application.

[12] One of the central threads of case management is for parties to exchange pleadings, identify the issues, facilitate expeditious adjudication and minimize costs. The third respondent came to court on the applicant's pleaded case. Should that basis change, certainly that will call for the filing of amended papers including heads of argument, resulting in additional cost and court's time. Although the court has a discretion to grant costs in favor of the third respondent in an attempt to cure the prejudice it may suffer, this will not advance the applicant's case as can be seen in subsequent paragraphs. It was on this basis that the court did not grant the vacation of hearing dates nor the other relief prayed for in that application.

[13] A question that arises at the outset is whether this court can condone the late noting of this review application. Mr Boltman argued that when the High court sits as a Labour Court it must do so within the framework of the Labour Court's regime as cited *Puma Chemicals v Labour Commissioner and Another*[5].

[14] It is settled law that an application to review a decision of an arbitrator must be done within 30 days of the award or decision. Section 89 (4)(*a*) of the Act provides that; 'a party who alleges a defect in arbitration proceedings may apply to the Labour Court for

[4] *Kaura v Kazenango* (A 193-2015) [2015] NAHCMD 176 (29 July 2015).
[5] *Puma Chemicals v Labour Commissioner and Another 2014 (2) NR 355 (LC).*

an order reviewing and setting aside the award 'within 30 days after the award was served on the party.' That is unless the defect relates to corruption, which is not the case herein.

[15] It is apparent from the founding affidavit that the arbitrator dismissed the applicant's 'review application' on 22 February 2022. I accept that to be the date on which the applicant became aware of the final outcome of their matter, which had been before the arbitrator under case CRWK 309-21. It is apparent that the notice of motion was filed on 11 July 2022.

[16] In *Lungameni and Others v Hagen and Another*[6], the review application was brought after a period of six weeks within which the award was served, and therefore it was found to be nullity and struck from the roll. It was accentuated that the Act itself does not confer powers on the court to condone a labour review application outside the peremptory periods as stipulated in the Act. I am in agreement with the sentiments of the *Lungemeni* and *Puma* matters, that the rules, which provides for condonation cannot confer authority to condone non-compliance with the provisions of the Act if the Act itself does not provide for that.

[17] Having said that, the inevitable conclusion is that this review application stands to be struck from the roll as it was not prosecuted within the prescribed period of s 89(4) of the Act. It would be a mere academic exercise to deal with the other issues, as the finding that the current review application constitutes a nullity, disposes of the entire matter.

[18] In the result I make the following order:

1. The applicant's application for review is struck from the roll for being prosecuted out of the prescribed period of time in terms of s 89 (4) of the Labour Act 11 of 2007.

2. There is no order as to costs.

3. The application is removed from the roll and regarded as finalised.

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[6] *Lungameni and Others v Hagen and Another 2014 (3) NR 352 LC.*

	Note to the parties:
Claasen Judge	Not applicable.
Counsel:	
Applicant	**3rd Respondent**
I Chinheya Of Brockerhof and Associates Inc. Windhoek	J Boltman Of Koplinger Boltman Legal Practitioners, Windhoek