REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LCA 18/2014

In the matter between:

SHOPRITE NAMIBIA (PTY) LTD **APPELLANT**

1.1.1.1.

And

LORENCIA HAOSES **1ST RESPONDENT**

K.K. HUMU N.O. **2ND RESPONDENT**

Neutral citation: Shoprite Namibia (Pty) Ltd v Haoses (LCA 18-2014) [2014] NALCMD 46 (26 November 2014)

Coram: SMUTS, J

Heard: 17 October 2014

Delivered: 26 November 2014

Flynote: Appeal against a preliminary ruling by an arbitrator under s89 of Act 11 of 2007. The arbitrator had followed this court's decision in *National Housing Enterprise v Hinda – Mbazira and Others* 2013 (1) NR 19 (LC) in finding that the period to refer a dispute under s86(2)(a) of that Act commences to run after internal remedies have been exhausted. That decision has been

upheld by the Supreme Court (on 4 July 2014) and is binding on this court and the outcome subscribed to. Appeal dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

SMUTS, J

(b) The issue raised in this appeal under s89 of Act 11 of the Labour Act[1] from a ruling by an arbitrator on a preliminary point concerns the question as to when the dispute had arisen. This issue is of considerable importance for the purpose of s86(2)(a) of the Act which provides for the time within which disputes involving dismissals are to be referred to the office of the Labour Commissioner.

(c)

(d) Section 86(2) provides:

> 'A party may refer a dispute in terms of subsection (1) only –
>
> (a) within 6 months after the date of dismissals, if the dispute concern a dismissal; or
>
> (b) within one year after the dispute arising in any other case.'

(e)

(f) The facts relevant to this issue appear from the referral and the submissions made by the parties when the preliminary point was taken by the appellant. No evidence was led on the issue. Nor was there any agreed statement of facts. The first respondent worked as a manager of one of the appellant's branches for some years. She faced disciplinary proceedings and was dismissed by the appellant on 19 December 2012. The first respondent

[1]Act 11 of 2007.

however filed an internal appeal on 15 January 2013 in terms of her conditions of employment. Although this internal appeal had been filed out of time, the first respondent would appear to have accepted it and proceeded to consider it. According to it, this appeal was concluded on 4 February 2013. According to the first respondent, she only became aware of the unsuccessful outcome of her internal appeal on 15 March 2013.

(g)

(h) The first respondent sought to refer a dispute of an unfair dismissal on 15 June 2013. This was apparently rejected because a date upon which the dispute arisen had not been reflected on the form LC21 provided at the office of Labour Commissioner. A second referral was submitted to the office of the Labour Commissioner on 8 July 2013. This was also withdrawn because the date reflected on the form as to when the dispute had arisen was 19 December 2012. The first respondent withdrew this referral and subsequently replaced it with one which stated that the date upon which the dispute had arisen was 15 March 2013, the date upon which the first respondent stated that she had received the outcome of her internal appeal. The arbitrator noted that neither party had submitted any documentation as to whether the date of 4 February 2013 or 15 March 2013 should be accepted as the correct date upon which the internal appeal hearing had been finalised.

(i)

(j) The sole question for the arbitrator to determine was whether he had jurisdiction to determine the dispute, given the fact that it was common cause that the dispute had been referred more than six months after 19 December 2012.

(k)

(l) The appellant contended that 19 December 2012 was the date of the dismissal and that the failure to refer the matter within six months from that date meant that the referral was out of time and that the arbitrator had no jurisdiction to hear the dispute by virtue of the provisions of s86(2)(a). The arbitrator followed the decision of the High Court in *National Housing Enterprise v Hinda Mbazira and Others*[2] (NHE) in which Parker, J found that s86(2)(a) was to be interpreted in a purposive manner and that the six month's time limit in s86(2)(a)

[2]2013 (1) NR 19 (LC).

would commence after all reasonable steps, including a disciplinary hearing and subsequent appeal had failed to resolve or settle the dispute in question. The arbitrator applied this decision and dismissed the preliminary point taken by the appellant. The appellant has appealed against that decision given on 27 March 2014.

(m) Mr Dicks, who appeared on behalf of the appellant, argued that the decision in the *NHE* matter by Parker, J was incorrect. In his judgment, Parker, J in dealing with a matter which also concerned a referral of an unfair dismissal, interpreted s86(2)(a) with reference to the provisions of s82. That section concerns the conciliation of disputes and is in entirely a different part of the Act. It primarily deals with disputes of interest in conciliation which follows upon the reporting of disputes of interest to the office of the Labour Commissioner. It enjoins the Labour Commissioner to refer such disputes to a conciliator to resolve them through conciliation if the Commissioner is satisfied that the parties had taken all reasonable steps to resolve or settle the dispute. Parker, J concluded that s86(1) and (2) should be read 'intertextually' with s82(7) (8) and (9) and concluded that s86(2)(a) meant that the time period to report disputes would mean that all reasonable steps, including domestic remedies would need to be pursued without success before the six months time limit would begin to run, and not necessarily from the date upon which the employee was informed of his dismissal.

(n)

(o) Mr Dicks forcefully argued that the approach of Parker, J was incorrect because the part of the Act which relates to the conciliation of disputes in which s82 is to be found, is entirely separate and distinct from the part concerning the arbitration of disputes in which s86 is to be found. He submitted that these sections should not be read intertextually as they concern two entirely different scenarios. Whilst there is indeed considerable force to this leg of his argument, it is not clear to me that the result reached by Parker, J was in any event incorrect even upon Mr Dicks' reasoning which would seem to me to have some merit. But this is now entirely academic as far as this court is concerned as the *NHE* matter went on an appeal and the Supreme Court upheld the judgment of

Parker, J.[3] The Supreme Court referred to the approach adopted by Parker, J including his reasoning in reaching his decision and held that he was correct in the interpretation accorded to s86(2)(a) that the six months time limit would begin to run after all reasonable or internal remedies had been exhausted and had failed to resolve or settle the dispute.

(p) This court is bound by the decision of the Supreme Court which followed the approach of Parker, J and upheld his decision in the *NHE* matter. It follows that the appeal cannot succeed and is to be dismissed for this reason alone.

(q)

(r) Even though I would, with respect, have approached the matter differently and not relied upon an interpretation based upon s82 for the conclusion reached by Parker, J and upheld by Supreme Court, because of the entirely different nature of the dispute settlement regimes entailed in the two different respective parts of the Act in which the sections are to be found, I respectfully agreed with the result which Parker, J arrived at as endorsed by the Supreme Court for reasons which are essentially to be found in the reasoning of the Supreme Court.

(s)

(t) The Supreme Court quoted extensively from a decision of the Labour Appeal Court in South Africa[4] which had stressed the exhaustion of internal domestic remedies before the time period could be said to commence to run within which the matter could be referred for the taking of steps provided for in the applicable legislation. The underlined portion of the quotation relied upon by the Supreme Court stressed the futility of an exercise in the event of a matter being reported if the employee were to be successful with a domestic appeal.

(u)

(v) It would seem to me that the portion of the quoted judgment held considerable sway with the Supreme Court and in my view, with respect, correctly so. Whilst I would not have relied upon the intertextual interpretation of Parker, J, it would seem to me that the same result would have been achieved

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[3]In *National Housing Enterprise v Hinda Mbazira* (NASC SA 42/2012) 4 July 2014.

[4]*SACCAWU and Another v Shakoane and Other*s [2000] 10 BLLR 1123 (LAC) at 1141E – 1144A.

by considering the question as to when the dismissal itself had arisen and the need for prescribed internal steps to be finalised before the dismissal arises for the purpose of reporting that dispute. In my view, where conditions of employment entitle an employee to an internal appeal procedure and an employee makes use of that internal remedy, then that employee cannot be said to have been finally dismissed until the outcome of that procedure invoked by that employee. A dispute had thus not yet arisen in the sense contemplated by the Act as the cause of action itself – a dismissal – has not as yet been completed.[5]

(w)

(x) This is essentially the basis to the reasoning of the Supreme Court, even though the interpretation placed upon s86(2)(a) with reference to s82 was however approved which was in my view not necessary for the Supreme Court to have done so, given the fundamental basis to the reasoning adopted by that court.

(y)

(z) I am thus not only bound by the decision of the Supreme Court, but I also, with respect, consider the result and the essential basis in reaching that conclusion to be correct, even though the facts of the SACCAWU matter may have been distinguishable. It was the reasoning of that case which had, with respect, been correctly applied.

(aa) It follows that the appeal is dismissed.

(bb)

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D F SMUTS

Judge

[5]Although the wording is different, this would accord with the approach of the courts in interpreting when a 'debt is due' for the purpose of extinctive prescription under the Prescription Act, 68 of 1969. The cause of action must be complete. See Joubert et al *The Law of South Africa* (2nd ed) Vol 21 at p57.

APPEARANCES

APPELLANT:	G. Dicks
Instructed by:	Kopplinger-Boltman Legal Practitioners
RESPONDENT:	No appearance