REPUBLIC OF NAMIBIA **REPORTABLE?**

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 90/2012

In the matter between:

PUMA CHEMICALS **APPLICANT**

and

LABOUR COMMISSIONER **FIRST RESPONDENT**

REBECCA CAROLINA JANUARIE **SECOND RESPONDENT**

Neutral citation: *Puma Chemicals v Labour Commissioner* (LC 90/2012) [2014] NALCMD 09 (10 February 2014)

Coram: GEIER J

Heard: **07 February 2014**

Delivered: **10 February 2014**

Flynote: Labour law - Labour Court - Jurisdiction – Court has no jurisdiction to condone and hear an application for review outside the time periods laid down in section 89(4) of the Labour Act 2007

Labour law – Application for review of arbitrator's decision brought outside the time periods set by section 89(4) of the Labour Act 2007 – Interpretation of section 89(4) of the Labour Act – Court finding that although language utilized in section 89(4) directory – it nevertheless had to be concluded from the language, scope and

purpose of the Labour Act 2007 that the legislature had intended the provisions of section 89(4) to be peremptory – Court accordingly concluding that it was not vested with the power to condone the late filing of a review application outside the time periods set by section 89(4) of the Act – application for review accordingly dismissed.

ORDER

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1. The review application to set aside the Arbitration Award dated 30 March 2012 is hereby dismissed.

2. The Registrar is directed to make a copy of this judgment available to the Honourable Minister of Labour and Social Services for her reconsideration.

JUDGMENT

GEIER J:

[1] This court per, Smuts J, has held that an application to review the decision of an arbitrator must be brought within the time period set in Section 89(4) of the Labour Act, Act No.11 of 2007 and that the power to condone the bringing of a labour review outside the set time periods has not been provided for in this Act.[1]

[2] In finding that:

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[1]See *Lungameni & Others vs Hagen & Another* (LC 99/2012) [2013] NALCM 15 (27 March 2013) at [7] reported on the SAFLII website at http://www.saflii.org/na/cases/NALCMD/2013/15.html

'This court has made it clear that these provisions are peremptory and that the court is not vested with the power to condone the non- compliance with those time periods'[2].

[3] The court in *Lungameni* relied on the decisions made in respect of similar time- bar provisions contained in the previous Labour Act and the current Labour Act, to wit: *Namibia Development Corporation v Mwandingi & Other*[3] which followed two earlier decisions namely the obiter view expressed by Henning AJ in *Nedbank vs Louw*[4] and the decision of Hoff J in *Standard Bank vs Mouton*[5].

[4] Smuts J in *Lungameni* came to the conclusion that the application for review before him, which had been brought more than 6 weeks after the applicant had become aware of the award, was brought outside the applicable time period provided for in section 89(4), which was as a consequence a nullity[6] and that it had to be struck from the roll as the court did not have jurisdiction to hear the application.[7]

[5] The applicant in this labour review wants this decision revisited as also its application for review was brought outside the 30 day period set by section 89(4) of the Labour Act 2007.

[6] It should be mentioned that this application for review also contains an application for condonation, to condone the late filing thereof, in which application it is contended that 'good cause' therefore can be shown, particularly as the applicant submits that it has strong prospects of success of overturning the award due to certain fundamental irregularities perpetrated by the arbitrator during the arbitration.

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[2] *Lungameni & Others vs Hagen & Another* at [7]

[3] *(LCA 87/2009 [2012] NALCMD 12 (November 2012)* at [28] reported on the SAFLII website at *http://www.saflii.org/cgi-bin/disp.pl?file=na/cases/NALC/2012/41.html&query=mwandingi*

[4] 2011 (1) NR 217 (LC) at [10]

[5] LCA 04/2011 at [9] handed down on 29 July 2011 reported on the SAFLII website at http://www.saflii.org/cgi-bin/disp.pl?file=na/cases/NALC/2011/21.html&query=mouton

[6] At [9]

[7] At [10]

[7] It should also be mentioned that this review was unopposed.

[8] Ms Visser who appeared on behalf of the applicant submitted that the court does have the power to condone the late filing of her client's review and to hear the matter outside the stipulated 30 day period. She recognised that this court would - in the ordinary course - have to follow the decision in the *Lungameni* matter and that she therefore had to persuade this court not to follow that judgment, as that judgment was wrongly decided.

[9] More particularly her argument in this regard was based on a recent trend to adopt a more flexible approach in the interpretation of statutory time limits, as also recognised by the Supreme Court in *Rally for Democracy & Progress v Electoral Commission of Namibia & Others*[8] where the Supreme Court stated:

'[32] It is common cause that the application was not filed outside the 30-day period allowed in s 110(1) of the Act. It is therefore not necessary for purposes of this appeal to consider whether the subsection's provisions may conveniently be labeled as 'peremptory' or 'directory'; whether the High Court may or may not entertain an election application presented outside the 30-day period or to make any findings on the validity thereof. We expressly decline to do so because it is not pertinent to the issues in the appeal which we are called upon to decide. Our silence on this issue should, however, not be construed as acquiescence in the views forcefully expressed by Parker J on the peremptory nature of s 110(1); his adoption of the dictum in *Hercules Town Council v Dalla*[9] (regarding the obligatory nature of prescribed time periods) as a correct statement of our law in the face of later, more moderated approaches adopted or endorsed by the courts[10] (including the full bench of the High Court which held that the modern approach manifests a tendency to

[8] 2010 (2) NR 487 (SC) at 513F to 514A

[9] 1936 TPD 229 at 240: '. . . the provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court.'

[10] Eg *Volschenk v Volschenk* 1946 TPD 486 at 490: 'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.' See also: *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* supra at 1038A – B: '. . . principle in my opinion has now been firmly established that, in all cases of time limitations, whether statutory or in terms of the Rules of Court, the Supreme Court has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the court.'

incline towards flexibility)[11] and his conclusion[12] that a peremptory provision must be obeyed or fulfilled exactly and that an act permitted by an absolute provision is lawful only if done in strict accordance with the conditions annexed to the statutory permission[13], notwithstanding case law to the contrary[14] and the cautionary remarks made by Trollip JA in *Nkisimane and Others v Santam Insurance Co Ltd*[15] not to infer merely from the use of those labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These are matters best left for adjudication on another day.'

[10] Ms Visser then went on to quote extensively in her heads of argument from the applicable authorities that she relies on and which are those set out by Van Niekerk J in *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others*[16] were the learned Judge went on to state:

'[23] In considering the question raised it is not helpful to focus merely on whether the requirements of s 35 are peremptory or directory. Although these are useful labels to use as part of the discussion (*Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H), the true enquiry is whether the legislature intended the distribution of any assets in terms of the liquidation and distribution account to be valid or invalid where the period for inspection is shorter than 21 days. (Cf *Ex parte Oosthuysen* 1995 (2) SA 694 (T) at 695I). It should be remembered that —

'It is well established that the Legislature's intention in this regard is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (*Nkisimane* (supra at 434A); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A)).' [*Oosthuysen* supra at 696A.]

[24] This principle was expanded in *Swart v Smuts* 1971 (1) SA 819 (A), when Corbett AJA (as he then was) said the following at 829E – F

'In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule. Thorough consideration of the wording of the

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[11] *DTA of Namibia and Another v Swapo Party of Namibia and Others* supra at 11C

[12] Para 26 of his judgment

[13] Based on Craies on Statute Law 7 ed 260

[14] Compare *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327 in fin – 328B; *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 588A – H; and *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C – E

[15] 1978 (2) SA 430 (A) at 433H – 434E

[16] 2013 (1) NR 271 (HC)

statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.' [My translation from the Afrikaans.]

[25] In *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) J at 328A – B the court expressed the issue in this helpful way:

'. . . what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.'

[26] In *Johannesburg City Council v Arumugan and Others* 1961 (3) SA 748 (W) the court considered several authorities on the issue of non-compliance with statutory time limits and concluded that in each of the cases cited the basis upon which the decision in the case was founded was 'the determination of the intention of the Legislature coupled with the possibility of prejudice' (at 757E – F).

[27] In *DTA of Namibia and Another v Swapo Party of Namibia and Others* supra at 9H – 10D the full bench noted with approval the following stated in *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) when Herbstein J summarised what the full bench considered *'certain useful, though not exhaustive, guidelines'* when he said at 451:

'In *Sutter v Scheepers* (1932 AD 165 at pp. 173, 174), Wessels JA suggested certain tests, not as comprehensive but as useful guides to enable a Court to arrive at that real intention. I would summarise them as follows:

(1) The word shall when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases.'

[28] In *Sayers v Khan* 2002 (5) SA 688 (C) the following was stated at 692A – G (the passage at 692A – D was recently applied in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* supra at 516I): H

'The jurisprudential guidelines relevant to the present case as articulated by the South African Courts (particularly in cases such as *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) and *Sutter v Scheepers* 1932 AD 165 at 173 and 174) are usefully summarised by Devenish (op cit at 231 – 4) as follows:

If, on weighing up the ambit and aims of a provision, nullity would lead to injustice, fraud, inconvenience, ineffectiveness or immorality and provided there is no express statement that the act would be void if the relevant prohibition or prescription is not complied with, there is a presumption in favour of validity. . . . Also where 'greater inconvenience would result from the invalidation of the illegal act than would flow from the doing of the act which the law forbids', the courts will invariably be reluctant — unless there is some other more compelling argument — to invalidate the act. Effectiveness and morality are inter alia also considerations that the courts could use in the process of evaluation, in order to decide whether to invalidate an act in conflict with statutory prescription.

(ii) The history and background of the legislation may provide some indication of legislative intent in this regard.

(iii) The presence of a penal sanction may, under certain circumstances, be supportive of a peremptory interpretation, since it can be reasoned that the penalty indicates the importance attached by the legislature to compliance. However, the courts act with circumspection in these circumstances. Therefore, in *Eland Boerdery (Edms) Bpk v Anderson* 1966 (4) SA 400 (T) at 405D – E, the Court made the observation that '(t)rouens, die toevoeging van so 'n sanksie is dikwels 'n aanduiding dat die wetgewer die straf, waarvoor voorsiening gemaak word in die Wet, as genoegsame sanksie beskou en dat hy nie bedoel het, as 'n bykomende sanksie, dat die handeling self nietig sou wees nie'. . . .

(iv) Were the validity of the act, despite disregard of the prescription, would frustrate or seriously inhibit the object of the legislation, there is obviously a presumption in favour of nullity. This is a fundamental jurisprudential consideration and therefore it outweighs contrary semantic indications.'

[29] I shall now proceed to an application of the approach and guidelines as set out in the various cases above. …'.[17]

[11] It was on the strength of this approach to statutory interpretation submitted that the word 'may' as used in section 89(4) of the Labour Act 2007 was an indication

[17] Pages 278 to 280 para's [23] to [29], see also *Simataa vs Public Service Commission and Another* (A12-2003) [2013] NAHCMD 306 (30 October 2013) reported on the SAFLII website at http://www.saflii.org/na/cases/NAHCMD/2013/306.html paragraphs [35] to [36] and also [37] and [51] of that judgment

that the provision is ‘directory’ rather than ‘peremptory’ and also because there was no provision expressly prohibiting or sanctioning or visiting non-compliance with a nullity.

[12] Ms Visser pointed out that the rules of the Labour Court required that labour reviews must be brought within 30 days and that Rule 15 grants the Labour Court the power to condone any none compliance with the rules on ‘good cause’ shown. With reference to Article 18 of the Constitution she submitted further that it would be a travesty of justice and offend against the word and spirit of the Constitution if a party would be denied the right to have an arbitration award reviewed in which an arbitrator had committed serious misconduct or a gross irregularity simply because a review was not brought within the set 30 day period. Any interpretation to the effect that the court has no jurisdiction to entertain a condonation application in this regard would be rigid and mechanical and not in accordance with the more flexible approach adopted by the court’s in statutory interpretation. The court should thus entertain the applicant’s condonation application and thereafter the review as otherwise the aim and objects of the Labour Act would be defeated.

[13] Also during oral argument counsel urged the court not to follow the *Lungameni* judgment. It was submitted further that regard should also be had to the previous Labour Act.

[14] She also now contended, with reference to the jurisdiction conferred on the Labour Court to condone the late noting of appeals against any arbitrators award, as provided for in section 89(3), that the absence of a similar provision, regarding reviews, was an oversight on the part of the legislature. Also the promulgation of the Labour Court Rules, in which provision was made, in Rule 15, for condonation for the non-compliance with the court’s rules, such as with Rule 14(2)(a), were indicative that the legislature had made a mistake in not providing for a condonation mechanism pertaining to reviews in the Labour Act.

[15] Again she reiterated that in following a more flexible approach - such as the one also adopted in *Simataa vs Public Service Commission* - it should be found that

the bringing of a review application out of time would not result in a nullity and would thus be condonable and as the applicant had shown 'good cause' for such condonation, the merits of the review should thus be considered and the review be granted.

[16] I should at this stage mention that Ms Visser, initially, argued the merits of the review, which showed that the arbitrator indeed had committed a gross irregularity in the proceedings in that the arbitrator had failed to conciliate the dispute referred to him under part C of the Labour Act[18] and because he had proceeded to hear the arbitration in the applicant's absence, leading to an award against the applicant made on short notice.[19]

[17] I indicated to her however during argument that she would first have to persuade me that I would have jurisdiction to entertain the review and that the strong merits of her client's case would in that context be relevant as a finding, that this court has not been clothed with a necessary jurisdiction to condone and hear an out of time review, would be relevant as an interpretational aid as the legislature is presumed not to intend to cause injustice.[20]

[18] When considering the submissions made on behalf of the applicant I will also take into account what the court has said in *Van Heerden & Others NNO v Queen's Hotel (Pty) Ltd*[21] and *S v Takaendesa*[22].

[19] What is cardinal in the determination of whether or not this court is clothed with the jurisdiction the applicant wishes it to assume, is, firstly, the determination of the legislature's intention and, secondly, whether it can be said that Smuts J, in

[18]See : *Nel v Shinguadja* (LCA 29/2013) [2013] NALCMD 41 (20 November 2013) at [63] to [65]
[19]The notice of the arbitration hearing was not in compliance with Rule 15 of the 'Rules relating to the Conduct of Conciliation and Arbitration' as gazetted under GN 262 in GG 4151 of 31 October 2008, requiring notice of at least 14 days
[20] See for instance: *Principal Immigration Officer Appellant v Bhula* 1931 AD 323 at 336 to 337
[21]1973 (2) SA 14 (RA)
[22]1972 (4) SA 72 (RA)

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Lungameni, was wrong in finding that this court is not vested with the power to condone the non-compliance with the statutory time periods set in section 89 (4).

[20] Two factors - from which the legislature's intention can be inferred - were already considered in the *Lungameni* judgment:

1. the argument that rule 15, of the rules of the Labour Court, vests the power on the court to, at any time, condone the non-compliance with the rules of court, here rule 14 (1)(a); and

2. the submission that, in the absence of an express power to grant such condonation and hear reviews outside the set time periods, the court was not vested with the power to do so.

[21] I am in absolute agreement with the learned Judge's response to the first argument - which is also obvious – namely that the power to condone the non-compliance with Rule 14 (1)(a) – (which rule essentially re-iterates what is contained in section 89(4)) - is the power to condone the non-compliance with the rules of the Labour Court - which rule does not- and cannot confer any power to condone the non-compliance with the provisions of the Labour Act, being superior legislation.

[22] In so far as the second argument is concerned - which was upheld by the court in *Lungameni* - it is similarly obvious - that it cannot be said that the inference - to be drawn from the legislature's omission, to grant similar powers of condonation, as provided for in cases of labour appeals, and as contained in section 89(3) – and which was to the effect that it had to be concluded that the court was not vested with the power to condone the non-compliance with section 89(4) - was palpably wrong, particularly as such reasoning would be in line with the case law cited in paragraph 7 of that judgment.

[23] What is then to be made of the further arguments raised by counsel?

[24] It is firstly clear that section 89(4) uses the word 'may': 'a party to a dispute who alleges a defect in any arbitration proceedings 'may' apply to the Labour Court for an order reviewing and setting aside the award'. *(emphasis added)*

[25] The language employed seems indeed to be directory only, also if one considers the absence of any sanctions or penalty in the Labour Act for not complying with that section.

[26] By way of contrast it is also interesting to note that the same terminology is not utilised in section 89(2), which states that a party to a dispute, who wishes to appeal an arbitrator's award, 'must' note an appeal within 30 days after the award is served.

[27] While both the noting of an appeal and the launching of a review against an arbitrator's award are optional, the terminology utilised seems to indicate that parliament intended to state 'if a party wishes to appeal it must do so within 30 days and if such party fails to do so the Labour Court may condone such late noting on 'good cause' shown. If a party, on the other hand, opts to review an arbitrator's decision, such party may do so, provided that such review is brought within the time limits set by section 89(4) i.e. within 30 days or within 6 weeks, after the discovery in a case of involving corruption, in which case no avenue for the condonation for the out of time bringing of an application for review is provided for or offered'. I will return to this aspect below.

[28] In this regard it is to be noted that it may not always be helpful to focus merely on whether the requirements set by a statute are 'peremptory' or 'directory' but that the true enquiry is what the intention of the legislature actually is, as properly construed.

[29] Trollip AJ put it as follows in *Nkisimane v Santam Ins Co Ltd*[23] :

[23] 1978 (2) SA 430 (A)

'Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380). [24]

[30] As far as the object of the provisions section 89(2) and section 89(4) are concerned, Ms Visser has correctly conceded that they reveal an intention of the legislature that review and appeal proceedings are to be conducted with promptitude in order to bring same to finality.[25] Parliament in this case has done this in its own peculiar way as appears from paragraph [27] supra.

[31] If one then has regard to the scheme created by the section it appears clearly that time periods for the noting of reviews and appeals were considered - so much so - that the legislature even considered that it would be apposite to extend the set period, as far as reviews are concerned, in cases involving corruption.

[32] Why otherwise, would the legislature then have set a period of 30 days and a period of 6 weeks, after the date of the discovery of corruption, and not at the same time provide for an extension of both periods on 'good cause' shown. The categorisation into 'normal' reviews and those involving 'corruption' is surely not coincidental. It reveals the specific and deliberate consideration of the legislature - not only to categorise - but also the consideration of the specific time periods which Parliament considered appropriate, for the brining of these types of reviews. Surely Parliament was also aware of the common law requirement to bring reviews within a

[24] At 33H to 434 B

[25] See for instance also : *Haimbili and Another v Transnamib Holdings Ltd and Others* 2013 (1) NR 201 (HC) at [13] to [14]

reasonable time, yet it chose not to make provision for the extension of the set periods, on condonation being granted.

[33] It would have been an easy matter to have included in section 89(3), for instance, the power of the Labour Court to condone the late filing of reviews also.

[34] There thus seems to have been a deliberate intention to limit - by statute - the common law period within which labour reviews are to be brought.

[35] This conclusion then also reveals that counsel's submissions - that the failure to extend to the court the power to hear labour reviews, out of time, was an omission or oversight - cannot be upheld.

[36] At the same time it emerges that the constitutional Article 18 rights of litigants, to have the decisions of arbitrators' reviewed, with reference to the Constitution, are not denied. All the Act, seemingly, intends to do, is to limit the time periods, within which ordinary labour reviews and those involving corruption, are to be brought even if such cases would involve and may involve constitutional considerations.

[37] Whether this limitation, in the absence of a provision, enabling the court's to extend those time periods, is unconstitutional however, I have not been requested to decide and also cannot decide, in the absence of a proper constitutional challenge made in this regard[26] and in which all the interested parties would also have been brought before the court.[27] I accordingly decline to decide this issue.

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[26] See : *Kalipi v Hochobeb* (A 65/2012) [2013] NAHCMD 142 (30 May 2013) at para's [20] to [27]; *Zaahl and Others v Swabou Bank Limited and Others* (Case No A 35/2006) delivered on 23 November 2006 - reported at http://www.saflii.org/na/cases/NAHC/2006/16.html - following *Prince v President, Care Law Society and Others* 2001 (2) SA 388 (CC) at paragraphs [22] – [28], *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC) in paragraphs [24] and 25], *Phillips and Others v The National Director of the Public Prosecutions* 2006 (1) SACR 78 (CC) at paragraph [43] *Lameck v President of Namibia* 2012(1) NR 255 (HC) at par [58], p 271 and the authorities referred to in footnote 21, *Shalli v Attorney-General* case POCA 9/2011 delivered on 16 January 2013 reported at http://www.saflii.org/na/cases/NAHCMD/2013/5.html at para [6]; *Lameck and Another vs President of the Republic of Namibia & Others* 2012(1) NR 255 HC at paragraph [58] cited with approval in *Shalli v Prosecutor-General* at [7];

[27] See : *Kaunozondunge NO and Others, Kavendjaa* v 2005 NR 450 (HC) at 465, see also *Majiedt and Others, Minister of Home Affairs* v 2007 (2) NR 475 (SC) at paras [7] to [11]

[38] Finally I believe that counsel's argument lost sight of the provisions contained in section 117(1)(b)(i), which expressly states that the Labour Court has exclusive jurisdiction to review an arbitration tribunal's award in terms of 'this Act'. - *(my emphasis)* - This section states in clear and unambiguous terms that such exclusive review jurisdiction is conferred by the Labour Act - on the Labour Court - and not in accordance with any other law.

[39] The golden thread that also permeates through all the authorities relating to a more liberal construction of statutes - as relied on by Ms Visser - is - that it will be the legislature's intention - which appears from the enactment under consideration - that will ultimately determine which statutory interpretation will prevail.

[40] In this instance - and given the clear intentions of Parliament - the categorisation of the statutory requirements, set by section 89(4) into 'peremptory' and 'directory' – are also not helpful, particularly in circumstances where the Act, expressly, requires reviews to be brought within a certain time - and no power to extend such time - or to condone the out of time launching of reviews - is given to the court.

[41] It must for all these reasons from the language, scope and purpose of the Labour Act 2007 ultimately be concluded that the provisions of section 89(4) were intended to be peremptory.[28]

[42] This is also precisely the conclusion Smuts J arrived at in the *Lungameni* matter in paragraph [7].

[43] I must add that it is with some reluctance that I have come to this conclusion as the failure to assume jurisdiction will obviously cause injustice to the applicant in this instance.

[28] See also for instance : *Le Roux and Another v Grigg-Spall* 1946 AD 244 at 249 to 250

[44] In the absence of a constitutional challenge - and while there is always a presumption that Parliament never intended an unreasonable result – if however, from the language of the statute it is clear what the intention of the legislature is - the court must give effect to it, no matter how unreasonable the result may be.[29]

[45] The mere fact that the giving to the words, of a statute, their clear and unequivocal meaning, may, in certain instances lead to hardship, is also no justification for a court of law to assume the mantle of the legislature by itself amending the statute.[30]

[46] Ultimately counsel's efforts have exposed that there may very well be a need for Parliament to consider whether or not it should expand the provisions of section 89(3) – for instance - to include reviews - thereby clothing the Labour Court with the

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[29] See Beadle CJ in *Van Heerden & Others NNO v Queen's Hotel (Pty) Ltd at 16 to 17 where the learned Chief Justice stated : While there is always a presumption that Parliament never intended an unreasonable result, if from the language of the statute it is plain what the intention of the Legislature is, the Court must give effect to it, no G matter how unreasonable the result may be. This Court has no power to adjudicate on the reasonableness or unreasonableness of an Act of Parliament. See the remarks of LEWIS, J., (as he then was), in Chingachura Exploration Co. (Pvt.) Ltd. v Hatty, N.O. 1963 (1) SA 46 (SR) at p. 55, and cases there cited. The desirability or otherwise of these particular regulations is a matter for Parliament, not for the Courts. In determining whether or not sec. 3 did give the Minister the right to make these regulations, the Court must look to the intention of the Legislature as expressed in the language of the Act as a whole. In S. v Takaendesa, 1972 (4) SA 72 (RAD), I referred to the elementary rules applying to the interpretation of statutory instruments as set out in Maxwell, Interpretation of Statutes, 12th ed., p. 8, and I might usefully repeat these here:*

'The rule of construction is 'to intend the Legislature to have meant what they have actually expressed'. The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced fromthe language used', for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law'.

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. 'The decision in this case,' said Lord MORRIS OF BORTH-Y-GEST in a revenue case, 'calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision'. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon) to others'.'

See also Craies on Statute Law, 6th ed., p.70:

[30] *S v Takaendesa* op cit at 77

requisite jurisdiction and power to entertain reviews outside the set time periods, in deserving cases, in order to avoid hardship and injustice.

[47] Also in view of my findings made in this instance - I cannot state that the decision in *Lungameni* is clearly wrong. I will therefore follow it.

a) In the result the application falls to be dismissed.

b) The Registrar is directed to make a copy of this judgment available to the Honourable Minister of Labour and Social Services for reconsideration.

H GEIER

Judge

APPEARANCES

APPLICANT:	I Visser Instructed by: Le Grange Legal Practitioners, Windhoek.