REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-LAB-APP-AAA-2022/00012

In the matter between:

JOAH N MATSI **APPELLANT**

and

ROADS CONTRACTOR COMPANY (PTY) LTD **RESPONDENT**

Neutral Citation: *Matsi v Roads Contractor Company (Pty) Ltd* (HC-MD-LAB-APP-AAA-2022/00012) [2022] NALCMD 49 (2 September 2022)

CORAM: OOSTHUIZEN J
HEARD: **17 June 2022**
DELIVERED: **2 September 2022**

Flynote: Labour Appeal — Labour Act 11 of 2007 — Appeal against the decision of the Arbitrator — prescription in terms of section 86(2)*(b)* — no order as to costs — the appeal is dismissed.

Summary: The appellant lodged an appeal before this court, against the arbitration award that was handed down by the arbitrator on 24 January 2022. The appellant was the acting General Manager for Operations from 1 January 2016 until 31 August 2021. The appellant was not awarded a permanent position by the respondent and brought the matter before the Labour Commissioner's Office. The arbitrator concluded that the dispute arose on 1 February 2017 and that the claim had prescribed, therefore, the tribunal lacked jurisdiction to hear the dispute. The appellant appealed against this award stating that the arbitrator wrongly came to this conclusion and that the dispute arose when the appellant became aware of the unilateral change.

Held that, the dispute was subject to section 86(2)*(b)* of the Labour Act and had to be lodged within one year after the dispute arose. The appellant was employed in this position for a period from 1 January 2016 to 31 August 2021, section 86(2)*(b)* makes provision that if a dispute arises, then the employer had one year to lodge the dispute.

Held that, the arbitrator correctly concluded that the dispute arose on 1 February 2017, which correctly stands to be the 13th month. The appellant may not have known whether or not the employer could employ anyone in the permanent position, however, the employee was aware of clause 8(4), in that he qualified to be appointed as the permanent General Manager for Operations after 12 months of acting in that position. Hence, when he was not appointed on 1 February 2017, the dispute arose. The appellant had one year from that date to lodge the dispute with the Labour Commissioner. The dispute was lodged only on 14 December 2020, which was two years, ten months and fourteen days after the dispute had prescribed.

Held that, the arbitrator had no jurisdiction to deal with the dispute as it was lodged out of time.

ORDER

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1. The appeal is dismissed.

2. The arbitration award dated 24 January 2022 is upheld.

3. There is no order as to costs.

4. The matter is finalized and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] The appellant is Joah Matsi, who is seeking an order for the setting aside of the Arbitration Award dated 24 January 2022 which was issued in favour of the respondent, Roads Contractor Company (Pty) Ltd.

[2] On 23 February 2022, the appellant instituted appeal proceedings before this court. The respondent filed its notice to oppose the appeal on 13 March 2022 and filed its grounds of opposition on 13 May 2022, on the basis that the arbitrator was correct in arriving at the decision it did.

Background

[3] The appellant was appointed as the acting General Manager for Operations from 1 January 2016 until 31 August 2020 on a five year contract.[1] During this period the appellant lodged a grievance to the respondent on 31 July 2018 and 15 October 2019 respectively, in relation to his permanent appointment. The respondent, however, informed the appellant on 31 August 2020 that he will no longer be the acting General Manager for Operations.

[4] The appellant then lodged a dispute to the Labour Commissioner on 14 December 2020, due to the respondent's refusal to appoint the appellant to a permanent position in terms of clauses 8.4 and 8.5 of the Human Resources Manual, the terms which of are not in dispute.

[5] The appellant alleges that he acted in this position for more than 12 months and he, therefore, automatically qualifies for a permanent appointment. Clauses 8.4 and 8.5 read as follows:[2]

'8.4 Appointment to act in any position is not a promise or a guarantee that the employee, so acting, will be appointed permanently in that position, once advertised. The company shall make effort to fill the position, by means of advertising the position internally, externally or both internally and externally.

8.5 However, should the company fail to fill the position, by means of advertising the position internally, externally or both internally and externally, in the period of twelve (12) calendar months, the same period during which the employee has been acting in the same position, then the employee will automatically qualify for substantive permanent appointment in that position on the 13th month.'

[1] Index: appeal record, page 76.
[2] Index: appeal record, page 55.

[6] The appellant's submissions are that he acted as General Manager of operations continuously as from 31 August 2019 for a period of 12 calendar months in the same position until 31 August 2020. The appellant's contention is that based on this he automatically qualified for a permanent position as the General Manager for Operations, as from September 2020 which he regards as the 13th month.[3]

[7] The respondent disputed this argument before the arbitrator and stated that the appellant referred the dispute for arbitration outside the prescribed period of one year, which is contrary to the provisions of section 86(2)*(b)* of the Labour Court Act 11 of 2007, hereinafter referred to as the "Act" . The respondent contends that the appellant qualified for permanent appointment on 1 February 2017 being the 13th month as provided for in clauses 8.4 and 8.5, as he started acting in the position on 1 January 2016. The respondent submitted that the appellant was aware as from November 2015 that it was not in a position to permanently appoint him as the General Manager for Operations and or when the initial 12 month period had lapsed and he was not permanently appointed.[4]

[8] The parties were requested to file written submissions after which the arbitration award was handed down by the arbitrator in terms of section 86(18) and reads as follows:[5]

'1. In the circumstances, I find that the respondent has succeeded to advance a case in terms of the *point in limine* so raised in that this office has no jurisdiction to hear the matter.

2. In the same vein, the *point in limine* so raised is hereby upheld.

3. That the matter is thus hereby dismissed with no costs.'

[3] Index: appeal record, page 55.
[4] Respondent's heads of argument, page 7.
[5] Respondent's heads of argument, para 8.

[9] The appellant lodged the appeal before this court, in hopes that the award would be set aside and the matter referred back to the arbitrator to hear the merits of the dispute.

[10] The appellant in his notice of appeal raised the following grounds of appeal:

'i. At the commencement of the arbitration hearing, a disagreement between the parties existed as to when the dispute of the appellant dispute arose the parties submitted written submissions and no evidence was led by either party as to when the dispute referred by the appellant arose.

ii. The arbitrator proceeded to determine when the dispute arose without evidence being led and ruled that he does not have jurisdiction to determine the dispute as the appellant referred his dispute outside the time periods as prescribed by the Act.

iii. The Arbitrator erred in law by not referring the issue to evidence by both parties and then rule thereon thereafter.

iv. In the premises, the arbitrator has reached a decision that no reasonable decision-maker would have reached.'

Issues

[11] This court has to decide on whether the arbitrator was correct in concluding that the dispute was referred outside of the one year period and thus prescribed, therefore, the Labour Commissioner's Office had no jurisdiction to adjudicate over the matter. Hence, the main issue to be determined is when the dispute arose.

The law

Prescription

[12] In terms of section 86 of the Act, it is provided that:

'(1) unless the collective agreement provides for referral of disputes to private arbitration, any party to a dispute may refer the dispute in writing to-

…

(2) A party may refer a dispute in terms of subsection (1) only-

(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or

(b) within one year after the dispute arising, in any other case.'

[13] Honourable Miller AJ, in *Kartsen v The Labour Commissioner and 3 Others*[6] held that:

'…Nothing in Section 86 of the Labour Act gives a conciliator or an arbitrator the power to extend the time period stipulated in the said section, and if condonation has to be given in terms of section 86(2)*(a),* such condonation or extension of time would be ultra vires.'

[14] In terms of *Cloete v Bank of Namibia*[7] the court held:

'It becomes clear at this juncture already that the legislature, through the enactment of the 'time-bar-provisions' - contained in Sections 86(2)*(a)* and *(b)* of the Labour Act – intended to achieve two things: firstly, it set the periods - obviously deemed to be fair and sufficient - within which such referrals could be made – and – secondly – it provided for the cut off points – after which such referrals would be time - barred – obviously intended to avoid 'endless' and 'forever' - ongoing' referrals and arbitrations. Similar considerations as for the enactment of the Prescription legislation would have prevailed in all possibility.'

[15] It is clear from the papers that both parties do not take issue with the s86(2)*(b)*, that a dispute has to be lodged within one year of the dispute arising, however, when the dispute arose and whether the dispute was lodged within one year after the dispute arose. The law is clear that if the claimant does not refer the dispute timeously then the process of conciliation and arbitration can no longer take place.[8]

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[6] *Kartsen v The Labour Commissioner and 3 others* (LC 121/2014) [2016] NALCMD 42 (26 October 2016) para 17.

[7] *Cloete v Bank of Namibia* (HC-MD-LAB-APP-AAA-2019/00071) [2020] NALCMD 34 (23 October 2020) para 35.

[8] *Employees of Swakopmund Uranium v Swakopmund Uranium* (HC-MD-CIV-ACT-CON-2018/01449) [2020] NAHCMD 142 (5 May 2020) para 48.

Conclusion

[16] I am compelled to agree with the arbitrator that the appellant acted in this position as from 1 January 2016 and therefore the dispute arose on the 13th month being,
1 February 2017, which was the time that the appellant should have been appointed to his permanent position, and the beginning of the 12 month period in which the appellant had to lodge the dispute with the Labour Commissioner, and not when the respondent refused his permanent appointment in August 2020. The appellant may not have known whether or not the employer was in a position to employ anyone in the permanent position, however, the employee was aware of clause 8(4), in that he qualified to be appointed as the permanent General Manager of Operations after 12 months of acting in that position. Hence, when he was not appointed on 1 February 2017, the dispute arose. The respondent was aware of the dispute since February 2017 and did not act or lodge the dispute within one year from that date, nor one year after he lodged his grievance with the respondent on 31 July 2018, neither did he lodge it one year after when he lodged the second grievance on 15 October 2019. The dispute was lodged only on
14 December 2020, which was two years, ten months and fourteen days after the dispute had prescribed.

[17] Section 86(2) is very clear and therefore at the time that the appellant lodged the dispute, the claim had already prescribed, the arbitrator set aside the dispute on the preliminary issues and the arbitrator did not have jurisdiction to adjudicate over the dispute, nor to hear the merits of the dispute. I am, therefore, in agreement with the respondent and inclined to set aside the dispute.

[18] I will now turn to the issue of costs, section 118 of the Labour Act[9] reads as follows:

[9] Act 11 of 2007.

‘Despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.’

[19] Having considered section 118, I am not of the view that the appellant acted in a ‘frivolous or vexatious manner’.

[20] In the result, I hereby make the following order:

1. The appeal is dismissed.

2. The arbitration award dated 24 January 2022 is upheld.

3. There is no order as to costs.

4. The matter is finalized and removed from the roll.

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GH OOSTHUIZEN

Judge

APPEARANCES:

APPELLANT:	E Coetzee of Tjitemisa & Associates, Windhoek
RESPONDENT:	J Janser of Shikongo Law Chambers, Windhoek