

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-APP-AAA-2019/00048

In the matter between:

BEAVAN DICKSON MUSHETI

APPELLANT

and

THE AUDITOR-GENERAL OF NAMIBIA

RESPONDENT

Neutral Citation: *Musheti v Auditor-General of Namibia* (HC-MD-LAB-APP-AAA-2019/00048 [2020] NALCMD 3 (6 February 2020))

CORAM: MASUKU J

Heard: 31 January 2019

Delivered: 06 February 2020

Flynote: Labour Law – appeal in terms s 86 – question whether dispute was lodged in time with the Labour Commissioner, namely 1 year from time when dispute arose – whether arbitrator was correct in determining time when dispute arose and thus whether he had jurisdiction to determine the dispute – whether arbitrator had jurisdiction to determine any other issues once he finds he has no jurisdiction.

Summary: The appellant was discharged from the Auditor-General's Office on account of misconduct, after a deeming provision came into effect. He had been absent from employment for more than 30 days. On appeal, he was reinstated and was to be paid. The employer, in computing the days he would be paid, excluded the time between the discharge and the reinstatement. He lodged proceedings before the Labour Commissioner's Office. At arbitration, the arbitrator, in response to point of law *in limine*, held that the appellant had not lodged the dispute timeously and that the arbitrator therefor had no jurisdiction to deal with the dispute and dismissed the proceedings.

Dissatisfied with that decision by the arbitrator that he did not have jurisdiction to deal with his dispute because it had been lodged out of time, the appellant lodged the present appeal. The arbitrator held that the claim arose when the appellant was given a letter dated 2 August 2017 reinstating him and advising him he will be paid for the period of absence. Later, a letter issued in November 2017 altered the position and included the days when the appellant could not tender services because he had been discharged in terms of the law. On receiving the latter letter with its consequences, the appellant lodged a dispute.

Held: that disputes, save those of dismissal must be lodged within a period of six months and that other claims, in terms of the Act may be lodged within one year.

Held that: the letter dated 2 August 2017, although it stipulated what was due to the appellant, did not give the minute details of the implications of the days of absence and it was only the letter dated 22 November 2017 that stated in clear terms the implications thereof and thus, it was that time that the claim arose.

Held further that: it is when the claimant has full knowledge of the claim and is fully possessed of the particulars of the claim that the claim can be said to arise.

Held: that after the arbitrator found that he did not have jurisdiction, he was not entitled to have entertained any other issue related to the matter as he did, even though he had been wrong in finding that he did not have jurisdiction.

Held that: because the matter had been dismissed on the basis of lack of jurisdiction, raised as a point *in limine*, the court is not entitled as prayed, to deal with the matter on the merits as it cannot serve as a court of first instance and also exercise appellate jurisdiction.

The appeal was upheld and the matter was referred back to the same arbitrator to deal with the matter on the merits.

ORDER

1. The Ruling issued by the Arbitrator Mr. Immanuel Heita, dated 22 August 2019 upholding the Respondent's point of law of prescription, is hereby set aside.
2. The matter is remitted back to the same Arbitrator for determination on the merits.
3. There s no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The question for determination involves a crisp question of law, namely, whether the Arbitrator, Mr. Immanuel Heita Musheti, correctly upheld a point of law of prescription, raised *in limine* on behalf of the respondent in arbitration proceedings before him.

[2] It is a matter of comment that the Arbitrator has not been cited in the present proceedings, a matter I do not intend to contend with as the Arbitrator is normally cited *ex officio*. Ordinarily, he or she has no effective role to play once the record of proceedings before him or her, has been dispatched and is before court. Parties should, however, as a matter of law, and in addition good practice, cite the arbitrator in such proceedings.

Background

[3] The matter arises from a set of unfortunate circumstances and which have seen it serve in a different setting before this court. It is unnecessary though, to engage in any detail on the other matters that appear tangential to the present proceedings. I will, accordingly confine the facts only to those that have culminated in the present dispute.

[4] The applicant, a male adult Namibian, was employed by the Auditor-General at the rank of Grade 7. In the course of employment, it appears that the appellant was afflicted by a certain sickness, which culminated in him being absent from duty for a considerable period of time.

[5] The respondent, the Auditor-General, took the view that the applicant's absence was unauthorised and accordingly invoked the provisions of s 24(5) (a)(i) of the Public Service Act.¹ In terms of that provision, a public service employee, who absent him or herself from duty for a period exceeding 30 days, shall be deemed to have been discharged from the Public Service, on account of misconduct.

¹ Act No. 13 of 1995.

[6] By letter, dated 15 August 2016, the appellant was advised by the respondent that he had been deemed discharged in terms of the said provision with effect from 25 April 2016. He was, in the same letter, advised of his right to appeal for reinstatement in terms of s 24(5)(b), which right he exercised accordingly. His appeal succeeded and he was reinstated to the Public Service, after a recommendation by the Public Service Commission having reviewed his case.

[7] By letter dated 7 August 2017, the appellant was advised of the good tidings. He was reinstated to the same grade and letters confirming same, including the fact that he was due to be paid some money, were written by the office of the respondent.

[8] Matters came to a head, giving birth to the present dispute, when the respondent indicated by letter dated 22 November 2017 that the appellant would not be paid for a period of 211 days, which would be reckoned as leave without remuneration. This came about because the appellant did file some medical certificates which explained part of his absence and which were accepted by the respondent.

[9] The appellant accordingly lodged a dispute of an unfair labour practice with the Office of the Labour Commissioner, Windhoek, in April 2019. The matter could not be resolved at conciliation stage, requiring that it serves before the arbitrator at arbitration. It is how the proceedings then served before Mr. Heita.

[10] Before the arbitration proceedings could commence before the arbitrator, Ms. Kangehombe, who represented the respondent before the arbitrator, raised certain points of law in limine, and requested the arbitrator to non-suit the respondent on whichever point, he found was sustainable. These included non-joinder, incorrect citation of the respondent, the absence of a statutory notice and finally, the issue of prescription.

[11] In his ruling dated 22 August 2019, the arbitrator dismissed all the points of law *in limine* raised by the respondent, bar the last issue of prescription, which he upheld and thus found that the dispute was filed outside the time limits imposed by s 86(2) of the Labour Act.² In this connection, the arbitrator held that the Office of the Labour Commissioner lacks jurisdiction to determine the matter. It is the correctness of that finding that the appellant has submitted to court for determination in these proceedings.

[12] I may mention that there is a further issue raised by the arbitrator relating to the provisions of s 24(5) of the Public Service Act. It is not clear what the effect of that issue on the ultimate finding was. In this regard, the arbitrator did not make a particular finding about the effect of this point of law on the proceedings. He did, however, proceed to dismiss the appellant's application and proceeded to also dismiss the appellant's claim.

[13] I now proceed to deal with the point relating to the question of prescription, which the appellant claims was wrongly decided by the arbitrator, and it constitutes the mainstay of his case in these proceedings.

Prescription

[14] In terms of s 86(2)(b) of the Labour Act, a party may refer a dispute to the Office of the Labour Commissioner within one year, if it is in respect of any case than a dismissal. The latter, according to s 86(2)(a), must be brought within a period of six months. It is abundantly clear that this case is not about a dismissal, the appellant having been reinstated and should accordingly have been referred within a period of one year.

[15] It would appear that the main bone of contention in this regard, is when the period of one year must be reckoned to run. The arbitrator, upholding the argument advanced by the respondent, held that that period should be

² Act No. 11 of 2007.

reckoned to run from 02 August 2017 and not 22 November 2017, as submitted by the appellant herein.

[16] The reasoning of the arbitrator in this regard, can be found in paras 18 and 19 of the ruling where the following appears:

[18] I had time to read through the documents in question, this issue of leave without remuneration was initially communicated to the applicant on the letter dated 02 August 2017, the respondent wrote another letter to the applicant emphasising the same issue and indicating the number of leave days which will be regarded as leave without remuneration.

[19] Based on the above, it is indubitable that the date in which the dispute arose is 02 of August 2017 and not 16 January 2018 as reflected on the referral form. It is pertinent to mention here that the referral was submitted to our office on the 15th August 2018 and as a result was not referred within the prescribe time frame in terms of section 86(2)(b) of the labour (*sic*) Act. Thus I am in agreement with the respondent (*sic*) submission that the applicant's referral was submitted outside the prescribed period and as a result the Labour Commissioner lacks jurisdiction to hear and determine this matter.'

[17] The appellant cries foul and claims that the calculation of days by the arbitrator, is, in the instant case erroneous. Is that argument sustainable, having due regard for the facts of this matter, particularly as evidenced by the documents filed of record?

[18] I am of the view that the finding by the arbitrator that the date from which the calculation of the period must be reckoned to run is 2 August 2017 is palpably wrong. I say so for the reason that the letter dated 2 August 2017 addressed to the appellant by the respondent, advised the former that his reinstatement had been granted with effect from 4 August 2017. That letter, in para 2, added that his 'period of absence from duty until the date of reinstatement not covered by the medical certificates be covered by vacation leave with or without remuneration according to your accumulated credit days on your last day of service.'

[19] To remove any doubt, the letter, in para 3 stated that, 'Arrangements have been made for the payment of your salary and allowance retrospectively with effect from the date your service was terminated. You are further requested to make arrangements with the Human Resources Office to complete the leave forms, upon your assumption of duty.' (Emphasis added).

[20] What is clear from the foregoing, is that the appellant's reinstatement was with effect from the date his services were terminated. The letter dated 22 November, 2017, changed the entire trajectory and effectively backtracked on the contents of the previous letter by stating in part that the period, which had been counted in his favour after the discharge, but before his reinstatement, would be treated as 'leave without remuneration'. The respondent added that it had by that letter, amended the memorandum dated 16 October 2017. Effectively, this also amended the letter dated 2 August 2017 and clearly prejudiced the appellant.

[21] I enquired about the memorandum referred to in the said letter but Ms. Kangehombe indicated that despite their best efforts, it could not be located. This is an unwelcome development when such crucial information develops feet as it were, and goes missing, when it may be central in untying the Gordian Knot in this case.

[22] In any event, I am of the considered view that even in the absence of the memorandum in question, the variance between the letter dated 2 August 2017 and the game-changer dated 22 November 2017, is clear for all to see. This is evident from the contents of paras 19 and 20 above. I accordingly do not agree with the respondent's position on this issue and further reasons for that position follow below.

[23] In light of the two letters, it was after the issue of the letter issued in November that the appellant took issue with the change of position by the respondent. It is accordingly that letter that sparked the dispute between the parties. Properly considered, that is the date from which the dispute must be

reckoned to run, namely, 22 November 2017 and not 2 August 2017, as the arbitrator held.

[24] I am therefore not in agreement with Ms. Kangehombe that the dispute arose on 2 August 2017. What is clear, in any event, is that even if the letter of 02 August 2017 may have, as Ms. Kangehombe sought to argue, set out the terms of the appellant's payment, once this was broken down to the actual number of days for which he would not be paid, by the letter dated 22 November 2017, that is when he received a full appreciation of his financial circumstances and did not agree with the calculations. That is when he became fully aware of the import of what the respondent meant, and accordingly that is the date when he became aware and the dispute accordingly arose.

[25] It would be preposterous to suggest that the appellant should have known the full implications of the contents of the letter dated 2 August 2017 before the breakdown had been made. Whereas he may have been happy, if not content with the sentence underlined in para 19 above, the calculations contained in the letter dated 22 November 2017, changed the entire trajectory and wiped away whatever joy and optimism he might have had.

[26] Without suggesting that s 12(3) of the Prescription Act, 1939, prescription is applicable to the instant case, it is useful to note that in terms of that provision, prescription begins to run from the date the person becomes aware of the debtor and the facts on which the debt arises. The facts on which the debt is predicated in the present matter, only came to the appellant's attention on 22 November 2017.

[27] It appears common cause that the appellant lodged his dispute with Labour Commissioner on 14 August 2018. A simple mathematical calculation shows ineluctably that the appellant was still within the period of one year when the dispute was lodged. That period, would have expired in November 2018, being the first anniversary of the letter giving rise to the dispute between the parties.

[28] In view of the above finding, I am of the considered view that the appellant is eminently correct in his submission that the appeal ought to succeed. In my considered view, the arbitrator fell into serious error in the calculation of the date when the dispute arose and this should result in the court finding for the appellant in the matter, contemporaneously resulting in the arbitrator's ruling being set aside.

[29] I turn to briefly deal with the second point that the arbitrator dealt with in his ruling. This relates to the arbitrator dealing with the issue of the provisions of s 24(5) in the absence of any evidence. I have previously held that he does not make any finding on that issue regarding its effect on the final order issued. It appears, with respect, precipitate for the arbitrator to have gone to the lengths he did to deal with this issue, in the absence of any evidence. From my reading of the issues in this matter, and the finding, some oral evidence had to be led as to what happened in fact.

[30] At para 25, the arbitrator stated that 'on the evidence before me, it is clear that the reinstatement was done as per the aforesaid section'. There is no evidence that was led regarding those issues, which appear to have had a factual flavour to them and in the absence of which the arbitrator would be ill placed to deal with them.

[31] The point of the matter is that the arbitrator, because he found that he did not have jurisdiction to entertain the matter, accordingly did not have the right to deal with any aspect of the matter. This includes the interpretation and applicability of the provisions of s 24 of the Act. Once he found, even incorrectly as has been pointed out, that he had no jurisdiction, he is not at large, to have entertained the issue of s 24 of the Act and to this extent, he erred and his ruling in that regard can properly be regarded as *pro non scripto*.

Way forward?

[32] Mr. Vaatz, for the appellant argued that once the court has found, as it has, that the arbitrator fell into serious error on the issue of jurisdiction, the court must without further ceremony, hold that the appellant is entitled to compensation and issue the appropriate order of compensation accordingly.

[33] Ms. Kangehombe, for the respondent, although disagreeing with the argument advanced by Mr. Vaatz, in her heads of argument, submitted that the court, even if it found for the respondent, should also determine the question whether the appellant was unfairly dismissed from employment by the respondent. In this regard, the court was urged to deal with the correctness of the finding to discharge the appellant by the respondent.

[34] I am of the considered view that both parties have in this connection, fallen into error. The issue of whether the appellant was correctly or incorrectly discharged is not one that can be determined by this court in the absence of evidence, and more importantly, in the absence of proceedings duly conducted and finalised by the Office of the Labour Commissioner on that issue. The court may only deal with those issues when a party to the proceedings, is unhappy with the result or the conduct of the proceedings before the Office of the Labour Commissioner.

[35] In like manner, the court may not properly deal with the question, finding as it has that the arbitrator's ruling on jurisdiction was incorrect, to deal whether the appellant is entitled to any compensation on the papers. This is so because the dispute has not been determined on the merits and the court may not circumvent the proper procedure, even if both parties importuned the court to do so – even on their knees!

[36] If the entreaties by the parties were to be entertained, then the court would be guilty of sitting impermissibly, on this matter as a court of first instance and also as an appellate court, in the absence of any finding on the merits by the body tasked by the legislature to deal with the matter as a tribunal of first instance.

[37] It must be vividly recalled that the arbitrator was not, at any stage, seized with the merits of the dispute but dismissed it on points of law *in limine*, especially on the question of jurisdiction. It is now history that this court has held that in so doing, the arbitrator was incorrect and the logical step to follow, is for the matter to be remitted back to the Office of the Labour Commissioner for the matter to be dealt with on the merits.

[38] The only question that should be determined in my view is this – is there any tangible reason as to why the matter should not be remitted to the same arbitrator who held that the Office of the Labour Commissioner, had no jurisdiction? Ordinarily, the question should be an emphatic No! This is so because the merits have not been entertained by the court and the finding, albeit incorrect, does not serve to show any bias or prejudice that the arbitrator can be said to harbour.

[39] The parties have addressed the court on this matter and they have submitted that in view of the order issued by this court, eventually, since the arbitrator is *au fait* with the matter, and appeared even-handed in dealing with the initial dispute placed before him, it would appropriate to refer the matter for continuation before the same arbitrator.

[40] In light of the agreement by the parties and for the reasons suggested by them, I am of the considered view, in the circumstances, that it would be safe to remit this matter to the Labour Commissioner's Office and for it to be assigned to the same arbitrator to deal with it.

Conclusion

[41] In the premises, the conclusion of the court is that the arbitrator was wrong in finding as he did that the Office of the Labour Commissioner had no jurisdiction to deal with the dispute. Equally, he erred in entertaining the question relating to s 24 of the Public Service Act. To that extent, the decision of the arbitrator must be set aside in its entirety, as I hereby do.

Order

[42] Having arrived at the conclusion recorded in the immediately preceding paragraph, the appropriate order in the circumstances is the following:

1. The ruling of the Arbitrator, dated 22 August 2019, declining jurisdiction to determine this matter, is hereby set aside.
2. The matter is remitted to the same Arbitrator, for determination on the merits.
3. There is no order as to costs.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: A. Vaatz

Of Andreas Vaatz & Partners. Windhoek

RESPONDENTS: S. Kahengombe (with her R. Ketjijere)

Of the Office of the Government Attorney. Windhoek.