

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2022/00072

In the matter between:

FISHERIES OBSERVER AGENCY

APPELLANT

and

IMMANUEL SHIVUTE SHIVUTE

FIRST RESPONDENT

NAHASON MUNYORUZO KENANGANDA N.O.

SECOND RESPONDENT

Neutral citation: *Fisheries Observer Agency v Shivute* (HC-MD-LAB-APP-AAA-2022/00072) [2023] NALCMD 21 (12 May 2023)

Coram: MILLER AJ

Heard: 30 March 2023

Delivered: 12 May 2023

Flynote: Labour law – Appeal against the arbitration award – section 86(2) of the Act – referral of dispute to Labour Commissioner filed out of time – the dispute lapsed at the time it was referred and should not have been entertained.

Summary: This is a labour appeal in which the appellant appeals against the arbitration award issued in favour of the first respondent. In this matter, the first respondent was employed by the appellant. The first respondent attained the age of 60 years during February 2021. He then addressed a letter to appellant requesting

for an extension of a further two years of employment. The appellant responded 23 February 2021, declining his request. The first respondent continues to make representations, however, fails to follow any internal procedure of reviewing or appealing the decision or to make provision for it. Time goes by and the 1st respondent only lodges a complaint with Labour Commissioner on 15 June 2022. The appellant submits that the referral of the dispute to the Labour Commissioner was filed out of time and at a stage where the matter had already lapsed. However, the first respondent submits that the dispute only arose when the representations made by the first respondent were unsuccessful.

Held that, the representations made were attempts to resolve a dispute which already existed.

Held that, the dispute arose when the appellant informed the first respondent that his employment contract was not to be extended.

Held that, provisions of section 86(2) of the Act is peremptory and that the period cannot be extended by making representations in the interim in an attempt to persuade the employer to change its mind.

Held further that, the dispute had lapsed and should not have been entertained. The award must be set aside and the appeal is upheld.

ORDER

1. The appeal is allowed.
2. The award made by the second respondent on 14 November 2022 is set aside.
3. There shall be no order as to costs.

JUDGMENT

MILLER AJ:

[1] This appeal lies against an award made by the second respondent on 14 November 2022. The award was one in favour of the first respondent and reads as follows:

'a) Respondent Fisheries Observer Agency is ordered to compensate Immanuel Shivute Shivute an amount of N\$277 989-84 (that being twenty four months' remuneration that he could have earned from March 2021 until February 2023 when he retires) (24 months x N\$11 582-91 (monthly rate) = N\$277 989-84

b) Total payment due to applicant: N\$277 989-84

c) The payment of N\$277 989-84 must be made before or on 16 December 2022 to the applicant or at Ministry of Labour, Industrial Relations and Employment Creation, Luderitz.'

[2] In a Notice of Appeal dated 8 December 2022, the appellant raises various grounds of appeal. They are the following:

'1. Whether the arbitrator erred in law, if regard is had to the facts and the application of the law, in assuming jurisdiction over the referral filed by the first respondent (the "respondent") and not finding that the referral had lapsed under Section 86 of the Labour Act 11 of 2007 ("the Act").

2. Whether the arbitrator erred in law, if regard is had to the facts and the application of the law, in concluding that an unfair labour practice was proven by the respondent and by awarding him relief on this basis.

3. Whether the arbitrator erred in law when he awarded compensation for a period of twenty-four(24) months in the respondent's favour in the absence of any admissible evidence as to the respondent's remuneration or salary.'

[3] The facts which are relevant for a determination of the issues raised are not really in dispute. They are the following:

3.1 The first respondent is a former PLAN combatant.

3.2 The appellant adopted a practice in terms whereof former PLAN combatants were offered employment.

3.3 In terms of the applicable conditions of service the employment would endure until the employee attained the age of 60 years.

3.4 Once an employee had attained the age of 60 years, the employment contract could be extended for a further two years provided the employee was fit to work and was willing to do so.

3.5 Subsequently and on 24 October 2020, the board of the appellant, altered the existing policy and determined that the optional two years extension of service was abolished.

3.6 The first respondent was employed by the appellant upon the terms and conditions of employment then applicable and as stated above.

3.7 The first respondent attained the age of 60 years during February 2021. The first respondent addressed a letter to the appellant requesting an extension of his employment for a further two years.

3.8 The appellant informed the first respondent on 23 February 2021 that his request was declined.

3.9 This decision was re-affirmed by the Human Resources Department of the appellant on 18 March 2021.

3.10 The upshot of this was that the first respondent ceased employment at the end of February 2021.

3.11 On 15 June 2022, the first respondent lodged a complaint to the Office of the Labour Commissioner to refer the existing dispute to conciliation and arbitration.

3.12 It appears that prior to that date representations had been made to the appellant, none of which were successful. These representations were not in the nature of any internal procedure or appeal. It appears that no provision was made in any event for an internal process of review or appeal against the appellant's decision.

[4] Counsel for the appellant submitted that, as was foreshadowed in the first ground of appeal, that Section 86 of the Labour Act 11 of 2007 is peremptory and to the effect that the referral of the dispute to the second respondent, should have been made written one year after the dispute arose. Counsel submits that at best, for the first respondent, the dispute arose on 18 March 2021. It follows, so it was argued, that the referral of the dispute was filed out of time and at a stage where the matter had lapsed.

[5] Counsel for the first respondent submits that the dispute only arose at a much later stage after the representations made on his behalf had come to naught. That submission is in my view devoid of any merit. The representations made were attempts to resolve a dispute which by then existed already. They did not take the form of any formal internal procedure of review or appeal, which did not exist given the circumstances relevant to the first respondent's position. In my view the dispute arose on 26 February 2021 when the appellant informed the first respondent that his employment contract was not to be extended.

[6] The provisions of section 86(2) of the Act are peremptory.¹ The period cannot be extended by making representations in the interim, in an attempt to persuade the employer to change its mind.

[7] The facts of the case resonate with those in *Luckhoff v The Municipality of Gababis*.² The dictum in the matter of *National Housing Enterprise v Maureen*

¹ *Lüderitz Town Council v Shipepo* (LCA 42/2012) [2013] NALCMD 9.

² *Luckhoff v The Municipality of Gababis* LCA 46/2014 [2016] NALCMD 6 (2 March 2016).

*Hinda-Mbazira*³ does not find application. In that case provision was made in the employment agreement to institute internal remedies.

[8] The second respondent erred in allowing the matter to proceed. Clearly the dispute had lapsed and should not have been entertained.

[9] As a consequence the award falls to be set aside. It is thus not necessary to determine the further issues raised.

[10] The following orders will issue:

1. The appeal is allowed.
2. The award made by the second respondent on 14 November 2022 is set aside.
3. There shall be no order as to costs.

P J MILLER
Acting Judge

APPEARANCES:

³ *National Housing Enterprise v Maureen Hinda-Mbazira* Case No. SA 42/2012.

APPELLANT:

S Vlieghe

Of Koep & Partners, Windhoek

FIRST RESPONDENT:

E Nangolo

Sisa Namandje & Co. Inc., Windhoek