

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

<p><b>Case Title:</b></p> <p>DANIEL MUCHOKWE <span style="float: right;">1<sup>ST</sup></span>          APPLICANT</p> <p>WERNER NGASHIKUAO <span style="float: right;">2<sup>ND</sup> APPLICANT</span>          SELMA KALUMBU <span style="float: right;">3<sup>RD</sup> APPLICANT</span>          TIMOTEUS UTALE <span style="float: right;">4<sup>TH</sup> APPLICANT</span></p> <p>v</p> <p>ANTI-CORRUPTION COMMISSION <span style="float: right;">1<sup>ST</sup></span>          RESPONDENT</p> <p>PRIME MINISTER <span style="float: right;">2<sup>ND</sup></span>          RESPONDENT</p> <p>PUBLIC SERVICE COMMISSION <span style="float: right;">3<sup>RD</sup></span>          RESPONDENT</p> <p>FABIOLA KATJIVENA <span style="float: right;">4<sup>TH</sup> RESPONDENT</span>          LABOUR COMMISSIONER <span style="float: right;">5<sup>TH</sup> RESPONDENT</span></p>	<p><b>Case No:</b>          HC-MD-LAB-MOT-REV-2022/00051</p> <hr/> <p><b>Division of Court:</b>          HIGH COURT (MAIN DIVISION)</p>
<p><b>Heard before:</b>          HONOURABLE LADY JUSTICE PRINSLOO</p>	<p><b>Date of hearing:</b>          1 February 2023</p> <hr/> <p><b>Delivered on:</b>          5 June 2023</p>
<p><b>Neutral citation:</b> <i>Muchokwe v Anti-Corruption Commission</i> (HC-MD-LAB-MOT-REV-2022/00051) [2023] NALCMD 23 (5 June 2023)</p>	
<p><b>Results on merits:</b></p> <p>Merits not considered.</p>	
<p><b>The order:</b></p> <p>1. The ruling of the fourth respondent under case CRWK 934/20 dated 16 February 2022 is reviewed, corrected and set aside.</p>	

2. The matter is referred back to the fifth respondent and the fifth respondent is directed to designate another Arbitrator to hear the matter de novo.

3. No order as to costs.

### **Reasons for orders:**

#### Introduction

[1] The four applicants in this matter are Daniel Muchokwe, Werner Ngashikuaao, Selma Kalumbu, and Timoteus Utale. The applicants are all senior investigating officers in the employ of the Anti-Corruption Commission of Namibia.

[2] The respondents are as follows:

a) The first respondent is the Anti-Corruption Commission of Namibia, established in terms of s 2 of the Anti-Corruption Act 8 of 2003, with its principal place of business at c/o Mont Blanc and Groot Tiras Street, Eros, Windhoek.

b) The second respondent is the Prime Minister of the Republic of Namibia, appointed in terms of Article 32(3)(i) of the Namibian Constitution in her official capacity as the Minister responsible for the Office of the Prime Minister with her seat of office situated at the Old State House Building, Windhoek.

c) The third respondent is the Public Service Commission, constituted in terms of Chapter 13 of the Namibian Constitution and in terms of the Public Service Act 13 of 1995, situated at United House Building, Windhoek.

d) The fourth and fifth respondents are Fabiola Katjivena (Arbitrator) and the Labour Commissioner. Both are cited in their nominal capacities, with their principal place of business at the Office of Labour Commissioner's Office, Mercedes Street, Khomasdal, Windhoek.

[3] The background facts of the matter are common cause between the parties and can be summarised as follows:

a) The applicants were appointed during 2018/2019 as senior investigating officers with the first respondent.

b) Since the positions were advertised without the benefit of vehicle allowance, the

applicants lodged a complaint with the third respondent seeking the same benefits as that of their colleagues appointed earlier.

c) The applicants referred a dispute to the Labour Commissioner's Office on 1 October 2019 after receiving an unfavourable response from the third respondent.

d) The referral to the Labour Commissioner was held to be premature as the applicants needed to exhaust all the internal remedies available to them.

e) This dispute was withdrawn by the applicants on 28 July 2020 to enable them to comply with s 33 of the Public Service Act.

f) On 9 September 2020, the applicants referred a fresh dispute to the Labour Commission.

g) A notice of conciliation and arbitration was issued on 8 December 2020 for a meeting to be held on 23 March 2021 before the fourth respondent.

h) At the meeting, the respondents expressed their intention to raise specific points in limine. If upheld, the points in limine would dispose of the dispute.

i) The parties agreed that the fourth respondent, Ms Katjivena, should adjudicate the points in limine based on the heads of argument only, without the need to hear evidence.

j) On 16 April 2021, the respondents raised their points in limine and filed their heads of arguments.

k) The points in limine raised during the arbitration proceedings can be listed as follows;

i. lack of locus standi;

ii. non-joinder;

iii. no relief sought;

iv. validity of the collective agreement and employment vis-à-vis the principle of legality;

v. undue delay;

vi. prescription;

vii. vague and embarrassing.

l) On 26 April 2021, the applicants filed their heads of arguments, and the respondents replied on 7 May 2021.

m) The arbitrator, Ms Katjivena, had to deliver her ruling on the points in limine within 30 days from the date of reply by the respondents.

n) Nine months later, on 16 February 2022, the fourth respondent delivered an arbitration award. In terms of the award, the fourth respondent made a finding that 'the points in limine are dilatory in nature and would not take the matter further forward'.

o) The fourth respondent did not deal any further with the points in limine raised by the first to third respondents and, out of her own motion, proceeded to decide the merits of the matter,

although not argued. Having done so, the fourth respondent held that the dispute lodged by the applicants was without merit and proceeded to dismiss the complaint.

#### The current application

[4] This is an application wherein the applicants seek to review the arbitration award of the fourth respondent dismissing the applicants' complaint as being without merit.

[5] As a result, the applicants seek the following relief:

- '1. Reviewing, correcting and setting aside the Fourth Respondent's ruling to dismiss the Applicants' dispute under case no CRWK 934/20 dated 16 February 2022.
2. Referring the dispute back to the Fifth Respondent to designate another Arbitrator to hear the matter de novo.
3. Further and/or alternative relief.'

[6] The relief sought by the applicants was opposed by the first to third respondents only.

#### The basis for the applicants' application

[7] The applicants rely on the following grounds for the relief sought from this court:

- a) The fourth respondent's conduct and attitude denied the applicants the opportunity to present their case and receive a fair hearing.
- b) The merits of the case need to be presented before a determination on it can be made, as the papers were not comprehensive enough to consider the dispute in full context.
- c) The fourth respondent committed a gross irregularity in the conduct of the arbitration proceedings.
- d) The applicants were prejudiced as a consequence of the conduct of the fourth respondent, as they were deprived of a fair hearing.

#### The opposition

[8] The respondents raised one main point in limine in opposition to the current relief sought by the applicants, which is that the review application brought by the applicants is defective and not in compliance with r 14(4) of the Labour Court Rules, in that the notice was not directed or

delivered to the Minister concerned and the Executive Director of the Ministry responsible for labour.

[9] The respondents reiterated the points in limine raised during the arbitration proceedings.

### Discussion

#### *Point in limine raised by the respondents*

[10] In respect of the complaint raised by the respondents that the application is defective as there is no compliance with r 14(4) of the Labour Court Rules, Ms Alexander pointed out that the application by the applicants is misunderstood as the review is aimed at the conduct of the arbitrator (r 14(1)(a)). Therefore the reliance on r 14(4) is misplaced.

[11] Rule 14(4) of the Labour Court Rules reads as follows:

'(4) The notice must be directed and delivered to the arbitrator, the Minister, the Permanent Secretary, the Commissioner or to any other body or official, as the case may be, and to all other persons directly affected-

a) calling upon such persons to show cause why such proceedings or decision should not be reviewed and corrected or set aside; and

(b) where appropriate, calling upon the arbitrator, the Minister, the Permanent Secretary, the Commissioner or any other body or official, as the case may be, to despatch, within 15 days after receipt of the notice, to the registrar the record of the proceedings sought to be corrected or set aside, together with such reasons as he or she desires or is by law required to give or make, and to notify the applicant that he or she has done so.' (my emphasis)

[12] Mr Ncube disagreed with the submissions made by Ms Alexander and submitted that r 14(4) is a strict provision, and the notice of review had to be delivered to the arbitrator, the Minister, the Permanent Secretary, and the Commissioner. Mr Ncube argued that the parties upon which the notice had to be served should not be read in the alternative but should be read consecutively. As a result, r 14(4) is mandatory, and failure to comply with it is fatal.

[13] I can't entirely agree with Mr Ncube in this regard. Mr Ncube relies on the punctuation and, in essence, invites the court to effectively read into every comma the word 'and'. In my

view, this does not make logical sense as the words 'arbitrator, the Minister, the Permanent Secretary, the Commissioner' are followed with the words 'or to any other body or official, as the case may be, and to all other persons directly affected'. There is clearly a choice to be exercised by the applicants regarding which of these parties to cite during the review proceedings. The Minister and the Executive Directors are not parties to the present review application, as the said application was launched against the arbitration award made by the arbitrator.

[14] In my view, the point in limine cannot be upheld.

*The points in limine raised at the arbitration*

[15] The points in limine that served before the arbitrator was argued afresh by Mr Ncube. Ms Alexander submitted that the arguments advanced on behalf of the respondents are premature as the court is expected to step into the shoes of the arbitrator to adjudicate these points in limine. I must agree with Ms Alexander's contention.

[16] The issues raised as the points in limine will, in due course, serve before this court, but that will be in the context of the court of appeal and not in the context of a court of first instance.

*Merits of the review application*

[17] It is common cause between the parties that the merits of the dispute were never placed before the arbitrator, nor was she requested to decide the merits of the dispute. It is unclear where the arbitrator obtained the facts on which she made her findings. One can only infer that it was obtained from the summary of dispute filed with the Labour Commissioner, the LC21.

[18] I also need to add that the arbitrator decided that the points in limine were dilatory in nature and left it at that. She did not advance reasons for this finding despite the fact that the respondents raised several points in limine. In my view, the points in limine at the arbitration were never properly determined.

[19] The conduct of the arbitrator was irregular. The order granted by the arbitrator on the merits without having any evidence or arguments placed before her must be set aside. Both parties suffer extreme prejudice by not having their matter properly adjudicated on the merits and on the points in limine for that matter.

[20] In the result, I make the order as set out above.	
<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendants</b>
N Alexander Of Sisa Namandje & Co. Inc., Windhoek	J Ncube Of Office of the Government Attorneys, Windhoek