

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF
JUDGMENT

NAMIBIA

Case no: LC 99/2012

In the matter between

ANDREAS LUNGAMENI & 43 OTHERS

APPLICANTS

and

ANGELINA HAGEN

1ST RESPONDENT

NOVANAM LIMITED

2ND RESPONDENT

Neutral citation: *Lungameni & Others v Hagen & Another (LC 99/2012) [2013]*
NALCMD 15 (27 March 2013)

Coram: **Smuts, J**

Heard on: 27 March 2013

Delivered on: 27 March 2013

Flynote: An application for review of a decision of an arbitration must be brought within the time periods set out in s 89(4) of the Labour Act, 11 of 2007. There is no power to condone the failure to bring a review outside those periods.

EX TEMPORE

SMUTS, J

[1] This is an application for the review of a decision of an arbitrator (cited as first respondent) who had dismissed the applicant's dispute which had been referred to her. The arbitrator did so on 15 March 2012.

[2] The 2nd respondent in these proceedings takes the point that the applicants have not complied with section 89(4) of the Labour Act 11 of 2007 with regard to the lodging of the application for review and that the application is a nullity as a consequence and should be struck from the roll.

[3] Section 89(4) provides:

“ A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award –

- (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption or;
- (b) if the alleged defect involves corruption within six weeks after the date that the applicant discovers the corruption.”

[4] In the applicants' own papers, they state that they received the award by fax on 28 May 2012. The review was only served on 20 July 2012. Mr Philander, who appears for the 2nd Respondent, argued that the peremptory provisions of section 89(4) had not been met and that the course which I should adopt would be to strike the review application from the roll, given the fact that the court does not have jurisdiction to hear an application brought outside the time period as it would constitute a nullity.

[5] Mr Mbaeva appears for the applicants. He argued that this court is vested with the power to condone the failure to bring an application within the time periods specified by virtue of rule 15 of the rules of this court. That rule vests this court with the power upon application on good cause shown at anytime to condone non-compliance with the rules of this court. That power to condone is however only in respect of a rule of this court (and not in respect of non compliance with the peremptory provisions in the Act). Mr Mbaeva accepted that but then shifted his argument to rule 14 dealing to reviews. This rule essentially confirms and re-iterates what is contained in s 89(4) of the Act, namely referring to the periods within which an applicant must bring an application for review. It is clear to me that rule 14, by referring to the time periods merely repeats what is in the Act then proceeds to provide further directions as to the manner in which such review applications are to be brought.

[6] Mr Philander argued that this Court would not be vested with any power to condone a non-compliance with the Act, in other words with s 89(4), in the absence of a power contained in the Act to do so. He referred to the provisions dealing with appeals and the time period for noting an appeal to this Court from an award of an arbitrator embodied in section 89(1). He referred to s 89(3) which contains a specific power to condone the late noting and of an appeal on good cause shown. There is no similar power with respect to applications for review under s 89(4). He accordingly submitted that a rule could not vest this court with the power to condone non-compliance with a peremptory statutory provision embodied s 89(4) of the Act in the absence of the power to do so contained in the Act.

[7] This submission is in my view well founded. It is based upon authorities of this court with regard to the time periods provided for in the Act, such as the time period within which disputes are to be referred to the office of the Labour Commissioner. The power to condone a referral out of time has not been provided for in the Act. This Court has made it clear that those provisions are peremptory and that this Court is not vested with the power to condone non-compliance with those time periods. It did so in the *Namibia Development Corporation vs Mwandingi and 2 Others*¹ which followed two other unreported decisions of this court to similar effect which are referred to in it. Although those decisions referred to the taking of other steps in the Act, that approach would apply with the equal force to s 89(4).

[8] Mr Mbaeva argued that the defect complained of in the application related of corruption and therefore the longer period of six weeks in section 89(4)(b) would apply. Mr Philander countered that, even if corruption were raised, the application was filed and served outside of the further period of six weeks for applications alleging corruption and that this would not avail the applicants. That submission is also correct. This application was brought more than six weeks after the award became known to the applicants. I may however add in passing that the submissions by Mr Mbaeva that the complaint involved corruption were in any event unsubstantiated. It would not seem to me on the papers before me that a case to that effect had been made out. I have not

¹Unreported judgment of this court on 3 December 2012

been able to discern from the papers properly construed that corruption has in any event been properly raised.

But it is not necessary for present purposes to make any finding in that regard, given the fact that the application was brought and served more than six weeks after the date upon which the applicants had discovered or become aware of the award.

[9] In all the circumstances, I am satisfied that 2nd Respondent has shown that the application has been brought outside the time period provided for in s 89(4). It is as a consequence a nullity.

[10] It follows that the application is to be struck from the roll by reason of the fact that it was brought outside time periods in s 89(4) and that this court would not have jurisdiction to hear it. In making such an order, I do not make any order as to the costs of this application.

DF Smuts
Judge

APPEARANCE

APPLICANT:

T. Mbaeva

Instructed by Mbaeva & Associates

RESPONDENTS:

R. Philander

Instructed by Lorentz Angula Inc.