

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2020/00069

In the matter between:

TITUS ANDREAS SHIKEMENI
BEN SEROGWE

FIRST APPELLANT
SECOND APPELLANT

and

TRANSNAMIB HOLDINGS
MEMORY SINFWA

FIRST RESPONDENT
SECOND RESPONDENT

Neutral citation: *Shikemeni v TransNamib Holding* (HC-MD-LAB-APP-AAA-2020/00069) [2023] NALCMD 45 (18 September 2023)

Coram: Schimming-Chase J

Heard: 30 March 2023

Delivered: 18 September 2023

Flynote: Labour Act 11 of 2007 – Section 86(2)(b) – Labour disputes, except for disputes relating to dismissals, must be referred to the Labour Commissioner within a year of the dispute arising.

Summary: During 2017, the appellants referred a labour dispute for the payment of overtime to the office of the Labour Commissioner. After some time, and the appellants being dissatisfied with the progress of the referral, the appellants withdrew the referral, and instituted a fresh referral in November 2019.

During arbitration proceedings, the employer of the appellants – TransNamib – took a point *in limine* that on the version of the appellants, the dispute arose during 2017 and the referral was only instituted during 2019. In terms of s 86(2) (b) of the Labour Act, any labour dispute, except disputes relating to the dismissal of an employee, must be referred within a year of the dispute arising. TransNamib contended that the dispute was thus referred late, and the arbitrator could not determine the matter. The arbitrator upheld the point *in limine*.

Dissatisfied with the award of the arbitrator, the appellants noted an appeal against the award. The appellants argued that they have been prosecuting their case without the assistance of a legal practitioner had no intention to withdraw the initial 2017 referral. Further, that the arbitrator erred in finding that the subsequent 2019 referral had lapsed in terms of the Labour Act.

Held that, appellants completed and signed the LC 48 form, recording their clear and unequivocal intention to withdraw the 2017 referral, and to refer a fresh dispute to the office of the Labour Commissioner.

Held that, judicial interruption of prescription is only successful if the proceedings are prosecuted to their finality. The withdrawal of proceedings renders the interruption of no force, and *pro non scripto*.

Held that, the latest date the appellants arguably had knowledge of the dispute was during 2017, and 2019, when the second referral was instituted, the appellants had done so out of time in terms of s 86(2)(b) of the Labour Act, and placed no argument before court that the finding of the arbitrator was perverse. As a result, the appeal is dismissed with no order as to costs.

ORDER

1. The appeal against the arbitrator's award issued under case number CRWK 1308-19 is dismissed.
2. There is no order as to costs.
3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] Before court is a labour appeal, brought by Mr Titus Shikemeni, the first appellant, and Mr Ben Serogwe. I refer to them as "the appellants" in this judgment.

[2] The first respondent is TransNamib Holdings Limited ("TransNamib"). The second respondent is Memory Sinfwa ("the arbitrator"), a duly appointed arbitrator, employed as such at the Office of the Labour Commissioner.

[3] It is the case of the appellants that they were employed as security guards by TransNamib, and that from 1999 and/or 2002 to 2013, they worked overtime and were not compensated. On their versions, the appellants became aware that they could claim for the alleged overtime during 2017, when TransNamib made payment to a group of security guards who had referred a claim for overtime to the office of the Labour Commissioner during 2008. The

appellants were not cited in the 2008 referral, as such, they did not benefit from the 2017 payment.

[4] The appellants then, and in terms of s 86 of the Labour Act 11 of 2007 (“the Labour Act”), referred an overtime dispute to the office of the Labour Commissioner (“the first referral”). The first referral was undertaken sometime during 2017, under case number CRWK 371-2017. It was then withdrawn during November 2019, following what the appellants term a delay by the arbitrator – Mr Mwandingi - during the arbitration proceedings, where TransNamib apparently made countless promises to the appellants that it would pay the overtime to them.

[5] On 11 November 2019, the appellants instituted a fresh referral under case number CRWK 371-2019 (“the second referral”). During these arbitration proceedings, TransNamib raised a point *in limine*, that in terms of s 86(2)(b) of the Labour Act, the dispute under case number CRWK 371-2019 was referred to the office of the Labour Commissioner more than one year after it arose.

[6] The arbitration proceeded on 19 August 2020, and the point *in limine* was argued. After the delivery of heads of argument by both parties, the arbitrator made her ruling on 26 October 2020, upholding the point *in limine*.

[7] In her ruling, the arbitrator found that the appellants became aware of their entitlement to overtime at the end of 2017, when they realised that their colleagues in the 2008 referral were paid, and they were not included in the payment. Further, that the appellants then instituted the first referral during 2017, before Mr Mwandingi – which they withdrew, after which they instituted a fresh referral, the subject matter of her ruling.

[8] She found that about two years had passed, which fell foul of the provisions s 86(2)(b) of the Labour Act, which requires a dispute be referred within one year after the dispute arising. She stated that the appellants could not rely on the first referral to stave off the prescription point in the second referral. She found in this regard that the appellants were well placed to request the

reassignment of the first referral to another arbitrator and that the withdrawal of the first referral did not change the date on which the dispute arose, namely when the appellants became aware of the entitlement to overtime in 2017. This led to the first referral which was later withdrawn. The arbitrator accordingly upheld the point *in limine* by TransNamib, and dismissed the second referral by the appellants. It is against this ruling, that this appeal lies.

[9] The appellants noted their appeal on 19 November 2020 which was not prosecuted in time. The appellants allege that since the noting of the appeal, they were represented by a labour consultant who is not an admitted legal practitioner of this court. As such, they were unrepresented at all material times. During February 2021, the appellants applied for legal aid, and were advised to resubmit their application after 17 March 2021. During April 2021, the Directorate of Legal Aid informed the appellants that the Directorate could not instruct a legal practitioner to act on their behalf, due to a moratorium placed on instructions to private legal practitioners. During July 2021, and unassisted, the appellants delivered an application for condonation and reinstatement of the appeal. During August 2021, the appellants once more sought the assistance of the Directorate Legal Aid. Ms Shikale of Shikale & Associates, came on record for the appellants during December 2021, and delivered an amended notice of appeal during March 2022, before her withdrawal from the matter in April 2022.

[10] Following the amended notice to appeal, TransNamib filed a notice of intention to oppose the appeal and its grounds of opposition.

[11] On 14 July 2022, Mr Esau of the Directorate of Legal Aid, came on record for the appellants.

[12] However undesirable in form and substance, even following the appearance of the legal practitioner of record for the appellants, the application for condonation and reinstatement of the appeal is unopposed. I accept that during the time that the application was launched, the appellants were unrepresented, with due effort made to obtain legal aid. The condonation is thus granted, and the appeal is reinstated.

[13] According to the amended notice of appeal, the question of fact or law appealed against in the arbitrator's ruling are as follows:

1. Whether or not the office of the Labour Commissioner had jurisdiction to hear the matter and/or whether the dispute the had prescribed?
2. Whether about two years had lapsed before the dispute in terms of Section 86(2)(b) was referred to the Labour Commissioner.
3. Whether the Appellants can refer to the dispute that they referred to the Labour Commissioner during 2017 and if that referral is sufficient to ward off prescription.
4. Whether the ruling is in accordance with the peremptory provisions of Rule 86(18).
5. Whether the acknowledgement of debt made by the first Respondent's legal practitioner interrupted prescription.'

[14] Counsel for the appellants, in attempt to advance the position of the appellants, argued that the appellants acted without the assistance of a legal practitioner and had no intention to withdraw the first referral. It was argued that this is evident *ex facie* the LC 48 form, that the appellants had intended to "refer another dispute".

[15] On this ground of appeal, I must reject the argument of counsel. If regard is had to the LC 48 form, it is apparent that although the appellants drew a line through the portion of the form reading 'and forthwith abandon my claims against the respondent', they still withdrew the referral and recorded 'hereby refer another dispute with more particulars to the matter'. Whether it was the intention of the appellants to abandon what they deem their cause or not, for purposes of evaluating the ground of appeal – is of no moment. I say so considering the fact that the appellants completed and signed the LC 48 form, recording their clear and unequivocal intention to withdraw the first referral and

to refer another dispute to the Office of the Labour Commissioner.

[16] Counsel for the appellants further argued that the arbitrator erred in finding that the second referral had lapsed in terms of the Labour Act. The basis of the argument was that the appellants in their heads of argument in the arbitration proceedings, stated that TransNamib had admitted liability to them for the payment of the overtime. These averments, so it was contended, were not disputed or responded to by TransNamib in its heads of argument, and that if proven, prescription would be interrupted.

[17] Counsel referred the court to the matter of *Member of the Executive Council for the Department of Health, Easter Cape v Gamede*,¹ arguing that the onus to prove the date of inception of the prescriptive period and the date of completion thereof rests on the party raising prescription as a defence. In the result, it was for TransNamib to prove that the dispute arose during 2017 and not after TransNamib admitted liability.

[18] Counsel for TransNamib argued that the appellants were aware of the litigation between TransNamib and 33 security guards relating to the overtime payment, and they had elected not to partake in that process. Even if their version is accepted, it leads to the conclusion that the dispute arose at the end of 2017, when payment was effected to the 33 guards. Argument further proceeded that the version of the appellants took many turns, as the appellants provided the arbitrator with at least three different dates on which they allege they obtained knowledge, those being: during or about the end of 2017, 22 July 2017, and August 2019.²

[19] Counsel further argued that the appeal record before court does not contain the first referral, and that the appellants are confined to the four corners of the record before court,³ and that as a result, this court is not in a position to

¹ *Member of the Executive Council for the Department of Health, Easter Cape v Gamede* (CA 05/2022) [2022] ZAECMHC 45 (29 November 2022) para 14.

² Para 16 of TransNamib's heads of argument.

³ *Likoro v S* (CA 19/2016) [2017] NAHCMD 355 (08 December 2017) para 14.

know when the dispute arose and when it was referred to the Office of the Labour Commissioner. Counsel however readily conceded in his written heads of argument that the referral number bears the year when the dispute was referred to the office of the Labour Commissioner. This concession is rightly made and accepted, and it is considered common cause between the parties that the first referral was undertaken during 2017.

[20] Counsel also argued that the arbitrator was correct in her finding and should the appellants not have found satisfaction with the initial arbitrator, they could have requested the reassignment of the referral to a different arbitrator, but instead, the appellants opted to withdraw the referral and institute a fresh referral. The fact that they withdrew the referral has no bearing on the date on which the dispute arose.

[21] Counsel referred the court to *Minister of Safety and Security and Another v Patterson*,⁴ where the following was stated:

‘ . . . The effect of the withdrawal of the action under case no. 7595/2004 was that the interrupting effect on prescription of service of the summons in that action was thereby negated.

...

[21] The effect of withdrawing the action instituted in terms of the summons in case no. 7595/2004 meant that the respondent failed to prosecute his claim to success ‘under the process in question’, with the result that the interruption of prescription that had intervened when the summons was served thereupon lapsed, and the running of prescription was deemed not to have been interrupted. The effect was of a statutory character that was beyond the power of any court to moderate or avoid.’

[22] Although the above case cited was not a labour matter, counsel did not

⁴ *Minister of Safety and Security and Another v Patterson* (A371/2013) [2016] ZAWCHC 169 (22 November 2016) paras [19] – [21].

address the court on why the application of the principle will be any different in labour proceedings, and I find no reason either. As in civil proceedings, judicial interruption of prescription is only successful if the proceedings are prosecuted to their finality. The withdrawal of proceedings renders the interruption of no force, and *pro non scripto*. I am thus not convinced by the appellants' argument that the arbitrator erred in finding that the second referral prescribed, as her reasoning follows, at best, the appellants obtained knowledge of the dispute during 2017.

[23] By 2019, when the second referral was instituted, the appellants had done so out of time in terms of s 86(2)(b) of the Labour Act. Accordingly, the appellants have not shown how or where the arbitrator made any perverse findings on the facts or the law.

[24] In light of the foregoing, the following order is made:

1. The appeal against the arbitrator's award issued under case number CRWK 1308-19 is dismissed.
2. There is no order as to costs.
3. The matter is regarded as finalised and removed from the roll.

EM SCHIMMING-CHASE
Judge

APPEARANCES

APPELLANTS:

D Esau

Directorate of Legal Aid

Windhoek

FIRST RESPONDENT:

R Walters

Adv SS Makando Chambers

Windhoek