REPUBLIC OF NAMIBIA Not Reportable

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: LCA 56/2014

In the matter between:

SOCIAL SECURITY COMMISSION	**APPELLANT**
And	
INONGE VIVIAN MUTWA	**FIRST RESPONDENT**
GETRUDE UUSIKU N.O	**SECOND RESPONDENT**
THE LABOUR COMMISSIONER	**THIRD RESPONDENT**

Neutral citation: Social Security Commission v Mutwa (LCA 56-2014) [2016] NALCMD 2 (18 January 2016)

Coram: SCHIMMING-CHASE, AJ
Heard: **19 June 2015**
Reasons: **18 January 2016**

Flynote: Labour Law – Section 86(2)(b) of the Labour Act No 11 of 2007– Dispute to be referred within one year of dispute arising – Dispute referred to Labour Commissioner after a period of four years – The first respondent made no effort to exhaust her internal

remedies within a reasonable time - Award accordingly made contrary to the provisions of section 86(2)(b) – Appeal upheld, court holding that the dispute prescribed under section 86 (2)(b) of the Labour Act.

REASONS

Schimming-Chase, AJ:

[1] On 19 June 2015, this court granted an order upholding the appellant's appeal and set aside the arbitration award made by the second respondent in favour of the first respondent. The appeal was initially only opposed by the first respondent, who withdrew her opposition on 24 February 2015. The first respondent also did not participate in any further process related to the appeal. The reasons for the order are set out below.

[2] The appellant appealed against an award granted in favour of the first respondent on 4 November 2014 and raised a number of grounds in support of the appeal. One of the grounds raised is whether or not the first respondent's claim prescribed in terms of section 86(2)(b) of the Labour Act No 11 of 2007, which provides that a party may refer a dispute other than a dispute concerning unfair dismissal within one year of the dispute arising. This question was raised as a preliminary point at the outset of the arbitration and was effectively dismissed by the arbitrator.

Background

[3] The first respondent worked for the appellant and was promoted to the position of Regional Branch Manager in Walvis Bay with effect from 1 December 2009. As part of her remuneration package resulting from the promotion, the first respondent became

entitled to and received a motor vehicle allowance amounting to N$ 10 668.76 per month, which significantly increased her monthly income.

[4] The dispute between the parties essentially concerns the increased promotional package that the first defendant became entitled to in terms of the new position. The appellant contends that persons appointed to the specific job category that the appellant was appointed to, receive a motor vehicle allowance as part of their increased remuneration. The first respondent contends that the motor vehicle allowance extended to her when she was so promoted is not part of her remuneration, but a benefit. The first respondent relied on clause 10.8.3 of the appellant's Procedure Manual which reads:

> '10.8.3 Promotion increase
>
> Where a serving employee is offered a higher job, which carries a tangible increased responsibility or greater status and where the salaries overlap, it can be recognised by giving an immediate promotional salary increase. This promotional salary increase will be higher than he /she currently earns.'

[5] The terms of the above policy are not disputed; the appellant contends that the first respondent did in fact receive a promotional increase on her appointment to the higher position, and the first respondent disagrees. The first respondent referred the dispute on this issue of her remuneration package in terms of section 86 of the Labour Act on 30 October 2013. On the first respondent's version her disagreement on her new remuneration package resulted in her querying the issue with the General Manager of the appellant during December 2009. Feedback was given on the appellant's stance on 11 January 2010, and the first respondent was not satisfied with the feedback. She communicated this to her supervisor. The first respondent did nothing further until July 2011, when she 'revived' her salary query with the new General Manager (some one and a half years later). Feedback was promised but apparently not provided according to the first respondent. During October and November 2011 meetings were then held between the first respondent and the appellant's officials, each side remaining with their initial positions. The first respondent then sent an official grievance through her union

representative during August 2012. Negotiations and consultations intermittently took place between November 2012 and September 2013. The first respondent then referred the dispute to the Office of the Labour Commissioner during October 2013. According to her, it was only after the latter consultative processes that the first respondent took a 'final decision to declare this issue as a dispute of right and unfair labour practice'.

[6] On the first respondent's own version, a dispute arose between the parties after she received the initial negative response in January 2010. Between January 2010 and July 2011, the first respondent failed to take any steps to resolve the dispute and continued working and receiving the motor vehicle allowance. One and a half years later, the first respondent inexplicably decided to take up the process. This was in July 2011. It still took over two years to refer the dispute.

[7] Although employees have the right of recourse in terms of the Labour Act to refer disputes relating to their employment, it is not acceptable that they drag their feet beyond the time clearly set out by section 86(2)(b) of the Labour Act. As Mr Tjombe correctly pointed out, the first respondent's claim for the remuneration would also have prescribed by virtue of the Prescription Act, 68 of 1969.

[8] I am in agreement with the submissions by Mr Tjombe, appearing for the appellant, that the first respondent's explanations for the delay are entirely unreasonable. In her summary of facts substantiating her referral to conciliation and arbitration, and in the arbitration proceedings, she claimed that

> "… took long under discussion internally at the company level and it would have been a premature decision from my side should I have referred the dispute while there were positive discussions and email exchanges creating an impression that the matter would be resolved internally."

[9] These email exchanges took place after the initial one and a half year period of complete inaction. The first respondent also offered no explanation why she took so long to 'revive' her issue some one and a half years after she received the

'unsatisfactory' answer. Even the feedback given to her in November 2011 was according to the first respondent, "not encouraging and showed finality from management side on the matter". Yet, the first respondent did not lodge a dispute. Until October 2013.

[10] I was referred by Mr Tjombe to the decision of the Supreme Court in *National Housing Enterprise v Hinda-Mbazira*[1] where it was held that Section 86(2)(a) read together with section 82(9) makes it clear that a referral can only be considered by the Labour Commissioner once all internal remedies in an undertaking have been exhausted[2].

[11] The *National Housing Enterprise* case involved *inter alia* the determination of the date of dismissal of the employee for purposes of calculating the 6 month period within which an employee could refer a dismissal as a dispute in terms of section 86(2)(a). In this matter, the dispute does not concern a dismissal but an interpretation and or calculation of additional salary/benefits accruing subsequent to a promotion. Section 86(2)(b) also specifically refers to a period of one year "after the dispute arising". Dispute is defined in section 1 as including any disagreement between an employer and an employee, which disagreement relates to a labour matter. The remuneration issues between the parties is a labour matter and the first respondent was aware of the dispute since December 2009 and received the same negative response in January 2010 and November 2011.

[12] Mr Tjombe correctly has no qualm with the principles set down in the above case, to the effect that internal remedies should be exhausted first. His argument is that the first respondent did not take reasonable steps to internally resolve the dispute before referring the dispute to the Labour Commissioner. Instead she delayed unnecessarily and dragged the dispute on for a period of 4 years after it arose, and only thereafter, did she refer the dispute. I agree that in these circumstances the first

[1]2014 (4) NR 1046(SC).
[2]At page 24 para 24

respondent failed to comply with the provisions of section 86(2)(b) of the Labour Act and that her claim in terms of that section had prescribed. Accordingly the appeal succeeds.

[13] These are the reasons for the order dated 19 June 2015.

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Schimming-Chase

Acting

Appearance:

Appellant	N Tjombe
Of	TjombeElago Law Firm, Windhoek