

**REPUBLIC OF NAMIBIA**



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO.: LC 69/2015

In the matter between:

**ROADS CONTRACTOR COMPANY**

**APPELLANT**

And

**PETRUS KLEMENS EISEB**

**RESPONDENT**

**Neutral citation:** *Roads Contractor Company v Eiseb* (LC 69/2015) [2016] NALCMD  
38 (30 September 2016)

**CORAM:** VAN WYK, ACTING

**Heard:** 8 July 2016

**Delivered:** 30 September 2016

**Flynote:** Labour Law – Rules of the District Labour Court: Labour Act 6 of 1992 (The Labour Act of 1992) – Rule 18 – s 24 of the Labour Act of 1992 – Prescription is a very fundamental claim - going to the root of the jurisdiction the of the District Labour Court

**Summary:** Respondent filed a complaint in the District Labour Court that his services were unlawfully and unfairly terminated on 7 January 2008. He received judgment in his favour in the District Labour Court in 2015 and appellant was ordered to pay to respondent an amount of N\$ 163,613.50.

Appellant appealed against the decision of the District Labour Court, on grounds that the respondent's employment contract was terminated by the efflux of time and was not unlawfully terminated.

*Held*, that s 24 of the Labour Act 6 of 1992, provides for a time limitation on the reliance of a complaint in the District Labour Court older than 12 months.

*Held*, if rights are not pursued within the time limitation both parties can accept the *de facto* situation as the legal reality.

*Held*, the Chairperson of the District Labour Court erred when he disregarded the appellant's claim of prescription and erred in finding that the employment contract continued uninterrupted from 28 October 2002 until 7 January 2008. His judgment is accordingly set aside.

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### ORDER

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1. The judgment under case number DLC 99/08 in the District Labour Court of Windhoek, is set aside.
  2. There is no order in respect of costs.
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### JUDGMENT

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VAN WYK, AJ

### Background

[1] In this matter the appellant is the Roads Contractor Company Ltd, the former employer of the respondent. The employment relationship terminated on 7 January 2008.

[2] Respondent filed a complaint in the District Labour Court, under case number DLC 99/08 on 4 February 2008, with the following particulars.<sup>1</sup> His services were unlawfully and unfairly terminated on 7 January 2008. He complained that he was appointed to work at a railway project at the Aus-Lüderitz region from where he was transferred to the respondent's head office in Windhoek. The relief sought was reinstatement and payment of all benefits.

[3] The matter was initially set down for hearing in March 2012, but was postponed for a number of times and was eventually finalized on 19 August 2015.

[4] This matter was heard by Mr. G.B Van Pletzen, in his capacity as Chairperson of the District Labour Court. In his judgment dated 12 October 2015,<sup>2</sup> he found that although the services of the respondent had been terminated in September 2006, the termination did not disclose a valid reason and as such it was not valid.<sup>3</sup> He dismissed the argument of prescription raised by the appellant on the basis that it was not pleaded. The crux of the Chairperson's reasoning is stated below:<sup>4</sup>

'It was never pleaded that the complaint was out of time, and was never addressed during the whole hearing. This argument would seem to me to be an ambush, and I am not going to give any weight to it.

From the foregoing I am satisfied that the complainant was in the service of the respondent the whole period from 28 October (sic)<sup>5</sup>, to 7 January 2008, and that any variation of the original agreement was null and void for several reasons. Firstly, these variations were made

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<sup>1</sup> Record page 1  
<sup>2</sup> Record p298-303  
<sup>3</sup> Record p301  
<sup>4</sup> Record p302  
<sup>5</sup> Record p 302

unilaterally, and presented to the complainant without the benefit of consultation, and explanation of the implication of acceptance of these variations. Had complainant known that these variations would have changed his whole position drastically, he could not have made an informed decision regarding acceptance of the variations.<sup>1</sup>

[5] The appellant noted an appeal against the finding of the Chairperson of the District Labour Court for the District of Windhoek on 30 October 2015.<sup>6</sup>

### **Points in Limine**

[6] At the appeal hearing, the respondent took the following two points in *limine*. He averred that the appellant's amended heads of argument was filed late, and not in accordance with *rule 18* of Labour Court Rules<sup>7</sup>. *Rule 18* requires filing of the heads not less than 10 days before the hearing date. In this case, the appellant filed the heads on 27 June 2016, only 9 days before the hearing date. Counsel for appellant at the appeal contended that the heads were filed on time and were not late. He also did not seek condonation from the court in respect of the heads of argument being filed one day late.

[7] In this respect, respondent is indeed correct, and appellant could have easily rectified the lack in his case by asking the court to condone the late filing. In the premises, without a condonation application from appellant, this court is not in a position to consider the appellant's amended heads of argument filed on 27 June 2016. The court will however have reference to the appellant's earlier heads of argument filed on 11 April 2016.

[8] Respondent further pointed out that appellant did not certify the copies of the record provided to respondent as true and correct. Appellant also failed to file such certificate with the registrar. Accordingly, the appellant is in breach of *rule 18 (3) (a) (iv) and (v)* of the *Rules of the District Labour Court*<sup>8</sup>. Respondent argued that the court should not condone the lack of compliance, and by implication the appeal is not proper

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<sup>6</sup> Record 304

<sup>7</sup> Labour Act, 6 of 1992

<sup>8</sup> Labour Act, 6 of 1992

before the court. He relied on the Supreme Court case of *Tweya and Others v Herbert and Others*<sup>9</sup> (the *Tweya* case), in which the Supreme Court declined an application to condone the use of an inadequate record in the appeal.

[9] Counsel for the appellant, Mr. Philander, admitted the shortcoming in relation to the certification of the record, but submitted that the respondent was ceased with the record since April 2016 and could have requested the certificates as raised. Mr. Philander submitted that respondent suffered no prejudice as a result of the missing certificate. Respondent could well have requested the same telephonically, rather than raising it as a technical objection at the hearing. He argued that the respondent is merely raising these technical objections to obtain an advantage in these proceedings and not because his case or preparation was prejudiced.

[10] Mr. Philander relied on the following dicta of Rabie J in the case of *Koelner SA and Others v Rawplug South Africa (Pty) Ltd and Others*:<sup>10</sup>

‘The same can be said about practitioners who set out to use every rule available to achieve some or other advantage over the opponent. The Rules of Court are there to facilitate the legal process and should not be abused’

[11] Counsel for the appellant cited a range of authorities,<sup>11</sup> arguing his case that the technical objection to less than perfect procedural steps, such as the lack of certification of the copies of record, should not be entertained. He submitted that the respondent did not aver any prejudice suffered by the lacking certificates and requested the court to proceed with consideration of the merits of this case, in the interest of the administration of justice, without the said certificates.

[12] Mr. Philander distinguished the instant case, where the prejudicial effect of the lacking certificate has not been alleged or demonstrated, from the instance in the *Tweya*

<sup>9</sup> (SA 76/2014) [2016] NASC 13 (6 July 2016)

<sup>10</sup> (5559/13[2914] ZAGPPHC 592 (23 July 2014))

<sup>11</sup> *Anglo Operations v Sandhurst* [2006] SCA 146 (RSA), para 32; *Trans-Africa Insurance Company v Maluleka* 1956 (2) SA 273, para 278 F-G; *Federated Trust Ltd v Botha* 1978 (3) SA 645. *Khunou and Others v M Fihrer and Son (Pty) Ltd and others* 1982 (3) SA 353 (W) at 355-356

case where the record was lacking in excess of 400 pages. A material part of the record was lacking, (and provided a mere court day before the hearing), so much so, that counsel representing a set of appellants was not in a position to advance argument on the question of prospects of success, and could not file any heads of argument because of the incomplete record. There was indeed a serious instance of prejudice to the case of the appellants in the *Tweya* case, which is very different from the current matter, he concluded. In the premises, I accept the manner in which counsel for the appellant distinguished the instant case from the *Tweya* case.

[13] In determining the second point in *limine*, I am reluctant to follow a strict approach to hold appellant to the letter of the rule and I am inclined to accept the appellant's reasoning that it is in the interest of the administration of justice to condone this non-compliance and proceed to hear the merits. In the premises, I condone the non-compliance with *rule 18 (3) (a) (iv) (v) of the Rules of the District Labour Court* and will proceed to deal with the merits of this matter.

### **Facts in Common Cause**

[14] The respondent was initially appointed by appellant on 28 October 2002, as a site clerk.<sup>12</sup> The appointment was on a contract for a project for a period of 9 months, alternatively, until the end of the contract in the Construction Division of the Roads Contractor Company at Aus-Lüderitz Railway Project. On 5 August 2004 his appointment was extended for Phase Two of the Aus-Lüderitz Railway Project, for the duration of the project.<sup>13</sup>

[15] As per the letter dated 11 August 2006, the appellant terminated the respondent's services effective 1 October 2006.<sup>14</sup> Respondent did not lodge a complaint in the District Labour Court regarding the termination of his services in accordance with this letter dated 11 August 2006. However, respondent made several attempts to

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<sup>12</sup> Record p287

<sup>13</sup> Record p290

<sup>14</sup> Record p289

resolve the matter by making enquiries and requesting to meet with his superiors to object to the content of the letter dated 11 August 2006.

[16] The respondent was appointed on a three-month employment contract, on 2 October 2006, as part of a group of employees<sup>15</sup> with a contractual term from 1 October 2006 to 31 December 2006.<sup>16</sup> On 24 October 2006, respondent was re-deployed, to Windhoek, with the same conditions of employment, save that he then held the position of assistant buyer in Windhoek.<sup>17</sup>

[17] Respondent accepted the re-deployment and communicated his acceptance by way of the letter dated 2 November 2006,<sup>18</sup> and raised a number of points relating to his re-deployment. He requested a relocation allowance in the amount of N\$2,500.00. He requested that the duration of his contract be changed to a permanent position. He further requested an adjustment to his salary to compensate for his loss of earnings related to the site allowance which he will no longer receive in Windhoek. These requests were not granted by appellant.

[18] On 22 March 2007, appellant further extended the respondent's employment contract until 31 December 2007. Respondent continued to render his services, until 7 January 2008, when respondent was informed that his contract terminated on 31 December 2007 and will not be extended. Respondent denies having signed Exhibit B, the document tendered to prove that he accepted the extension granted on 22 March 2007.<sup>19</sup>

[19] Having considered the above stated factual matrix, I find that the employment contract between the parties was indeed terminated in 2006. Respondent demonstrated his knowledge thereof when he tried to consult his supervisors about the matter and tried to convert the arrangement into a permanent arrangement, even contending for a

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<sup>15</sup> Record p281-283, p 56-58

<sup>16</sup> Record p292

<sup>17</sup> Record p293

<sup>18</sup> Record 295

<sup>19</sup> Record p151

salary adjustment. He did not file a dispute with the District Labour Court and continued to render his services despite the fact that he denies having signed the acceptance letter. It is my finding that whether he signed the acceptance letter or not, his conduct indicates that he understood the content of the termination letter and he continued to render his services in his new capacity, trying to resolve the situation through negotiation.

[20] Mr. van Pletzen made a different factual finding in this respect and I refer to crux of his ruling cited above. He ruled that the employment contract commenced on 28 October 2002 and was terminated unilaterally on 7 January 2008 and was thus unlawful, and hence his order for payment of loss of earnings. His ruling was based on the fact that he found the 2006-act of termination a unilateral act, because it was 'presented to the complainant without the benefit of consultation'<sup>20</sup>.

[21] It is fair to say that Mr. Van Pletzen made a determination of the correctness of the 2006-act of termination, and based his ruling regarding the 2008 complaint thereon. In doing so he made the following observation regarding the appellant's argument that the respondent's rights on the 2006- act of termination has indeed lapsed before the complaint was filed in 2008<sup>21</sup>:

'It was never pleaded that the complaint was out of time, and was never addressed during the whole hearing. This argument would seem to me to be an ambush, and I am not going to give any weight to it.

[22] I will now deal with the argument of prescription as raised by appellant on appeal.

### **Prescription of relief based on the 2006-act of termination**

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<sup>20</sup> Record p 302

<sup>21</sup> Record p302



[23] The essence of the appellant's case is that the respondent was not dismissed, but that respondent was appointed on a contract, terminating 31 December 2007. In other words, his employment contract terminated, by the efflux of time. This position is based thereon that respondent's last employment engagement was based on the offer of employment to respondent as assistant buyer, in March 2007, and terminated on 31 December 2007, by the efflux of time. I will refer to this appointment as the 'last employment contract'.

[24] The appellant argued that the last employment contract was preceded by a notice of termination of employment dated 11 August 2006. I will refer to this notice of termination as the '2006-act of termination'. Appellant during argument in court admitted that the 2006-act of termination was a unilateral act by the appellant and the legality thereof might have been susceptible of a challenge by the respondent in terms of the provisions of the *Labour Act 6 of 1992*. I hold that the cause of action based on the 2006-act of termination arose on 30 September 2006, the last date of service in terms of the notice. I will now consider the impact of *s 24 of the Labour Act 6 of 1992* on the legality of a complaint based on the 2006-act of termination.

[25] *Section 24 of the Labour Act 6 of 1992*, provides as follows:

'Notwithstanding the provisions of any other law to the contrary, no proceeding shall be instituted in the Labour Court or any complaint lodged with any District Labour Court after the expiration of a period of 12 (twelve) months as from the date on which the cause of action has arisen... . except with the approval of the Labour Court or District Labour Court ... on good cause shown.'

[26] The ordinary language of this provision is unambiguous and clothed in peremptory language. Complaints in the District Labour Court must be lodged within 12 months from date of cause of action. Respondent did not lay a complaint within 12 months from the date of 30 September 2006. He opted to try and resolve the issue with his employer through negotiation and accepting re-deployment to another position.

[27] Only when this avenue still rendered the respondent unemployed on 7 January 2008, he filed a complaint on 4 February 2008 in the District Labour Court. Respondent did not seek an approval from the District Labour Court at such time to lodge his complaint based on the 2006-act of termination.

[28] In the premises, I hold that the correct legal position in this matter is that the respondent's cause of action based on the 2006-act of termination lapsed, by the time he filed a complaint in February 2008.

[29] In his judgment in the District Labour Court, Mr. Van Pletzen, ruled that the prescription of the respondent's rights to complain based on the 2006-act of termination, was not pleaded and consequently not properly raised in the matter before him. He viewed the appellant's argument<sup>22</sup> of prescription as an ambush tactic and resolved not to take it into consideration in his final decision.

[30] Accordingly, he held that respondent's claims based on the unlawfulness of the 2006-act of termination is valid, consequently, that such termination of respondent's services was unlawful and should for purposes of the determination of the entire employment relationship be regarded as if it never occurred. It follows, so his argument goes, that the actual employment relationship between the parties in this matter lasted from 28 October 2002 until 7 January 2008, without interruptions<sup>23</sup>.

[31] I hold a different view on this matter. A claim of prescription against a cause of action is quite fundamental in terms of the principles of the Act. It goes to the root of the statutory intent behind entertaining labour disputes in the judicial arena. In the instant case where there are allegations that the 2006-act of termination has been followed with conduct by respondent indicating that he accepted the termination and consequent re-deployment, even more so. The reason why the Legislator has placed a timeline for lodging of complaints is to bring finality to the rights of parties in the employment

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<sup>22</sup> Record 301

<sup>23</sup> Record p302

relationship.<sup>24</sup> The employment relationship is a dynamic one which evolves over time. If parties are allowed to enforce rights years after the time it accrued, disputes can become very complex.

[32] I respectfully associate myself with the following dicta by Smuts J, which was in relation to *s 86 (2) of the Labour Act, 11 of 2007*, but can have equal application to the intent of the Legislator in *s 24 of the Labour Act 6 of 1992*:

'As was confirmed by this court, the provisions of s 86(2) are peremptory. As was stressed in that matter, the provisions of the Act clearly demonstrate a statutory intention for disputes to be resolved and determined expeditiously.'<sup>25</sup>

[33] If a party's rights are not pursued within the time constraints of *s 24 of the Labour Act 6 of 1992*, both parties should be in a position to accept the *de facto* situation as the legal reality - once the period of 12 months expired.

[34] To the contrary, Mr. Van Pletzen is giving the respondent the benefit of rights not pursued timeously, by holding that the 2006-act of termination was unilateral and can be disregarded. In my view this finding, is contrary to the intent of the Legislator in *s 24*, where the provision is clearly placing a time bar on the reliance of a complaint in the District Labour Court older than 12 months.

[35] In this regard I respectfully associate myself with the reasoning of Muller AJ, in *Standard Bank Namibia v Grace and Another*:<sup>26</sup>

'Mr Coleman now submits in his supplementary heads and in this court that the arbitrator, being a creature of statute, derives his jurisdiction from the provisions of the Labour Act, No. 11 of 2007 (the Labour Act) and consequently did not have the jurisdiction to hear and adjudicate on a dispute relating to promotion. The submission, as I understand it, therefore is

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<sup>24</sup> *Luderitz Town Council v Shipepe* (LCA 42/2012) [2013] NALCMD 9 (2013)

<sup>25</sup> *Luderitz Town Council v Shipepe* supra

<sup>26</sup> (LCA 42/2010) [2011] NALC 22 (12 August 2011)

that on that ground alone the appeal must succeed. Mr Tjitemisa's counter argument in that regard is that this is a new point which was not raised before the arbitrator and although the appeal against respondents "promotion" is a ground of appeal in the amended notice of appeal, it is a new point of law and cannot be entertained now.

I disagree with Mr Tjitemisa's submission that this point cannot be raised now. It is clearly a legal point and goes to the root of the arbitrator's jurisdiction to hear and adjudicate an issue like promotion. I shall consequently consider Mr Coleman's argument and determine whether it has any merit.'

[36] The case of *Standard Bank v Grace*, (the Standard Bank case) was decided in terms of the *Labour Act of 2007*. However I am of the view that the intent of the Legislator with *s 24 in the Labour Act 6 of 1992* and *s 86 of the 2007 Act*, are comparable and therefore I find the authority a suitable reference.

[37] In the *Standard Bank* case, the issue of prescription was raised in the supplementary heads on appeal, it was not pleaded or raised in the arbitration proceedings and yet it was entertained as a valid defense because it raised such a fundamental objection to the statutory powers of the presiding office - in that case the Office of the Labour Commissioner. I hold that this principle has equal force in the instant case in relation to the statutory mandate of the District Labour Court, in terms of *s 24 of the Labour Act 6 of 1992*.

[38] Having considered the above, I am satisfied that the Chairperson of the District Labour Court erred in his finding that the employment contract continued uninterrupted from 28 October 2002 until 7 January 2008. This factual finding was based on his incorrect legal finding that he can disregard the appellant's claim of prescription in respect of the 2006-act of termination.

[39] It follows that the judgment of Mr Van Pletzen in the District Labour Court, under case DLC 99/08, is wholly set aside.

[40] Based on the above, I make the following order:

1. The judgment under case number DLC 99/08 in the District Labour Court of Windhoek is set aside.
2. There is no order in respect of costs.

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L VAN WYK  
Acting Judge

## APPEARANCES

APPELLANT: SR Philander  
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RESPONDENT: JN Tjitemisa  
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