REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 33/2011

In the matter between:

KUDU FM **APPLICANT**

and

TUULIKKI MWAFUFYA-SHIKONGO N.O. **FIRST RESPONDENT**
JOHANNES WILLEMS **SECOND RESPONDENT**
PENDA L YAOTTO N.O. **THIRD RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK **FOURTH RESPONDENT**

Neutral citation: *Kudu FM v Shikongo N.O.* (LC 33/2011) [2012] NAHCMD 10 (30 November 2012)

Coram: MILLER AJ
Heard: **26 October 2012**
Delivered: **30 November 2012**

[1] This matter comprises the following issues:

a) A condonation application brought by the applicant seeking condonation for the late filing of its review application in this matter.

b) A review application to set aside a decision by an arbitrator in proceedings under the Labour Act to vary on earlier award made by her.

JURISDICTION AND CONDONATION

[2] The condonation application following facts.

[3] It is common cause that:

a) On 1 November 2010 the first respondent made an arbitration award against the applicant and in favour of the second respondent;

b) This award was duly served on both the applicant and the second respondent.

c) On 13 January 2011 the arbitrator purported to vary the award in accordance with section 88 of the Labour Act;

[4] The applicant alleges that the varied award was never served on it.

[5] The second respondent alleges that the varied award was served on the applicant by the third respondent on 13 January 2011. The third respondent is a labour inspector employed as such by the Ministry of Labour and Social Welfare.

[6] The applicant alleges that the varied award was not served on it as alleged and only came to its knowledge on 12 May 2011.

[7] In this regard the applicant alleges (and it is not disputed) that on 12 May 2011 the deputy-sheriff served the applicant with a writ of execution and notice in attachment of execution.

[8] As a result of the aforementioned a search of the court file was conducted by the applicant's legal practitioners of record on the same day and the varied award was discovered on the court file. This remains in dispute.

Dispute of facts

[9] There is accordingly a dispute of facts regarding the date of service in January 2011 (being 13 or 14 January 2011) as well as what was served on the particular day.

Regarding the date of service

[10] The second respondent alleges that service took place on 13 January 2011.

[11] The applicant alleges that service took place on 14 January 2011.

Regarding what was served

[12] The second respondent alleges that the following documents were served:

a) The varied arbitration award dated 13 January 2011;
b) The notice to comply with the arbitration award dated 13 January 2011.

[13] The applicant alleges that the following documents were served:

a) The original arbitration award dated 1 November 2011;
b) The notice to comply with the arbitration award dated 13 January 2011.

[14] It is noteworthy that the second respondent in his answering papers to the review application does not deny the lack of service of the varied award and this is only denied months later in his answering affidavit to the applicant's condonation application.

The Court's approach with a dispute of facts

[15] Insofar as there remains a dispute approach of the Courts in resolving disputes of fact on the papers is trite. The rule as formulated in Plascon-Evans[1] is as follows:

'This rule has been referred to several times by this Court (see Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976 (2) SA 930 (A) at 938A - B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430 - 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923G - 924D).

It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to

[1] 1984 (3) SA 623 (A)

the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H).

Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A).'[2]

[16] The Plascon-Evans principle has been applied most recently in our law in the case of Oranjerivierwynkelders Koöperatief Bpk and another v Professional Support Service CC and Others 2011 (1) nr 184 (HC), by Justice Damaseb J P, at 441 para 5 thereof, as follows:

[5] The present being motion proceedings in which final relief is sought, the rule in Plascon-Evans[3] applies: motion proceedings are designed for the resolution of common cause facts but should disputes of fact arise on the papers, the court may still grant a final order if the facts deposed to by the applicant and admitted by the respondent, together with the facts put up by the respondent, justify such an order. Even if facts are not formally admitted, but it is clear that they cannot be denied, the court must regard them as admitted. In certain circumstances, denial of a fact may not be such as to raise a real, genuine or bona fide dispute of fact. Should a genuine dispute of fact arise on the papers but it is not referred to oral evidence, the court must accept the version of the respondent unless it is so far-fetched that it can be rejected on the papers.[4]

The second respondent's version

[17] The following is the second respondent's version:

[2] At 634 G – 635 H
[3] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634;
[4] Bahlsen v Nederloff and Another 2006 (2) NR 416 (HC) at 424E – G para 31.

a) On 1 November 2010 the second respondent made her award and served same on the applicant and second respondent (common cause).
b) The application to the Labour Inspector to enforce the arbitration award (Form LS 30) is signed and dated 8 December 2010 and the date stamp of the Ministry of Labour and Social Welfare bears the same date. The application to enforce was therefore brought on 8 December 2011 which is common cause.
c) The first respondent varied the award on 13 January 2011;
d) On the same day the varied award was sent to the third respondent;
e) On the same day the third respondent filed at Court and served on the applicant the varied award (although the acknowledgement of receipt is only dated 14 January 2011);
f) On the same day the third respondent completed and swore to an affidavit of service in front of a Commissioner of Oaths.

[18] It is further clear from Form LS 30 that there is an acknowledgement of receipt on the form by Roxanne Diergaardt with the date of receipt indicated as 14 January 2011 and the time of receipt indicated as 09h25.

[19] In the proof of service of the third respondent, for service of the aforesaid Form LS 30 on the applicant the following facts are important:

a) It is signed by the third respondent on 13 January 2011;
b) It is commissioned by the Commissioner of Oaths on 13 January 2011;
c) It indicates that service occurred on 13 January 2011;

d) The acknowledgement of receipt signed for by Diergaardt indicates the date to be 14 January 2011 and not 13 January 2011;
e) The space on the Form LG 36 left for the details of the person to on whom the document was served is left blank;

[20] It is therefore clear to me that the third respondent is not correct when he attested to the service affidavit. This coupled with all the things alleged to have been done on 13 January 2011, namely that, the first respondent varied the award, the award was then sent to the third respondent, the third respondent then served the varied award on the applicant, the third respondent then filed the varied award with this Court, the third respondent then drafted a service affidavit, the third respondent then deposed to a service affidavit in front of a commissioner of oaths and all the while the acknowledgement of receipt indicates the date of service as 14 January 2011 (one day later).

[21] Adopting the approach to the dispute of fact I mentioned earlier I find that the applicant was served with the original arbitration award of dated 1 November 2010 and was never served with the varied arbitration award.

[22] At paragraph 9 of second respondent's heads of argument section 89 of the Labour Act is referred to but with the incorrect numbering. Section 89(4) (correctly quoted) reads as follows:

'(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award -

(a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or
(b) if the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption.

(5) A defect referred to in subsection (4) means -
(a) that the arbitrator -
(i) committed misconduct in relation to the duties of an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the arbitrator's power; or
(b) that the award has been improperly obtained.'

[23] It is clear that the review application must be lodged within 30 days after the award was served on the party. As I have found that service was never effected it follows that the review application lodged by the applicant on 14 June 2011 has been lodged in time and consequently no condonation therefore is necessary.

REVIEW APPLICATION

[24] I turn now to deal with the review application.

[25] In its application for review the applicant seeks the following relief in its notice of motion:

'TAKE NOTICE that KUDU FM (hereinafter called the applicant intends to apply to this Court for the decision set out below to be reviewed and for an order-

(a) Reviewing and setting aside the decision taken by the first respondent on 13 January 2011, at her own instance, to have varied the arbitration award granted by her in terms of section 86(15) of the Labour Act, 2007,, and made under case number CRWK 427/10 between the parties Johannes Willemse (Applicant) and Kudu FM (Respondent) on 1 November 2010;

(b) Setting aside the third respondent's Compliance Order dated 13 January 2011 and issued under case number CRWK 427/10 in terms of section 90 of the Labour Act, 2007;

(c) Setting aside the Writ of Executions dated the 15th day of March 2011, but stamped on 22 March 2011 and 29 April 2011 respectively, and both issued under case number LC 33/2011 in the above Honourable Court; …'

[26] The following facts are common cause:

a) The first respondent made an arbitration award against the applicant and in favour of the second respondent on 1 November 2010.
b) The first respondent acting at her own instance varied the award on 13 January 2011.

[27] Section 88 of the Labour Act reads:

'88. An arbitrator who has made an award in terms of section 86(15) may vary or rescind the award, at the arbitrator's instance, within 30 days after service of the award, or on the application of any party made within 30 days after service of the award, if –

(a) it was erroneously sought or erroneously made in the absence of any party affected by that award;
(b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
(c) it was made as a result of a mistake common to the parties to the proceedings.'

[28] "Days" are defined in rule 1 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published under GN 262 in GG 4151 of 31 October 2008, as 'calendar days'.

[29] The award was served on 1 November 2010 and varied on 13 January 2011 and a calculation of the number of days shows that the award was varied 73 calender days after service thereof on 1 November 2010.

[30] Counsel for the applicant directed me to the case of *Immanuel v Minister of Home Affairs*[5] wherein Damaseb J P stated the following:

'Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, ie that powers are exercised only within their true limits. If a functionary acts outside the authority conferred by law, the High Court can quash his or her decision. This is the doctrine of ultra vires.'[6]

[31] I agree with counsel for the applicant in this regard.

[32] In the result I find that the first respondent exceeded the limits of the powers conferred on her by section 88 of the Labour Act and her decision in this regard stands to be set aside.

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[5] Immanuel v Minister of Home Affairs and Others 2006 (2) NR 687 (HC)
[6] At 701 H-J

ORDER

[33] I accordingly make the following orders:

a) The decision taken by the first respondent on 13 January 2011, at her own instance, to have varied the arbitration award granted by her in terms of section 86(15) of the Labour Act, 2007, and made under case number CRWK 427/10 between the parties Johannes Willemse (Applicant) and Kudu FM (Respondent) on 1 November 2010 is set aside;

b) The third respondent's compliance order dated 13 January 2011 and issued under case number CRWK 427/10 in terms of section 90 of the Labour Act, 2007, between the parties Johannes Willemse (Applicant) and Kudu FM (Respondent) on 1 November 2010 is set aside;

c) The writs of execution dated 15 March 2011 and 29 April 2011 and issued under case number LC 33/2001 is set aside.

d) There shall be no order as to costs.

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P J Miller

APPEARANCES

APPLICANT : Mr. van Zyl
Of Neves Legal Practitioners, Windhoek.

SECOND RESPONDENT: Ms. Angula

Of AngulaColeman, Windhoek