

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTIVE 61

<b>Case Title:</b> Nicolay Buekes and The Arbitrator (Emma Nikanor) FP Du Toit Transport t/a Jet-Ex Couriers 2 <sup>nd</sup> Respondent	<b>Case No:</b> HC-MD-LAB-MOT-REV-2023/00047
	<b>Division of Court:</b> Main Division
	<b>Heard on:</b> Decided on the papers
<b>Heard before:</b> Honourable Lady Justice Rakow	<b>Delivered on:</b> 8 December 2023
<b>Neutral citation:</b> <i>Buekes v The Arbitrator (Emma Nikanor)</i> (HC-MD-LAB-MOT-REV-2023/00047) [2023] NAHCMD 58 (8 December 2023)	
<b>Order:</b>  1. The decision of the arbitrator of 20 December 2022 in the matter CRWK983-20 is hereby set aside and the matter is referred back to the arbitrator to deal with.  2. There is no order as to costs.	
<b>Reasons for order:</b>	

RAKOW J:

### Introduction

[1] The applicant is Nicolay Buekes, an adult male person and the respondents are the arbitrator, Ms Emma Nikanor and FP Du Toit Transport t/a Jet-Ex Couriers.

### Background

[2] On 20 August 2020, the applicant referred a matter of unfair dismissal and unfair labour practice to the labour commissioner in terms of section 86(2) of the Labour Act of 2007. The matter was eventually set down for conciliation on 21 October 2021. The applicant was represented by Mr Thomas Namadungwe, however, the arbitrator did not allow him to take part in the proceedings. The matter was postponed to 19 January 2022 to allow applicant to obtain representation. The applicant retained Mr Thomas Namadungwe as his representative but again on 19 January 2022, the said Mr Thomas Namadungwe was not allowed to represent the applicant.

[3] After the refusal to allow Mr Thomas Namadungwe to represent the applicant in the proceedings. The applicant launched an application for the recusal of the arbitrator, Ms Emma Nikanor, from the proceedings. That application was dismissed on 10 March 2022 and the matter was postponed to 14 June 2022 for arbitration proceedings. On 14 June 2022, the applicant (through his then representative) requested for a postponement of the matter to allow the applicant to appeal against the refusal of the arbitrator to recuse herself from the matter. However, the applicant did not pursue the intended appeal. The matter was postponed to 14 July 2022 but at that stage the arbitrator was booked off for the period 11 July 2022 until 2 September 2022. There is no indication what happened with the matter on 14 July 2022.

[4] From the record of the proceedings, it seems as if the arbitrator then proceeded with the

matter and drafted her ruling without hearing the parties again or notifying them of a hearing. She signed this ruling in which she dismissed the matter on 20 December 2022. The reason given for dismissing the complaint is that the applicant did not show any serious interest in the matter. This ruling was received by the applicant on 19 January 2023. The first respondent did not participate in these proceedings, only the second respondent.

#### Point in limine

[5] The second respondent raised a point *in limine* that the review application was filed outside the prescribed period of 30 days and should therefore be dismissed with costs.

[6] The plaintiff disputes this and explains that he received the finding of the arbitrator on 19 January 2023 and 30 days ran out on Saturday 18 February 2023, with the next day being a Sunday, and therefore filed the appeal on Monday 20 February 2023.

[7] In terms of the Interpretation Act 33 of 1957, section 4, the reckoning of number of days happens as follows:

‘When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.’

[8] However in the Labour Court Rules published under GN 279 in GG 4175 of 2 December 2008 ‘day’ is defined as follows:

‘day means any calendar day; and (a) when any particular number of days is prescribed for the performance of any act, the same must be reckoned exclusive of the first and inclusive of the last day; and (b) the last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday.’

[9] It is clear from the calculation prescribed by the Labour Court rules that the application

was filed in time. The point *in limine* is therefore dismissed.

#### Arguments by the parties

[10] It was submitted on behalf of the applicant that the arbitration proceedings were not conducted as envisaged in terms of the relevant provisions of sections 85 and 86 of the Labour Act 11 of 2007, in that the arbitrator did not apply her mind to the matter before her and in so failing, committed a gross irregularity in relation to her duties as an arbitrator, resulting in that the proceedings having to be set aside.

[11] It was further argued that the arbitrator has a duty to properly and fully apply her mind to the matter. The failure to provide the applicant with an opportunity to be heard before making the adverse decision against the applicant amounts to a gross irregularity and is susceptible to review. It is submitted that the arbitrator failed in his duties to give the applicant a chance to be heard.

[12] For the second respondent, it was argued that the applicant was given more than enough time and opportunity to file his appeal. He was informed by the arbitrator that his appeal must be filed by 15 July 2022 but if nothing is filed, his matter will be dismissed. The fact that Mr Thomas Namandungwe could not represent him has nothing to do with failing to file his appeal. This representation was opposed by the second respondent and as such the application for representation was dismissed by the first respondent.

[13] The onus and duty rested on the applicant to either file an appeal or to inform the first applicant that he no longer intends to do so and wanted to proceed with the arbitration proceedings. He did nothing to prosecute his own dispute. The conduct of the applicant clearly spells out an abandonment inconsistent with an intention to prosecute his labour

dispute, alternatively to enforce his right he now relies on.

### Matters for review

[14] Section 12 of the Labour Act deals with representation. It reads as follows:

'(12) In any arbitration proceedings a party to a dispute may appear in person, if the party is an individual, or be represented, only by –

(a) an office bearer or official of that party's registered trade union or of a registered employers' organisation;

(b) if the party is an employee, a co-employee; or

(c) if the party is a juristic person, an employee of that person, but a person who is a legal practitioner must not appear on behalf of a party except in the circumstances referred to in subsection (13).

(13) An arbitrator may permit –

(a) a legal practitioner to represent a party to a dispute in arbitration proceedings if - Republic of Namibia 78 Annotated Statutes Labour Act 11 of 2007 Schedule: Transitional Provisions

(i) the parties to the dispute agree; or

(ii) at the request of a party to a dispute, the arbitrator is satisfied that –

(aa) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and

(bb) the other party to the dispute will not be prejudiced; or

(b) any other individual to represent a party to a dispute in arbitration proceedings if - (i) the parties to the dispute agree; or

(ii) at the request of a party to a dispute, the arbitrator is, subject to subsections (14), satisfied that –

(aa) representation by that individual will facilitate the effective resolution of the dispute or the attainment of the objectives of this Act; and

(bb) the individual meets prescribed requirements; and

(cc) the other party to the dispute will not be prejudice.'

[15] From the proceedings, it is however not clear in which capacity Mr Thomas Namandungwe appeared. The arbitrator did not give leave for Mr Namandungwe to appear on behalf of the applicant and such leave is in her discretion. The court will not interfere lightly with the arbitrator in exercising her discretion.

[16] Section 89(4) of the Labour Act 11 of 2007 empowers an aggrieved party to file review proceedings against any ruling or decision of the arbitrator alleging a defect in arbitration proceedings, to apply to the Labour Court for an order reviewing and setting aside the award. Further in terms of subsection:

'(5) thereof a defect referred to means that the arbitrator

(a) – (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.'

[17] In terms of section 86(7)(a) of the Labour Act, the applicant has an opportunity to provide submissions to show cause as to why his or her matter should not be dismissed. It reads as follows:

'(7) Subject to any rules promulgated in terms of this Act, the arbitrator - (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly;'

[18] In *Stephanus v Roads Authority*<sup>1</sup> Usiku J said the following regarding informing the

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<sup>1</sup> *Stephanus v Roads Authority* (HC-MD-LAB-MOT-REV-2023/00028) [2023] NALCMD 49 (6 October 2023).

parties of the hearing:

'(I)t is apparent that the provisions of rule 27(3) of the Rules requires the arbitrator to attempt to contact the absent party telephonically, if possible, before making the decision to dismiss the applicant's matter. There is no evidence on the record that shows that the arbitrator did attempt to contact the applicant. Furthermore, there is no evidence on record to the effect that it was impossible, in the circumstances, for the arbitrator to contact the applicant. Without having attempted to contact the applicant to establish his whereabouts, the arbitrator would not have been in position to determine whether or not the applicant had good cause for his failure to appear at the proceedings on time.

[17] In my view, by proceeding to dismiss the matter in terms of rule 27(2)(c), without having first attempted to contact the applicant, the arbitrator committed a gross irregularity. Such irregularity resulted in the applicant not having his case fully and fairly determined.'

[19] In a similar way, the arbitrator in the current matter also did not contact the parties or even inform them of the hearing date. She took a decision about the matter without giving them an opportunity to be heard or for the applicant to indicate to her whether he is still interested in proceeding with the matter or not. She, therefore also committed a gross irregularity and for that reason, this review must succeed.

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

1. The decision of the arbitrator of 20 December 2022 in the matter CRWK983-20 is hereby set aside and the matter is referred back to the arbitrator to deal with.
2. There is no order as to costs.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>Respondent(s):</b>
L Isak Of Kadhila Amoomo Legal Practitioners, Windhoek.	S Horn Of Theunissen, Louw & Partners, Windhoek.