REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION OSHAKATI

JUDGMENT

HC-NLD-LAB-APP-AAA-2020/00002

In the matter between:

AFRICAN MEAT SUPPLIES CC **APPELLANT**

and

ALWINE SHIWELA **RESPONDENT**

Neutral Citation: *African Meat Supplies CC v Shiwela* (HC-NLD-APP-AAA-2020/00002) [2021] NALCNLD 5 (16 December 2021).

CORAM: MASUKU J

Heard: **04 June 2021**

Delivered: **16 December 2021**

Flynote: Labour Law – appeal in terms of s 86(2) and (3) of the Labour Act, 2007, read with rule 7 and 14 of the Conciliation and Arbitration Rules ('Con-Arb rules) – prescription of because of dispute being lodged after the 6 month period prescribed in the Act – imperative to serve dispute before referral documents on party affected before lodging same with the Office of the Labour Commissioner.

Summary: This is an unopposed appeal in which the appellant appealed against the findings by the arbitrator, in which she held that the respondent's labour dispute

had been lodged within the time limits prescribed in the Labour Act and further found that the had been served with the labour dispute, in the absence of proof.

Held: that the labour dispute was lodged by the respondent outside the period set out in s 86(2) of the Labour Act, 2007 and as such, the dispute is hit by prescription and should not have been determined any further by the arbitrator.

Held that: that was no proof placed before the arbitrator that the appellant had been served with the referral of the dispute by the respondent on the date the respondent alleged.

The appeal was therefor upheld and the decisions of the arbitrator were concomitantly set aside.

ORDER

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1. The Appellant's appeal succeeds.
2. The Arbitrator's ruling is substituted with the following, 'the points of law in *limine* raised by the Appellant in NROS 223-19 be and are hereby upheld'.
3. There is no order as to costs.
4. The matter is regarded as finalised and removed from the roll.

JUDGMENT

MASUKU J:

Introduction

[1] Serving before court for judgment, is an appeal, which stems from a decision taken on 29 May 2020 by an arbitrator, namely Ms. Martha Shipahu.

[2] Briefly stated, Ms. Shipahu presided over an arbitration between the appellant and the respondent. The dispute before her pertained to the dismissal of the respondent by the appellant. During the hearing, the appellant raised points of law *in limine*, which were dismissed by the arbitrator. It is that decision that the appellant is dissatisfied with and is keen to have overturned by this court in exercise of its appellate powers envisaged in s 89 of the Labour Act, No. 11 of 2007, ('the Act').

[3] The application is not opposed. As such, the court has no other version before it and will decide it on the papers filed by the appellant, in so far as its contentions are consistent with the applicable law.

The parties

[4] The appellant, is Africa Meat Supplies CC, a close corporation registered as such in terms of the Close Corporation Act, No. 26 of 1988. The respondent is Ms. Alwine Shiwela an adult woman, who was in the appellant's employ.

Background and the appellant's case

[5] The facts that give rise to this dispute are not in serious contention. This is so because no opposition, as recorded above, has been placed before court by the respondent. There is, accordingly no other version before this court. In the premises, the version advanced by the appellant will carry the day, provided the law applicable is on the appellant's side. In light of this I will do no better than render the summary of facts as eloquently chronicled by the appellant's counsel. I do so below.

[6] The respondent was previously employed by the appellant. She was dismissed from such employment on 24 April 2019 for gross negligence. On or about 01 October 2019, the respondent consequent to the dismissal, referred a dispute of unfair dismissal to the office of the Labour Commissioner in Windhoek. A notice of an arbitration hearing was issued by the Office of the Labour Commissioner and the hearing was set down for 06 November 2019.

[7] On this date the appellant did not attend the proceedings. This was because it contends that it had no knowledge of the dispute and its referral. Furthermore, it did not know about the setting down of the hearing. The arbitration was thus postponed to 25 November 2019 by the designated arbitrator. On that date the appellant was served with a copy of the respondent's referral papers and signed an acknowledgment of receipt on the respondent's Form LC21.

[8] On 25 November 2021, the appellant attended the arbitration proceedings and at this stage requested an opportunity to obtain legal representation. This request was granted on 30 January 2020. When the conciliation proceedings commenced, the appellant raised two points of law *in limine*, *to wit*, defective service and prescription.

[9] The arbitrator granted the parties an opportunity to file their written submissions on these two issues. It was after receipt of the parties submissions that a ruling on the two points of law *in limine*, would be delivered by the arbitrator. The appellant duly filed its written submissions as ordered but the respondent failed to do so.

[10] On 2 June 2020, the arbitrator delivered her ruling on the legal issues raised by the appellant and in which ruling, she dismissed the appellant's preliminary points of law. It is that ruling that is the subject of these proceedings.

Defective Service and prescription

[11] It is the appellant's contention that it was never served with the respondent's dispute on 30 September 2019. The appellant contends that it was only served with the dispute on 06 November 2019. The latter date falls outside the prescribed six months period from the date of dismissal. As a result thereof, the appellant claims that by the time the respondent's claim served before the arbitrator, it had thus prescribed in law. Accordingly, so the appellant contends, there was no lawful dispute for the arbitrator to adjudicate on.

[12] The crux of the appellant's argument regarding defective service is this: sections 86(2) and (3) of the Labour Act 11 of 2007, make provision for a dispute to be lodged within 6 months of the date of dismissal. It also provides for service of the referral documents to be effected on parties affected. In this connection, the provision must be read in conjunction with rule 7 of the Conciliation and Arbitration Rules, ('Con-Arb rules').

[13] I find it necessary to set out the provisions of the Act and applicable rules as they form the substratum of the appellant's argument. Section 86 reads as follows:

'(2) A party may refer a dispute in terms of subsection (1) only –

(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or

(b) within one year after the dispute arising, in any other case.

(3) The party who refers the dispute in terms of subsection (1) must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute'

[14] Rule 7(1) of the Con-Arb rules, on the other hand, states that:

'(1) A party must prove to the Labour Commissioner that a document was served in terms of these Rules, by providing the Labour Commissioner with an executed Form LG 36, and-

(a) With a copy of proof of mailing of the document by registered post to the other party;
(b) With a copy of the telefax or email transmission report indicating the successful transmission to the other party of the whole document; or
(c) If a document was served by hand-
   (i) With a copy of a receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or
   (ii) With a statement confirming service signed by the person who delivered a copy of the document to the other party or left it at any premises.'

[15] In my considered view, if one is to closely consider these provisions, it becomes clear that a dispute, if it relates to a dismissal, must be referred to the office of the Labour Commissioner within a period of six months from the date of dismissal.

[16] Regarding the issue of service, the Con-Arb rules provide a party to a dispute must place evidence before the Labour Commissioner that all documents in

connection with labour dispute have already been served on a party to the dispute before lodgement with the Labour Commissioner's office. That this must be so, is clear from the provisions of s 86(3), quoted above.

[17] In this connection, it must be further added, the party lodging the dispute bears the onus of satisfying the Labour Commissioner that service has already been effected on the affected party at the time the referral is lodged with the Labour Commissioner. It is after the Labour Commissioner is properly satisfied that the other party has been served that that office can start complying with its statutory duties towards ripening the dispute for determination.

The arbitrator's ruling

[18] In her ruling Ms. Shipahu noted that respondent served the dispute referral on the appellant on 30 September 2019, the same day it was lodged. This is a contention that the appellant refutes. Her ruling which then consisted of three paragraphs was as follows:

> '1.Therefore my ruling that, a copy of the referral must be served to the other party to the dispute before the date of the conciliation, arbitration proceedings.
> 2. I ruled that the appellant referred her dispute as per prescribed section 86(2) (a) of the Labour Act No.11 of 2007 (Form LC21, the date the dispute arose 24th March 2019 and the date of the referral was 30th September 2019). Therefore the matter has to be heard.
> 3. I ruled that the conciliation, arbitration proceedings for this matter will take place on 26th June 2020 at 12h00 at the Ministry of Labour Industrial Relations and Employment Creations – Oshakati.'

Determination

[19] Ms. Shipahu's ruling is as bare as can be. She found that in terms of the law the dispute referral is to be served on the other party before the conciliation and arbitration proceedings. The primary issue in dispute is whether the respondent was never served with this dispute referral when the application was lodged but was only served after the hearing notice was served on him.

[20] There is nothing apparent on record or otherwise that indicates that the dispute referral had been served on the appellant on 30 September 2019 through facsimile. Despite this Ms. Shipahu found that the respondent referred her dispute as prescribed by section 86(2) (a) of the Act and the matter was ripe to be heard.

[21] What can be gleaned from her ruling is that only the time frame within which to lodge the dispute after a dismissal was considered. This however is not sufficient and cannot be correct. Ms. Shipahu found that a party is to be served before the conciliation and arbitration proceedings but she failed to establish that service had been effected the appellant before lodgement of the dispute with the office of the Labour Commissioner.

[22] When proper regard is had to Rule 7(1) (a) of the Con-Arb Rules, service is deemed to be properly effected when a copy of the telefax or email transmission report indicating the successful transmission to the other party of the whole document is provided. This has not been provided by the respondent in the instant case.

[23] In the absence of this, this court cannot accept that service had been effected on 19 September 2019 as contended by the respondent and found by the arbitrator. This is aggravated by the fact that the appellant’s denial of service is not refuted. It must therefore be accepted, as I do, that service was not effected on the appellant on 19 September 2019, as there is no such proof. In law, the adage he who alleges must prove, remains ever true.

[24] The issues of prescription and service are interrelated. This is because if court finds that service had not been effected on the appellant, the time limits within which the referral dispute should have been lodged was not met. Accordingly, the referral could be deemed to have lapsed. The appellant’s uncontradicted position is that it received the dispute referral on 06 November 2019.

[25] That being the case, the 6 months period within which the appellant was to serve the dispute referral lapsed on 24 October 2020. In turn, this means that the dispute has prescribed by the time the arbitrator entertained it. Clearly, the arbitrator was incorrect in law to hear and determine a dispute that was not lodged in line with

the mandatory legislative prescripts in s 86(2)(a) of the Act. The arbitrator's jurisdiction does not extend to hearing arbitrations filed in violation of s 86(2)(a) of the Act.

Conclusion

[26] In view of the brief analysis of the issues above, I am of the considered view that on the facts of the matter, the appellant has made out a case that the arbitrator had no jurisdiction to entertain the respondent's referral, as it was not lodged within the mandatory six-month period. In this regard, the legal provisions applicable would warrant the appeal to be upheld.

Costs

[27] It is not disputed that this is a labour matter. As such, s 118 of the Act decrees that an order for costs should not be granted unless there is evidence of frivolousness or vexatiousness on the part of the unsuccessful party. There is suggestion or evidence that the respondent has been vexatious or frivolous in any manner in this matter. In point of fact, she did not even oppose the appeal. There is accordingly no need to depart from prescripts of s 118 of the Act in the circumstances.

Order

[28] Having due regard to the discussion, the findings and conclusions recorded in this judgment, the proper order to issue in the circumstances is the following:

1. The Appellant's appeal succeeds.
2. The Arbitrator's ruling is substituted with the following: 'the points of law in *limine* raised by the Appellant in NROS 223-19 be and are hereby upheld'.
3. There is no order as to costs.
4. The matter is regarded as finalised and removed from the roll.

T. S. Masuku

Judge

APPEARANCES:

APPELLANT:	W. A. Greyling
Instructed by:	Greyling and Associates
RESPONDENT:	No Appearance