

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2022/00047

In the matter between:

**SURE START PROPERTIES CC**

**APPELLANT**

and

**MELANIE VAN DYK**

**FIRST RESPONDENT**

**LIWELA SASELE N.O.**

**SECOND RESPONDENT**

**Neutral citation:** *Sure Start Properties CC v Van Dyk* (HC-MD-LAB-APP-AAA-2022/00047) [2023] NALCMD 5 (1 February 2023)

**Coram:** PARKER AJ

**Heard:** 9 December 2022

**Delivered:** 1 February 2023

**Flynote:** Labour law – Arbitrator’s award – Appeal against – Appellant invoked prescription in terms of s 86(1)(b) of the Labour Act 11 of 2007 to contend that the time for the complainant (ie first respondent) to refer the dispute to the Labour Commissioner has prescribed.

**Summary:** Labour law – Arbitrator’s award – Appeal against – First respondent was aggrieved by her employer’s failure to pay her commissions and listing fees she claimed were due to her – The employer’s business was that of estate agents – First

respondent's attempts to get payment failed and she referred a dispute to the Labour Commissioner – The arbitrator held for the first respondent and ordered the appellant (the 'respondent') to pay N\$129 718.90 to the first respondent – Appellant's application to rescind the arbitrator's award failed – Hence the present appeal – The court found that the appellant failed to invoke prescription in any document filed on record with the Labour Commissioner during the arbitration having failed to attend the arbitration proceedings – Besides, the court found that on the facts the arbitrator was entitled to proceed with the arbitration in the absence of the appellant (the 'respondent') in terms of rule 27(2) and (3) of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner (GN No. 262 of 2008).

*Held*, the arbitrator could not invoke prescription on his own motion.

*Held further*, the party who wishes to invoke prescription must do so in the relevant document filed on record in the proceeding but not in a rescission application or on appeal.

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### ORDER

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1. The appeal is dismissed.
2. The arbitrator's order in paras 28(a), (b), (c), (d) and (e) of the award granted on 15 July 2020 are confirmed.
3. Paragraphs 29 and 30 of the said award are confirmed but amended to read as follows:
  - 29(a) The aforementioned amounts of money must be paid by the appellant to the first respondent on or before 28 February 2023 with interest at the rate of 20 percent per annum, calculated on the said amounts from the date of this judgment to the date of full and final payment.

29(b) The Labour Commissioner is hereby ordered to assist in enforcing the said award by invoking rule 22 of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner (GN No. 262 of 2008).

4. There is no order as to costs

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## JUDGMENT

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PARKER AJ:

[1] The appellant appeals against the entire arbitration award granted by the second respondent (the arbitrator) in Case No. CRWK1170-19 on 15 July 2020 and 22 June 2022. The appellant, represented by Ms Vermeulen, prays the court for an order made on 22 June 2022 dismissing the appellant's application to rescind the arbitrator's award granted on 15 July 2020. The first respondent (the 'employee') has opposed the appeal, and she represents herself.

[2] The determination of the present appeal turns on a very short and an extremely narrow compass. Ms Vermeulen submitted that the statutory period had prescribed; and the Labour Commissioner was therefore not entitled to accept the complaint, and in turn, the arbitrator was not entitled to deal with the complaint in conciliation and arbitration.<sup>1</sup> The first respondent does not agree. She submitted that Mr Grove of the appellant agreed to pay the commissions owed to her but she was informed that the appellant was not able to do so because it was using the money available to pay for litigation the appellant was involved in.

[3] From the outset, I should say this. On the facts and in the circumstances of the case, I find that the arbitrator was entitled to proceed with the arbitration when the appellant failed to attend the arbitration proceedings: The arbitrator complied with

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<sup>1</sup> See *Kartsen v The Labour Commissioner* [2016] NALCMD 42 (26 October 2016).

rule 27(2) and (3) of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.<sup>2</sup>

[4] In all this, one should not overlook the basic rule of practice of prescription relevant to the instant proceeding. The court or a tribunal (eg: arbitration tribunal) could not invoke prescription on its own motion. The party who wishes to invoke prescription must do so in the relevant document filed of record in the proceeding. This is extremely necessary and required to give the opposing party the opportunity to raise a valid answer to the allegation of prescription.<sup>3</sup> In my view, the rule conduces to due administration of justice and fairness.

[5] In the instant matter, the appellant received a copy of the first respondent's complaint referred to the Labour Commissioner on Form LC 21. Ms Vermeulen confirmed such receipt. But the appellant failed to file any document on record with the Labour Commissioner, invoking prescription in terms of s 86(1)(b) of the Labour Act. Besides, the appellant did not appear before the arbitrator to invoke prescription during the arbitration.

[6] It was too late in the day and unacceptable for the appellant to invoke prescription in the appellant's grounds of appeal. It would be unfair for the court in the appeal to entertain the invocation of prescription as that would prejudice the first respondent in the manner referred to in para 4 above: The first respondent would have been denied the opportunity to raise a valid answer to the allegation of prescription. Similarly, the arbitrator, too, could not consider prescription in the rescission application because the issue of prescription was not 'a mistake common to the parties to the proceedings', within the meaning of rule 32(1) of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

[7] It is important to note that the appellant's grounds of appeal rested solely on prescription, and I have held above that the court sitting as an appeal court could not consider the invocation of prescription at this late hour. Consequently, the ineluctable

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<sup>2</sup> GN No. 262 of 2008.

<sup>3</sup> LTC Harms *Amler's Precedents of Pleadings*, 4 ed (1993) at 262- 263.

conclusion is that the appeal should fail. The appeal has no legal grounds to stand on.

[8] In the result, I make the following order:

1. The appeal is dismissed.
2. The arbitrator's order in paras 28(a), (b), (c), (d) and (e) of the award granted on 15 July 2020 are confirmed.
3. Paragraphs 29 and 30 of the said award are confirmed but amended to read as follows:
  - 29(a) The aforementioned amounts of money must be paid by the appellant to the first respondent on or before 28 February 2023 with interest at the rate of 20 percent per annum, calculated on the said amounts from the date of this judgment to the date of full and final payment.
  - 29(b) The Labour Commissioner is hereby ordered to assist in enforcing the said award by invoking rule 22 of the Rules relating to the conduct of conciliation and arbitration before the Labour Commissioner (GN No. 262 of 2008).
4. There is no order as to costs.

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C Parker  
Acting Judge

## APPEARANCES:

APPELLANT:

J Vermeulen  
Of Ellis Shilengudwa Inc., Windhoek

FIRST RESPONDENT:

In person