REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 114/2013

In the matter between:

THE INTERNATIONAL UNIVERSITY OF MANAGEMENT **APPLICANT**

and

WILLIAM S TORBITT **FIRST RESPONDENT**
TUULIKKI MWAFUFYA SHIKONGO **SECOND RESPONDENT**
PENDA YA OTTO N.O **THIRD RESPONDENT**
THE REGISTRAR OF THE LABOUR COURT **FOURTH RESPONDENT**

Neutral citation: *The International University of Management vs Torbitt* (LC 114/2013) [2014] NALCMD 6 (20 February 2014)

Coram: PARKER AJ
Heard: **30 January 2014**
Delivered: **20 February 2014**

Flynote: Practice – Applications and motions – Application for declaratory order – Applicant seeks protection of its vested right under s 86(18) of the Labour Act 11 of 2007, read with art 12(1) of the Namibian Constitution – Court found that the applicant has a vested right in the arbitrator obeying the peremptory command under s 86(18) of Act 11 of 2007 – Court held that the arbitrator's disobedience of the peremptory command prescribing a time limit for the issuance of the arbitrator's award offends art 12(1) of the Namibian Constitution in relation to the applicant –

Consequently, the court exercised its discretion in favour of granting the declaratory order sought.

Summary: Practice – Applications and motions – Application for declaratory order – Applicant seeks protection of its vested right under s 86(18) of the Labour Act 11 of 2007, read with art 12(1) of the Namibian Constitution – Court found that the applicant has a vested right in the arbitrator obeying the peremptory command under s 86(18) of Act 11 of 2007 – The arbitrator issued her arbitration award outside the statutory prescribed time limit of 30 days in terms of s 86(18) of the Labour Act 11 of 2007 – The court found that s 86(18) imports a peremptory status taking into account the ordinary grammatical meaning of 'must' in context – Accordingly, the court found that the statutory command in s 86(18) couched in such peremptory terms is a strong indication, in the absence of considerations pointing to another conclusion, which did not exist in the instant case, that the Legislature intended disobedience to be visited with a nullity.

ORDER

(a) The applicant's non-compliance with the rules of court as to the requirements relating to forms, service and practice directions is condoned, and the matter is heard as an urgent application.

(b) It is declared that the award issued under case no. CRWK877-12 is a nullity and *void ab initio* and of no force.

(c) I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] The applicant has brought an application by notice of motion whereby the applicant seeks orders in terms appearing in the notice of motion. The applicant seeks primarily a declaratory order. The determination of the application turns on extremely short and narrow compass. It concerns above all the interpretation and application of s 86(18) of the Labour Act 11 of 2007 which provides:

'Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator.'

[2] It is common cause between the parties that the arbitrator in the case, that is, case no. CRWK877-12, did not issue his or her award within the prescribed statutory 30 days' time limit which would have been on or before 20 April 2013. She issued the award on 8 May 2013. For that reason the applicant contends that the award is a nullity and *void ab initio*. The applicant relies on the *ipssima verba* of s 86(18) of the Labour Act and their interpretation and application. Mr Namandje, counsel for the applicant, argued in those terms.

[3] Mr Vlieghe, counsel for the first respondent argues contrariwise. And in doing so counsel refers the court to two Supreme Court cases (ie *Immigration Selection Board v Frank* 2001 NR 107 (SC) and *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC)) on relevant facts to consider when condoning the late issue of an arbitration award. Mr Vlieghe misses the point. These two cases are of no assistance – none at all – on the point under consideration, that is, the interpretation and application of s 86(18) of the Labour Act. The statutory provision does not permit any court to condone the late issuance of an arbitration award. This provision is in sharp contrast to s 89 of the Labour Act, for instance. In this regard I should say no court has the power to set aside a statutory provision and formulate its own draft and pursue a determination of a point in dispute along the court-formulated draft. That approach has never been part of our law. This conclusion sets the line along which the determination of this application which, as I have said, concerns the interpretation and application of s 86(18) of the Labour Act, will traverse.

[4] And what is the argument of Mr Ncube, counsel for the second, third and fourth respondents. It is briefly this. One 'can ascribe many meanings' to the word 'must' and so 'must' in s 86(18) does not mean that an award should always be issued within the prescribed statutory time limit and for that reason s 86(18) is ambiguous and so the section should be interpreted in such a way as to cure the ambiguity.

[5] Counsel on both sides of the suit referred a number of cases to the court and I am grateful for their industry. I have distilled some conclusions from the principles they enunciate; that is, those that are of assistance on the points that call for consideration in the determination of the application.

[6] In view of Mr Ncube's argument and Mr Vlieghe's argument that s 86(18) should be interpreted in a certain way that advances their contentions, I take the view that the starting point in the interpretation and application of that provision is this. And in that regard I cannot do any better than to rehearse what I said in *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793, para 7:

'Logically, our next port of call is the interpretation and application of s 14 of Act 30 of 1998. The rule is firmly established in the practice of this court that in interpreting statutes recourse should first be had to the golden rule of construction because the plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal or grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it will be permissible for a court of law to depart from such a literal construction, for example where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent: see *Jacob Alexander v The Minister of Justice and Others* Case No. A 210/2007 (judgment on 2 July 2008) (unreported) at 18–19 where the relevant authorities are approved and relied on. In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, where Hannah J cited with approval in *Engels v Allied Chemical Manufacturers (Pty) Ltd and Another* 1992 NR 372 (HC) at 380F–G, Evershed MR stated succinctly,

> "plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context." '

[7] It is also important that the interpretation I put on s 86(18) of the Labour Act should not be contrary to the legislative intent. (See *Rally for Democracy and Progress*, para 8.) It must also promote the legislative purpose behind s 86(18). (See *Compania Romana de Pescuit (SA) v Rosteve Fishing (Pty) Ltd* and *Tsasos Shipping Namibia (Pty) Ltd (Intervening): In re Rosteve Fishing (Pty) Ltd v MFV 'Captain B1', Her Owners and All Others Interested in Her* 2002 NR 297.)

[8] In the instant case, I find that the words – all the words, including 'must' – in s 86(18) are clear, plain and unambiguous and so they should be given their literal and grammatical meaning and, in my opinion, that will not lead to any manifest absurdity, inconsistency, hardship or a result that is contrary to the legislative intent and purpose.

[9] The legislative purpose behind the section is as clear as day: it seeks to ensure that arbitration awards are issued expeditiously. And by its choice of the auxiliary verb 'must', the Legislature intended 'to oblige' (see *Concise Oxford Dictionary*, 11th ed) and arbitrator to obey the statutory command without fail; and the arbitrator is not given any leeway in the matter. Thus, the word 'must' used as an auxiliary verb, is a modal denoting obligation: it casts an absolute duty on the arbitrator without any shadow of allowance which would permit the arbitrator to issue the award any time he or she likes after the statutory time limit has expired. It follows inevitably and reasonably that s 86(18) of the Labour Act intends that 'must' should have mandatory and peremptory meaning and effect, not permissive or directory meaning and effect. (See G Thorton, *Legislative Drafting* (1987): p 90, 241, on peremptory and directory status of statutory provisions.) To argue contrariwise, as Mr Vlieghe and Mr Ncube do, is to arrogate to oneself a better knowledge of what the Legislature intended than what the Legislature actually had in mind when it expressed itself clearly and unambiguously as it did in s 86(18) of the Labour Act,

and to put forward, without justification, the unexpressed intention of the Legislature. (See *Rally for Democracy and Progress v Electoral Commission*.)

[10] Thus, the intention of the Legislature in s 86(18) of the Labour Act is clearly to command in peremptory terms the duty of an arbitrator to issue his or her arbitration award within the prescribed statutory time limit; and the purpose is to ensure that arbitration awards are issued expeditiously and within a fixed and identifiable time limit. The absurdity that would indubitably be begotten by the interpretation put forth by Mr Vlieghe and Mr Ncube is this. Arbitrators would, under the Labour Act, have a field day, uncontrolled, to issue arbitration awards any time they want at their whims and caprices. Parliament could not have intended such absurd result.

[11] Doubtless, the legislative intent and the legislative purpose, read intertextually, as they should, conduce to one of the aims of the Labour Act which finds expression in the long title of the Act, namely, 'to provide for the systematic … resolution of labour disputes'…

[12] Thus, a clear time limit has been prescribed by s 86(18) of the Labour Act, and the Legislature did not see the desirability of including power to extend the time limit, as it did see and did provide for extension of time in other provisions of the selfsame Act, eg subsec (3), read with subsec (2), of the Labour Act. (See, for instance, *Thembekile Dlamini and Seven Others v The Principal Secretary in the Ministry of Public Service & Information and Others* Case No. A 347/08 (Unreported) (judgment of the Industrial Court of Swaziland)), referred to me by counsel. Guideline 7.8.3 of CMAC Arbitration Guideline (under Swaziland's labour law) empowers the Commission to extend the time limit of 30 days prescribed by s 17(5) of Swaziland's Industrial Relations Act 2000 within which an arbitrator 'shall issue' his or her arbitration award after conclusion of the arbitration where the Commissioner finds exceptional circumstances to exist. No such power of extension exists in our Labour Act, as I have said ad nauseam. Significantly, the provisions in s 86(18) of the Labour Act are materially identical to the provisions of s 17(5) of Swaziland's Industrial Relations Act 2000. *Thembekile Dlamini and Seven Others* tends to controvert, rather than advance, the arguments of Mr Ncube and Mr Vlieghe. Indeed,

this case fortifies the conclusion I have reached on the interpretation and application of s 86(18) of the Labour Act.

[13] For completeness and to put the conclusions I have read beyond doubt; I should say the following with the greatest deference to Mr Ncube, in response to Mr Ncube's spirited but weak and preposterous argument that one 'can ascribe' many meanings to 'must'. Mr Ncube misses the point. What counsel says is true to countless number of English words: such reality is not unique to the word 'must'. It is a cardinal rule of English grammar that the specific meaning of a word depends largely on the particular form of the word that has been used, the context in which the word has been used, and the position of the word in the syntax of the sentence in question. I have not one iota of doubt in my mind that 'must', as is used in s 86(18) of the Labour Act, is an auxiliary verb, and by context and in regard to the syntax of s 86(18), it means 'be obliged'. (Concise Oxford English Dictionary, 11th ed) That is the ordinary, grammatical meaning of 'must' in that section by context.

[14] Furthermore, it is not insignificant, neither is it aleatory that 'must' and not 'shall' is used in s 86(18) of the Labour Act. It is to take it out of the hands of the over activist judge who may be minded to put forth the theory that depending upon the context, 'shall' may mean 'may', thus creating a directory or permissive status for 'shall' in addition to its natural, peremptory and mandatory status. Thus, given its ordinary grammatical meaning by context (see *HN and Others v Government of the Republic of Namibia* 2009 (2) NR 752 (HC)), s 86(18) means that the statutory command in s 86(18) is couched in peremptory terms. That being the case, it is a strong indication, in the absence of considerations pointing to another conclusion (as that canvassed by Mr Ncube and Mr Vlieghe, which I have rejected) that the Legislature intended disobedience of the time limit prescribed by s 86(18) of the Labour Act to be visited with a nullity. (See *Compania Romana Pescuit (SA)*.)

[15] Based on the aforegoing reasoning and conclusions, I find the entire argument of Mr Ncube and Mr Vlieghe to be, with respect, simplistic, self-serving and fallacious. This conclusion leads me to the next level of the enquiry. It is about the declaratory order sought by the applicant. The power of this Court to grant

declaratory orders is given by s 16 of the High Court Act, 1990 (Act No. 16 of 1990), which provides that –

'(d) (the High Court) in its *discretion*, and at the instance of any interested person, to (may) enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.' (Italicized for emphasis)

[16] In *Jacob Alexander v The Minister of Home Affairs and Others* Case No. A 155/2009 (Unreported), para 9, I stated as follows concerning the interpretation and application of s 16(d) of Act No. 16 of 1990:

'Interpreting and applying a similar provision, which contains identical words as the Namibian provision quoted above, in s 19(1)*(a)* of South Africa's Supreme Court Act, 1959 (Act No. 59 of 1959) in *Government of the Self-Governing Territory of Kwazulu v Mahlangu* 1994 (1) SA 626 (T), Eloff JP stated at 634B that the important element in this section is that the power of the Court is limited to a question concerning a right. The nature and scope of the right might be inquired into, but in the absence of proof of such a right, or at least a contention that there is such a right, the Court has no jurisdiction. The 'flip side' of this view, which I respectfully accept, is that the Court has jurisdiction if there is proof of a right or at least a contention that there is such a right.'

I also cited with approval in *Mahlangu*, para 10, the following pithy dictum by Dijkhorst J from *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1995 (4) SA 120 (T) at 124E:

'The question whether or not relief should be granted under this section has to be examined in two states. Firstly, the jurisdictional facts have to be established. When this has been done the Court must decide whether the case is a proper one for the exercise of its discretion.'

[17] Thus, the crucial jurisdictional facts that in the instant case the applicant should establish are that (a) the applicant is an interested person in the right inquired into and (b) there is a right which becomes the object of the enquiry; and the right

may be either vested (present and future) or conditional (contingent). (*Jacob Alexander*, para 11).

[18] On the papers I find it established that the applicant is an interested person. I also find that it has a vested right in the arbitrator obeying s 86(18) of the Labour Act which affects it and that right is entrenched and protected by the Act; see the long title of The Act. It needs hardly saying that the applicant has approached the court for the court to protect that right. The Labour Act entrenches the labour rights and protections of all those involved in labour matters and disputes, not only rights of employees, as Mr Ncube appears to suggest in his submission that s 86(18) should be interpreted against the purpose of the Act, as articulated in the long title of the Act, in favour of the respondents. It then also goes without saying that art 12(1) of the Namibian Constitution, read with the Labour Act, also guarantees the right to fair trial of all disputants in labour matters; that is, in the instant case, the parties to this matter. The failure of the arbitrator to issue her arbitration award within the prescribed statutory time limit offends the fair trial right of the applicant; and no amount of excursions into semantics and sophistry, as undertaken by Mr Ncube and Mr Vlieghe, can assist the respondents. The respondents' opposition to the application has no legal leg to stand on, as I have demonstrated.

[19] For these reasons, I am impelled inexorably to exercise my discretion in favour of granting the relief of declaration sought by the applicant. Wherefore; I make the following order:

(a) The applicant's non-compliance with the rules of court as to the requirements relating to forms, service and practice directions is condoned, and the matter is heard as an urgent application.

(b) It is declared that the award issued under case no. CRWK877-12 is a nullity and *void ab initio* and of no force.

(c) I make no order as to costs.

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C Parker

Acting Judge

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APPEARANCES

APPELLANT:	S Namandje Of Sisa Namandje & Co. Inc., Windhoek
FIRST RESPONDENT:	S Vlieghe Of Koep & Partners, Windhoek
SECOND, THIRD AND FOURTH RESPONDENTS:	J Ncube Of Government Attorney, Windhoek