

NOT REPORTABLE

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LC 82/2009

In the matter between:

NAMIBIA DEVELOPMENT CORPORATION

APPLICANT

and

PHILLIP MWANDINGI

FIRST RESPONDENT

THE LABOUR COMMISSIONER

SECOND RESPONDENT

FELIX MUSUKUBILI

THIRD RESPONDENT

Neutral citation: *Namibia Development Corporation v Mwandingi* (LC 82-2009) [2014] NALCMD 42 (17 October 2014)

Coram: VAN NIEKERK J

Heard: 29 March 2012

Delivered: 17 October 2014

Flynote: **Labour Act, 2007 (Act 11 of 2007)** – Review and appeal arising from same case – should be allocated to same judge – same issue arising in both review and appeal – decision in appeal matter renders issue moot in review matter.

Prescription Act, (Act 68 of 1969) – applies to labour dispute arising under former Labour Act, 1992 (Act 6 of 1992) – decisions by Labour Commissioner and arbitrator that Prescription Act not applicable and therefore granting condonation for late referral of dispute arising from Labour Act, 1992 reviewed and set aside.

ORDER

1. The application is granted.
2. The decisions mentioned in prayers 1, 2 and 3 as set out on page 3 of the notice of motion are hereby reviewed and set aside.
3. There shall be no order as to costs.

JUDGMENT

VAN NIEKERK J:

[1] In this matter the applicant seeks, on an unopposed basis, to review, correct or set aside certain decisions made by the second and/or third respondents. These are:

- '1. The decision taken by second respondent alternatively third respondent to condone first respondent's failure to refer the dispute to the Labour Commissioner in terms of section 86(1) of Act 11 of 2007 within 6 months alternatively 12 months after the date of first respondent's alleged constructive dismissal by applicant.
2. The second respondent's decision to refer the matter for conciliation.
3. The third respondent's decision to refer the matter for an arbitration hearing.'

[2] The affidavits filed in support of the review application indicate the following. The applicant used to be the employer of the first respondent, who resigned on 30 May 2001. The first respondent later became an employee of the Ministry of Labour. On 11 September 2009 the first respondent referred a labour dispute with the applicant to the second respondent for conciliation or arbitration on the basis of an alleged constructive dismissal on 30 May 2001. He simultaneously applied for condonation for the late referral.

[3] The applicant opposed the application for condonation, but did so late. It accordingly filed an application for the late opposition, which the first respondent opposed. In its supporting affidavit the applicant took the stance that in terms of the transitional provision, more specifically section 15(3) of the Labour Act, 2007 (Act 11 of 2007), the second respondent had to apply the provisions of section 24 of the previous Labour Act, 1992 (Act 6 of 1992), to determine whether the first respondent's claim had been lodged in time. Furthermore, the applicant contended that, in any event, the first respondent's claim had become prescribed in terms of the Prescription Act, 1969 (Act 68 of 1969).

[4] During a pre-conciliation hearing, the applicant's representative raised the matter of his client's application for condonation of the late opposition to the first respondent's application for condonation. He also sought written confirmation of any decision that the

second respondent might have taken with respect to the first respondent's condonation application. In response the third respondent merely replied that the second respondent had condoned the respondent's application as the applicant's opposition was late. He further stated, *inter alia*, that the Prescription Act was not applicable to labour matters and that in so far as may be necessary, he grants condonation

[5] As the applicant was not sure when and by whom the first respondent's application for condonation was granted, it directed a letter to each of the respondents in which clarification was sought. None of the respondents replied.

[6] Eventually the applicant launched these proceedings in which it seeks the relief as set out above on various grounds. At the same time that the applicant launched the review proceedings, it also noted an appeal. The applicant explains in its founding affidavit that, while some of the grounds for review and appeal may overlap, it remains uncertain whether all of the necessary details on which it may base its appeal will form part of the record provided. As a precaution it filed the application for review and the notices of appeal simultaneously.

[7] Unfortunately the review application and the appeal were allocated to two different judges, which resulted in some duplication of work. In future litigants who adopt the same procedure should timeously bring this fact to the attention of the Registrar so that both the review and the appeal are allocated to the same judge.

[8] The appeal was heard by Smuts J, who delivered judgment on 3 December 2012. The matter is reported as *Namibia Development Corporation v Mwandingi* 2013 (3) NR 737 (LC). The learned judge stated the following (at 740B):

'[11] The issue raised in the appeal concerns whether the Prescription Act 68 of 1969 applies to the claim made by the respondent which had arisen when the erstwhile Labour Act 6 of 1992 (the 1992 Act) applied, read with the transitional provisions of the Act. The question thus raised in this appeal is whether the respondent's dismissal complaint or referral had become prescribed under the Prescription Act.'

[9] The approach of the Court was to first determine whether the Prescription Act applies to labour matters and debts arising from the 1992 Act. Having considered the

relevant South African and Namibian authorities and the relevant statutory provisions, the Court came to the conclusion that it does so apply (at 746G). As there were no allegations of prescription being interrupted by the respondent (the first respondent in the review matter), Smuts J found that the respondent's claim for constructive dismissal had become prescribed prior to its referral in September 2009 (at 746G-H) and upheld the appeal. I respectfully agree with the reasoning and conclusion of the learned judge.

[10] When the review matter was argued before me, Mr *Maasdorp* for the applicant confined his submissions to only one of the review grounds, which is that the second and/or third respondents exceeded their powers in seeking to adjudicate on a claim that had already prescribed under the Prescription Act and which could not be resuscitated. As a necessary step to uphold or dismiss this ground, one must determine whether the Prescription Act applies to labour matters and debts arising from the 1992 Act. This was indeed the approach followed by counsel in argument. It is clear that the same issue arises in both the appeal and the review. To the extent that it does and has been decided upon, the issue has become moot. On the papers before me it is clear that the second and third respondents, by failing to apply the Prescription Act, alternatively, by deciding that it is not applicable, failed to consider whether the first respondent's claim had become prescribed. They committed an error in law, which led them to unlawfully condone the late referral of the first respondent's dispute and taking steps to further deal with the dispute by way of conciliation and arbitration. In this they have indeed exceeded their powers in the manner contended by the applicant.

[11] In as far as it may be necessary to make an order, it is the following:

1. The application is granted.
2. The decisions mentioned in prayers 1, 2 and 3 as set out on page 3 of the notice of motion are hereby reviewed and set aside.
3. There shall be no order as to costs.

_____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicant:

Adv R Maasdorp

Instr. By G F Köpplinger Legal Practitioners