**REPUBLIC OF NAMIBIA**

**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: LC 2/2010

In the matter between:

**NAMQUEST FISHING (PTY) LTD** **APPLICANT**

and

**VILHO MELKISENDEKI** **FIRST RESPONDENT**

**GERTRUD USIKU** **SECOND RESPONDENT**

**Neutral citation:** *Namquest Fishing (Pty) Ltd v Vilho Melkisendeki* (LC 2/2010) [2013] NALCMD 16 (20 MAY 2013)

**Coram:** **UEITELE, J**
**Heard:** **15 November 2012**
**Delivered:** **20 May 2013**

**Flynote:**

Labour Court - Applications and motions – application to review and set aside arbitration award – Section 89(4) of the Labour Act, 2007 read with Rule 14(7) of Labour Court Rules requiring such application to be launched within 30 days of the arbitration award having been handed down.

Labour law - Procedure – Application in terms of Rule 6 (1) of the Labour Court Rules - Such application must be by notice of motion supported by an affidavit as to the facts upon which the applicant relies for the relief - In present case the affidavit attached to notice of motion not commissioned by person competent to commission oath.

Labour law - Procedure – Application to review and set aside arbitration award – in terms of Section 89(4) of the Labour Act, 2007 read with Rule 14(7) of Labour Court Rules - Affidavit used is support of the relief claimed in such application must be authenticated as contemplated in Rule 63 of the rules of the High Court.

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**Summary:**

The first respondent referred a complaint of unfair dismissal and unfair labour practice to the office of the Labour Commission. The Arbitrator handed down an arbitration award when applicant and his representative walked out of a conciliation proceedings. Applicant launched an application to have the proceedings leading to the arbitration award reviewed and set aside.

*Held* that at the time when application to review and set aside the conciliation/arbitration proceedings was launched, the document annexed to the notice of motion was not an affidavit, as a result there was no application before the court.

*Held* further that rule 63 of the High Court Rules requires a document that is executed outside Namibia to be authenticated as contemplated in rule 63(2). If the document is not so authenticated it cannot be used in any proceedings before this court. The document annexed to the applicants' notice of motion launched on 15 February 2010 can therefore not be used in support of the relief sought. Since there is no affidavit attached to the application, there was no application filed within the 30 days contemplated in section 89(4) of the Labour Act, 2007.

*Held* further that the filing of an affidavit some eighteen months later does not assist the applicant, as there is no application to condone the late filing of the application for review.

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**ORDER**

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The applicant's application is struck from the roll, no order as to cost.

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**JUDGMENT**

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**UEITELE J**:

[1] The applicant in this matter is Namquest Fishing (Pty) Ltd which has brought an application on notice of motion to:

> '(a) review and set aside the arbitration proceedings conducted before the second respondent between the applicant and 1st respondent and resultant award dated 11 January 2010…;
>
> (b) alternative to prayer (a) *supra,* declare the said arbitration proceedings and resultant award dated 11 January 2010 …to be null and void as being in conflict with Articles 12(1)(*a*) and 18 of the Namibian Constitution and/or the common law;
>
> (c) Costs be awarded against both the First Respondent and Second Respondent, the one paying the other to be absolved;
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> (d) That the arbitration award made in terms of case number CRW 31/2009 , by the arbitrator, being the Second Respondent be stayed pending the review application;

(e) Granting such further and/or alternative relief as this honourable court may deem fit.'

[2] I find it appropriate to briefly set out the factual background to this matter. Mr Vilho Melkisendeki, who, I will in this judgment refer to as 'the first respondent' referred a complaint of unfair dismissal and unfair labour practice to the office of the Labour Commission on 2 September 2009. On 26 October 2009, the Labour Commissioner gave notice in terms of Regulation 20(2) of the Labour General Regulations[1] and section 86(4) of the Labour Act, 2007[2] that the complaint of the first respondent is set down for an arbitration hearing before, Ms. Gertrud Usiku, who, I will in this judgment refer to as 'the second respondent' on 11 November 2009 at 09 o'clock at Walvis Bay Municipal chambers. On the same date (i.e. on 26 October 2009), the Labour Commissioner, designated the second respondent as the Arbitrator.

[3] On 30 October 2009 (the applicant's letter is erroneously dated 30 September 2009) the applicant addressed a letter to the office of the Labour Commissioner in which letter it requested a postponement of the conciliation/arbitration hearing to a new date. The request was granted and the conciliation/arbitration hearing was set down for 11 December 2009.

[4] On 4 December 2009, the applicant through its legal practitioners addressed a letter to the office of the Labour Commissioner, in which letter it states that the "respondent hereby formally objects that the hearing takes place before the appointed arbitrator Ms. Gertrud Usiku on *inter alia* the following grounds: Mrs. Usiku already pronounced herself in no uncertain terms on the merits of the case on 20 August 2009. Mrs. Usiku's impartiality is not only questioned but downright rejected."

[5] On 11 December 2009, the conciliation proceedings started before the second respondent. At the start of the proceedings, the first respondent objected to the

[1]Published under Government Notice No.261 of 2008 in Government *Gazette* No. 4151 of 31 October 2008.
[2]Act 11 of 2007.

presence of Mr Steyn the applicant's legal practitioner. Mr Steyn responded to the objection by stating that the proceedings were still at the conciliation phase, and he could thus represent his client. Mr Steyn thereafter raised a point in *limine*. The point in *limine* raised by Mr Steyn is that the applicant was cited as Namquest Fishing which according to Mr Steyn was unknown to the applicant. He, Mr Steyn accordingly prayed that the first respondent's claim be dismissed. The first respondent responded that he simply omitted to add "(Pty) Ltd" to the name of the applicant and moved for the citation of the applicant to be corrected so that it is reflected as Namquest Fishing (Pty) Ltd. The second respondent allowed the amendment. After the amendment was allowed, the applicant's representative (a certain Mr De Castro) and the applicant's legal representative (Mr. Steyn) walked out of the conciliation hearing.

[6] At about 12h40 on the same date that the applicant's legal representative and the applicant's representative walked out of the conciliation meeting (i.e. 11 December 2009), the arbitrator addressed a letter to Mr Steyn in which she informed him that the arbitration proceedings in the matter of first respondent and the applicant will proceed that date (i.e. 11 December 2009) at 14h00. Mr Steyn contacted Mr De Castro and both agreed that it was not worth to attend the arbitration hearing. They accordingly did not attend the arbitration hearing. The arbitration hearing proceeded in the absence of the applicant and its legal representative on 11 December 2009.

[7] On 11 January 2010, the arbitrator made an arbitration award and found in favour of the first respondent. She accordingly ordered the applicant to pay the first respondent an amount of N$99 900. The award was sent by registered mail to the address of Mr Steyn who alleges that he only received the written award on 15 January 2012. The arbitrator, however, states that she personally handed the award to the legal representative of the applicant on 11 January 2010. It is the award dated 11 January 2010 which the applicant seeks this court to review and set aside or declare void.

[8] The applicant launched its review application on 15 February 2010. The return of service (i.e. Form L.G. 36) indicates that 'the notice of motion and the affidavits together with the annexures to the affidavits' were served on the Labour Commissioner and on the first applicant on the 15 February 2010. Between 15 February 2010 (when the notice of motion was first served on the Labour Commissioner and the first respondent) and 25 July 2011 (when the first respondent gave notice of its intention to oppose the review application) nothing happened. Because the first respondent was out of time to file his notice to oppose the applicant's review application, he applied to this court to condone his lateness in filling the notice to oppose the applicant's review application. On 02 September 2011 this Court condoned the late filling of the notice to oppose the review application and granted the first respondent leave to file its opposing/answering affidavit.

[9] The first respondent filed its opposing affidavit and in that affidavit raised four preliminary objections against the applicant's application. The points *in limine* raised by the first respondent are:

(a) The first point in *limine* is that the application does not comply with section 89(4)(*a*) of the Labour Act, 2007 and Rule 14(2) of the Labour Court Rules, in that the review application was launched more than 30 days after the award was handed down.

(b) The second point in *limine* is that the affidavit (the founding/supporting affidavit) used in support of the relief claimed was not authenticated as contemplated in Rule 63 of the rules of the High Court.

(c) The third point in *limine* is that the applicant has not complied with Rule 14(3) of the Labour Court rules, in that the record of the arbitration proceedings was not certified as a true record of the arbitration proceedings; and

(d) The fourth point in *limine* is that the applicant did not comply with rule 14(9) in that the applicant did not supplement its founding affidavit, but instead in *toto* replaced/substituted the founding affidavit.

[10] I will now proceed to consider the points raised in *limine*. As indicated above the first point in *limine* is that the application for review does not comply with section 89(4)(*a*) read with rule 14(7). A review application in respect of a labour matter is governed by section 89 of the Labour Act, 2007 that section amongst others, reads as follows:

> **"89 Appeals or reviews of arbitration awards**
>
> (1) …
>
> (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-
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> (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."

[11] What is clear from the provisions of section 89(4) and (5) is that the basis on which this court may review and set aside an arbitration award is when an applicant alleges and proves a 'defect' in the arbitration proceedings. It is furthermore clear that for the court to review the arbitration proceedings the aggrieved party must apply to the Labour Court within 30 days after the arbitration award was served on that party.

[12] In the present matter the following facts are not in dispute:

(a) The arbitration award was handed down on 11 January 2010;

(b) The application to review and set aside the arbitration proceedings was launched on 15 February 2010; and

(c) The applicant has not filed an application to condone the alleged non-compliance with the provisions of section 89(4) read with rule 14(7).

[13] There are conflicting versions as regards the date on which the arbitration award was served on the applicant. The second respondent alleges that she personally served the arbitration award on Mr Steyn the legal practitioners for applicant on 11 January 2010. Mr De Castro, who deposed to the affidavit on behalf of the applicant on the other hand alleges that he only received the award via e-mail from Mr Steyn on 25 January 2010. Mr Steyn alleges that he received the award per registered mail on 15 January 2010.

[14] I am of the view that the dispute as regards the date on which the arbitration award was served on the applicant can be resolved by reference to section 129 of the Labour Act, 2007 and rule 6 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner[3]. Rule 6 amongst others provide as follows:

> "**6 Service of documents**
>
> (1) Service of documents in terms of the Act or these Rules may be effected by the party to the proceedings, a person duly authorised in writing by the party to serve the process, or a messenger of the court appointed in terms of section 14 of the Magistrates Courts Act, 1944 (Act 32 of 1944).

[3] Published under Government Notice No.262 of 2008 in Government *Gazette* No. 4151 of 31 October 2008.

(2) Subject to section 129 of the Act, a document may be served on the other parties-

(a) by handling a copy of the document to-

(i) the person concerned;

(ii) a representative authorised by the other person to accept service on behalf of that person;

(iii) a person who appears to be at least 16 years old and in charge of the person's place of residence, business or place of employment premises at the time; or

(iv) a person identified in subrule (3);

(b) …"

Section 129 of the Labour Act, 2007 in material terms provide as follows:

"**129 Service of documents**

(1) For the purpose of this Act-

(a) a document includes any notice, referral or application required to be served in terms of this Act, except documents served in relation to a Labour Court case; and

(b) an address includes a person's residential or office address, post office box number, or private box of that employee's employer.

(2) A document is served on a person if it is-

(a) delivered personally;

(b) sent by registered post to the person's last known address;

(c) left with an adult individual apparently residing at or occupying or employed at the person's last known address; or

(d) in the case of a company-

(i) delivered to the public officer of the company;

(ii) left with some adult individual apparently residing at or occupying or employed at its registered address;

(iii) sent by registered post addressed to the company or its public officer at their last known addresses; or

(iv) transmitted by means of a facsimile transmission to the person concerned at the registered office of the company.

(3) Unless the contrary is proved, a document delivered in the manner contemplated in subsection (2)(b) or (d)(iii), must be considered to have been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed."

[15] It is common cause that the second respondent served the arbitration award on Mr Steyn of the Law Firm, CL de Jager & Van Rooyen. There is no evidence on the record indicating that the applicant in writing authorized[4], Mr Steyn to accept service of documents on its behalf. I am thus satisfied that the arbitration award was only served on the applicant on 25 January 2010. It therefore appears that the application to review and set aside the arbitration proceedings was launched within the 30 days period contemplated in section 89(4) of the Labour Act, 2007 and Rule 14(2) of the Labour Court Rules.

[4]As is required by Rule 6(2)(a)(ii) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner,

[16] I used the word appears, because Mr Van Zyl who represented the first respondent, argued that even if I find that the review application was launched within the 30 days period contemplated in the Labour Act, 2007 and Rule 14(2) of the Labour Court Rules, the applicant is still out of time.

[17] Mr Van Zyl based his submissions, on the provisions of rule 6(1) of the Labour Court Rules[5] which in material terms provides as follows:

> "**6 Applications**
>
> (1) Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

He thus argued that rule 6(1) required of an applicant who desires to have arbitration proceedings set aside, to bring an application on notice of motion supported by an affidavit as to the facts upon which the applicant relies for the relief. He further submitted that the document attached to the applicant's notice of motion is not an affidavit and should also be disregarded as it does not comply with the provisions of rule 63 of the High Court Rules.

[18] I am of the view that the submission of Mr Van Zyl is meritorious. I say so for the following reasons: In the present matter, the ending part of the document purporting to be an affidavit deposed to by Mr Fernando De Castro provides as follows[6]:

> 'Dated at Walvis Bay on this 10th day of February 2010.
>
> _____
>
> Fernando De Castro

[5]Published under Government Notice Published under Government Notice No. 279 in Government Gazette No. 4175 of 2 December 2008 [wef 15 January 2009] as amended by Government Notice No. 92 in Government Gazette No. 4743 of 22 June 2011.
[6]See page 13 of the record of the review application.

I certify that on the 10th day of February 2010 in my presence at Walvis Bay the deponent signed this affidavit and declared that he:

(a) knew and understood the content thereof;

(b) had no objection to taking this oath;

(c) considered the oath to be binding on his conscience and uttered the words: 'I swear that the contents of this affidavit are true, so help me God'.

**BEFORE ME**

SIGNED AND STAMPED ABOVE

**COMMISSIONER OF OATHS**

**FULL NAMES:** GLORIA BLANCO IGLESISAS

**ADDRESS:** GIEBERNO CENTRAL
DELEGACION DEL GOBERIENO DE LA CORUNA
PLAZA DE ORENSE

**CAPACITY:** LA CORUNA
ESPANA
DELEGADA'

[19] An 'affidavit' is defined as 'a written statement, sworn by the deponent . . .'[7] It is trite that an affidavit must be sworn to before a person competent to administer an oath[8]. Commissioners of oaths and Justices of the Peace are either appointed by the Minister of Justice for a specific area or magisterial district within the Republic of

[7] S v Opperman 1969 (3) SA 181 (T) at 184.

[8] See section 7 of the Justices of the Peace and Commissioners of Oaths Act,1963 (Act 16 of 1963) which provides as follows:

**'7 Powers of commissioners of oaths**

Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section ten prohibited from administering all oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation or such a declaration.'

Namibia[9] or are holders of specified offices designated as *ex-officio* Commissioners of oaths and Justices of the Peace.[10]

[20] In the present matter the document purporting to be the supporting affidavit creates the impression that the statement contained in that document was sworn to before a certain Gloria Blanco Iglesias, with an address somewhere in "Espana" (Spain). If indeed that is correct there is no evidence before me that Gloria Blanco was appointed or designated as a Commissioner of Oaths in terms of section 8(1)(a) of the Justices of the Peace and Commissioners of Oaths Act, 1963[11]. It thus follows that the affidavit was not sworn to before a person who is competent to administer an oath and the document attached to the notice of motion is thus not an affidavit as is required by the rules of this court.[12]

[21] During argument Ms. Petherbridge who appeared for the applicant submitted that the affidavit must be containing typographic errors because Mr De Castro was not in Walvis Bay when he signed the affidavit, she said he was in Spain. But that still does not save the document, as rule 63 of the High Court Rules requires that a document executed outside Namibia be authenticated as contemplated in rule 63(2). If the document is not so authenticated it cannot be used in any proceedings before this court[13]. The document annexed to the applicants' notice of motion launched on 15 February 2010 can therefore not be used in support of the relief sought. Since there is no affidavit attached to the application, there was no application filed within the 30 days contemplated in section 89(4) of the Labour Act, 2007[14].

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[9]See sections 2 and 5 of Justices of the Peace and Commissioners of Oaths Act, 1963.
[10]See sections 7 of Justices of the Peace and Commissioners of Oaths Act, 1963.
[11]Section 8 provides as follows:

**"8 Powers as to oaths outside the Republic**

8 (1)(a) The Minister may, by notice in the Gazette, declare that the holder of any office in any country outside the Republic shall in the country in which or at the place at which he holds such office, have the powers conferred by section seven upon a commissioner of oaths, and may in like manner withdraw or amend any such notice."

[12]Compare with Caldwell v Chelcourt Ltd 1965 (1) SA 304 (N).
[13]The Council of the Municipality of the City of Windhoek v D B Thermal (Pty) Ltd and Another (An Unreported judgment) case I 1997/2004 delivered 28 October 2009.
[14]See the case of Da Silva v Pillay 1997(3) SA 760 at 790.

[22] Ms. Petherbridge however sought to argue that the affidavit that was filed together with the notice of motion on 15 February 2010, was replaced by a properly commissioned affidavit, which was filed on 11 June 2011. I have made the finding that at the time when application was launched, (i.e. on 15 February 2010) there was no affidavit annexed to the notice of motion and as a result there was no application before the court. It therefore follows that filing of an affidavit some eighteen months later does not assist the applicant as there is no application to condone the late filing of the application for review. I uphold the first and second points in *limine* raised by the first respondent.

[23] In the result I make the following order:

The applicant's application is struck from the roll and I make no order as to cost.

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SI Ueitele
Judge

APPEARANCES

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|---|---|
| APPLICANT: | Ms. Petherbridge<br>Of Petherbridge Law Chambers, Windhoek. |
| FIRST RESPONDENT: | C J VAN ZYL<br>Instructed by Metcalfe Attorneys, Windhoek. |
| SECOND RESPONDENT: | No Appearance |