REPUBLIC OF NAMIBIA

"ANNEXURE 11"

IN THE HIGH COURT OF NAMIBIA

Case Title: B2GOLD NAMIBIA (PTY) LTD // HILENI SHITULA AND ONE ANOTHER	**Case No:** HC-MD-LAB-APP-AAA-2020/00061
	Division of Court: High Court, Main Division
Heard before: Honourable Acting Judge Miller	**Date of hearing:** 8 October 2021
	Delivered on: 21 February 2022
Neutral citation: *B2Gold Namibia (Pty) Ltd v Shitula* (HC-MD-LAB-APP-AAA-2020/00061) [2022] NALCMD 6 (21 February 2022).	
Result on merits: The appeal succeeds.	

Having heard **Ms Lauren Williams**, counsel for the Appellant and **Ms Monika Angula**, counsel for the Respondents and having read the documents filed of record:

IT IS ORDERED THAT:

1. The appeal succeed, and the award made by the arbitrator is set aside.

2. No order as to costs.

3. The matter is finalised and removed from the roll.

Reasons for orders:

A: Introduction:

[1] This matter concerns an appeal against an award issued by the Labour Commissioner at Otjiwarong and which is dated 2 October 2020. In terms of the award, the appellant was ordered "immediately to transfer the respondent Hilma Shitula back to the previous (position) as Assistant Security Officer with effect from 15 November 2020."

[2] The appeal lies against that order.

B: Issues Raised On Appeal.

[3] The appellant contends as a first issue in its Notice of Appeal that the second respondent (the Arbitrator) erred in finding that on the facts the dispute between the parties arose on a about 29 February 2019 and not on 13 October 2015.

[4] The appellant contends that the dispute arose on or about 13 October 2015. It goes on to argue that the referral to the arbitration falls outside the one year period provided for in Section 86(2) of the Labour Act 11 of 2007 (the Act).

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[5] It is necessary and convenient to deal with this issue first. Before I do so it is necessary to summarize the facts giving rise to the issue.

C: The Fact of Background

[6] The respondent is an employee of the appellant. She was initially employed in the capacity of an Assistance Security Officer. The employment commenced on 1 January 2015.

[7] During the year 2015 the work force of the appellant was restructured. This exercise affected the appellant in as much as her duties were changed to that of a stores person. An agreement by way of an addendum to the contract of employment was concluded and signed on 13 October 2015 which addendum reflected the changes brought about by the restructuring process.

[8] The respondent look up the new position and was still of the time of the hearing by the

arbitrator employed in that position.

[9] On 11 July 2018 the respondent by way of a letter requested to be transferred back to her erstwhile position. The respondent was advised to apply for the position which she did. The application was however, not successful.

[10] On 28 February 2019 the respondent launched the proceedings before the arbitrator which now form the subject of this appeal.

D: <u>Discussion</u>

[11] The first issue to determine is on what date the dispute arose.

[12] To place this issue in its proper perspective the arbitrator's factual findings are relevant together with the legal consequences which flow from the factual findings. In essence the arbitrator found as a matter of fact the appellant's decision to transfer the respondent in October 2015 was a unilateral decision taken by the appellant in terms whereof the terms and conditions of the respondent's employment were altered. Having come to that conclusion to arbitrator concludes that such a practice is prohibited by law. In that respect the arbitrator refers to section 50(1) (e) of the Act. The arbitrator found as a matter of fact that the respondent was not consulted. In my view the evidence established that the dispute arose in October 2015. The respondent's evidence is that she was in a sense forced to sign the addendum to the agreement. In that respect the finding of the arbitrator that the dispute arose on that date is correct, albeit for the wrong reasons in my respectful view.

[13] In finding that the dispute, which was based on the factual findings, arose in 2015, the arbitrator refers to section 82(9) of the Act which provides that "the party who refers a dispute to the Labour Commissioner must satisfy the Labour Commissioner that the parties have taken all reasonable steps to resolve to in settle the dispute between the parties."

[14] The arbitrator then concludes that the dispute arose in 27 February 2019 when the respondent was informed that no position of a security officer was available.

[15] With due respect to the arbitrator the evidence does not support the notion that the respondent took reasonable steps to resolve the dispute. The only evidence that the respondent took any step is the letter dated 11 July 2018 written by the respondent, and to which I referred earlier. That can not be said to be an attempt to resolve any dispute and certainly not a

reasonable step coming as it did more than two years after the dispute arose.

[16] In this regard in my view that arbitrator erred both on the facts and the legal conclusions flowing from the factual findings made.

[17] The findings made by the arbitrator are such that I conclude that no reasonable arbitrator would have come to these findings and conclusion.

[18] Once it is accepted that the dispute arose on 13 October 2015 and that it can not be said that the respondent look reasonable steps to resolve the dispute, the peremptory provision found in section 82(2) of the Act was not complied with.

[19] In these circumstances it follow that the appeal must succeed on that issue.

[20] The following orders are made:

[20.1] The appeal succeeds and the award made by the arbitrator is set aside.

[20.2] There shall be no order as to costs

[20.3] The matter is finalised and removed from the roll.

Judge's signature:	**Note to the parties:**
Miller AJ	
Counsel:	
Plaintiff(s)	**Defendant (s)**
Ms Lauren Williams Koep & Partners	Ms Monika Angula AngulaCo. Inc.