REPUBLIC OF NAMIBIA

IN THE LABOUR COURT OF NAMIBIA,

MAIN DIVISION, WINDHOEK

CASE NO. LCA 46/2014

In the matter between:

AUSTIN LUCKHOFF **APPELLANT**

And

THE MUNICIPALITY OF GOBABIS **RESPONDENT**

Neutral citation: *Luckhoff v The Municipality of Gobabis (LCA 46/2014) [2016] NAHCMD 6 (2 March 2016)*

CORAM: MASUKU J.,

Heard: 19 June 2015
Delivered: 2 March 2016

Flynote: **LABOUR LAW** – Labour Act 11 of 2007- provisions of s. 86 (2) (b) of the Labour Act - period for referral of disputes to the Labour Commissioner– Meaning of 'year' in s. 86 (2) (b) - Dispute of right distinguished from dispute of interest.

Summary: The appellant had been employed by the respondent Municipality before independence and retired well after independence in 2013. He had, in terms of the applicable terms and conditions, been eligible to medical aid after retirement. In 2010, the respondent altered the term relating to medical aid after retirement and of which the appellant was aware. On retirement some three years or so later, when he did not receive his medical aid payment, he lodged a dispute. The arbitrator found that the appellant was not entitled to medical aid and his claim was dismissed. He lodged an appeal to the Labour Court against the said finding. The respondent also noted a cross appeal, claiming that the arbitrator had no jurisdiction to deal with the dispute because the appellant had referred the dispute outside the time limit imposed by statute and that the dispute had, by the time of its referral, become one of interest and ceased becoming one of right and therefor not amenable to arbitration in terms of the law.

Held – that the dispute was subject to s. 86 (2) (b) of the Labour Act and had to be lodged within one year after the dispute arose. The court found that the dispute was lodged some thirty months after the dispute arose. *Held further* – that the dispute arose when the respondent allegedly unilaterally altered of the terms and conditions of the appellant's employment and not necessarily when the appellant was not paid his medical aid benefit. The court held that the arbitrator had no jurisdiction to deal with the dispute as it was lodged out of time.

Regarding the nature of the dispute, it was held that at the time the dispute that was referred by the appellant, it was no longer one of right but was one of interest as the appellant had at that point retired and was no longer in the respondent's employ. The cross appeal was upheld and the appeal was dismissed.

ORDER

---

1. The appellant's appeal is dismissed.
2. The respondent's cross-appeal is upheld.

3. The appellant is ordered to pay the costs of the appeal for one instructed and one instructing Counsel.

JUDGMENT

MASUKU J.,

Introduction

[1] At the centre of this appeal lies an award issued by the arbitrator on 1 October 2013. This award had the effect of a double-edged sword, which cuts both ways. As a result, it cut open wounds in both protagonists. They have, for that reason, both approached this court seeking redress for what they each perceive as the deleterious effects of the award on their respective rights and interests.

[2] Testimony to the fact that the award cut both ways is that presently serving before court is an appeal by the Mr. Austin Luckhoff (the appellant) and a cross-appeal by the Municipality of Gobabis (the respondent), who were embroiled in a dispute before an Arbitrator, Ms. Alexina Mazinza Matengu.

[3] Before engaging the monumental issues that emerge and require this court's determination, it is fitting that I start by setting out the history of the dispute in order to place the live issues in a proper historical context for the reader. Most of the issues are common cause and what may differ, may be the interpretation put to the facts and the law applicable thereto.

Historical Background

[4] The appellant is a Namibian national. He served the respondent in the position of health inspector during the pre-independence era from January 1981. He continued to serve the respondent post-independence and eventually retired when he turned 60 on 7 February 2013. The main question that brings both parties before this court on appeal is whether the appellant is entitled to be paid the benefit of medical aid after his retirement. I use the word 'benefit' in the ordinary parlance, which is not in any way nuanced by the documents and their interpretation, which may be an exercise that may, depending on how the matter turns, need to be undertaken in this judgment.

[5] As indicated in the preceding paragraph, the appellant contends that he is entitled to be paid this benefit even after retirement and bases his contention on certain legal documents and events that shall be analysed, if it becomes necessary, in the course of this judgment. It is common cause that upon retirement, the respondent ceased paying this benefit to the appellant and claims that in terms of the terms and conditions of the respondent's employees, including the appellant, the payment of medical aid as a benefit was discontinued at retirement and that the appellant is bound thereby.

[6] Dissatisfied with the stoppage of this benefit by the respondent after his retirement, the appellant referred a dispute to the Labour Commissioner. It was not resolved during conciliation and was accordingly referred to arbitration. It culminated in a protracted hearing, where both parties were represented by legal practitioners. Oral evidence was adduced by both parties and their respective sets of witnesses. At the end of the hearing, the Arbitrator, on 1 October 2013 as aforesaid, issued an award in favour of the respondent and found that the respondent had no duty to continue making medical aid available to the appellant after he had retired as an employee of the respondent. In this, the appellant claims, the arbitrator erred, hence the appeal.

[7] It is common cause that at the commencement of the arbitration proceedings, the respondent raised certain points of law *in limine.* Essentially, these points of law related

to the arbitrator's jurisdiction to arbitrate the dispute launched by the appellant. The first issue raised was that the appellant's dispute was lodged outside the time limits prescribed by law. The second was that the nature of the appellant's dispute was one of interest and which was therefore not amenable to the jurisdiction of the arbitrator. Both points of law were dismissed by the Arbitrator and the arbitration proceeded on the merits. The dismissal of these points of law forms the bases of the cross-appeal.

The grounds of appeal

[8] In his notice of appeal dated 14 October 2014, the appellant essentially raised four grounds of appeal, which attacked the finding in the respondent's favour. Shorn of all the laces and frills, the appellant's grounds of appeal acuminate to the following:

(a) That the Arbitrator erred in finding that a unilateral change of terms and conditions of employment does not constitute an unfair labour practice in terms of the Labour Act (the Act)[1];
(b) That the Arbitrator erred in finding that the appellant failed to submit proof that he was entitled to receive a medical aid benefit after retirement from his employment with the respondent;
(c) That the Arbitrator erred in finding that the circumstances and benefits received by Messrs. Atkinson and Pretorius after retirement or resignation from the respondent's employ could not be compared to the circumstances or benefits the appellant should have received post retirement; and
(d) That the Arbitrator erred in finding that the appellant accepted the change in conditions of his employment wrought by clause 11 (4) of the '2011 conditions of employment'.

[9] By notice dated 24 October 2014, the respondent indicated its intention to oppose the appeal. On even date, the respondent filed its notice of cross-appeal. It, too, attacked the Arbitrator's award on the grounds captured below:

[1] Act No. 11 of 2007.

(a) That the referral of the dispute was outside the time period provided in s. 86 (2) (b) of the Act;
(b) That the Arbitrator had no jurisdiction to arbitrate the dispute in terms of the Act as it was one of interest; and
(c) The appellant's complaint does not resort under the unfair labour practices as contemplated in Chapter 5 of the Act.

Both parties, it must be mentioned, filed more comprehensive grounds in which each contended that the Arbitrator erred. It is not necessary at this juncture to visit the particular grounds in any degree of detail than I have done already.

[10] Having had a bird's eye view of the entire matter, after reading the voluminous record and after listening to carefully manicured argument presented on behalf of both sides, I am of the view that it would be prudent, in the circumstances, to first consider the cross-appeal. It must be recalled that the cross appeal consists mainly, if not exclusively, of points of law in terms of which it was argued that the Arbitrator had no jurisdiction to entertain the dispute, either at the time she did, alternatively, at all. The bases for these contentions have been foreshadowed in the preceding paragraph and may be analysed in greater detail as the judgment unfolds.

[11] I adopt this approach for the reason that if the cross-appeal succeeds and I find that the Arbitrator erred in entertaining the dispute when she did or at all, then *cadit quaestio.* It will be only if I am not in agreement with all the grounds raised in the cross-appeal that I may be constrained to proceed to consider whether or not the appeal has any merit.

The cross appeal

Lateness of referring of dispute to Labour Commissioner

[12] As indicated above, there are three main bases on which the Arbitrator is alleged to have erred and all the grounds alleged entail an examination of certain provisions of the Act. I proceed to consider two of these in turn.

Implications of section 86 (2) (b) of the Act

[13] Section 86 (2) of the Act bears the following rendering:

> '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.'

Before undertaking an analysis and implication of the above section, it is in my view important to first consider what a 'dispute' is in terms of the Act. This is provided in the Act and 'means any disagreement between an employer and or employer's organization on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter.[2]'

[14] I now revert to section 86. It is entitled 'Resolving disputes by arbitration through Labour Commissioner'. A cursory look at the section suggests that there are two types of disputes which may be referred for arbitration through the Labour Commissioner. The first category involves disputes relating to dismissal of employees. The second category relates to what is referred to as 'other disputes', namely, disputes other than those concerning dismissal. It would then be fair to say that disputes relating to dismissal have their own provision and time limit within which they should be referred namely, within six months of the dismissal complained of. All other disputes, on the other hand, also have their own time limit, which is a year from the date when the dispute arose.

[15] There is no doubt that the dispute in issue does not relate to a dismissal. That is so because it is clear and largely common cause that the appellant left the respondent's

[2] Section 1 (1) of the Act.

employ after he had reached the age of retirement and was not dismissed. For that reason, his dispute, whatever its nature, ought to have been referred to the Labour Commissioner 'within one year after the dispute arising'. The respondent contends that the appellant referred the dispute to the Labour Commissioner after this prescribed period had elapsed and the appellant *per contra* contends that it was within the time stipulated. That is the Gordian Knot that this court is called upon to cut at this stage. Which of the two protagonists is correct on this score?

[16] The first thing to note is that the Act does not define the computation of days and times in its definition section. For that reason, the definition of what a 'year' is cannot be found in the Act. In this regard, one must have recourse to the Interpretation of Statutes Act or other source for guidance. In this regard, the Interpretation of Laws Proclamation[3] whilst it provides a definition of other periods of time, including 'month', does not, however, provide a definition for 'year'.

[17] For that reason, I am compelled in the circumstances, to resort to other references for assistance. The Black's Law Dictionary[4], defines a year as '1. Twelve calendar months beginning January 1 and ending December 31 – Also termed *calendar year*. 2. A consecutive 365-day period beginning at any point; a span of twelve months'. In section 26 of the Companies Act[5], it was described as meaning a calendar year.

[18] From the definition captured above, it would appear to me that for present purposes, the second definition provided by the Black's Law Dictionary suffices, namely a consecutive period of 365 days, beginning at any point. I accordingly adopt that interpretation as being the proper one to be accorded the word 'year', occurring in section 86 (2) (b). The question in this case, it would seem, is when this period must be regarded to have begun. Both protagonists have indicated different points at which this consecutive 365 day period must be reckoned to run. If the point of counting advocated for by the respondent is adopted, then it means that the appellant filed his appeal out of time. On the other hand, if the period and reference to case law advocated for by the

[3] 37 of 1920.
[4] 2004 Edition at page 1646.
[5] 1909 (T).

respondent is found to be correct, then the dispute was referred within the period of a year as envisaged in the Act. I will come to the disparate points of computation of time in a moment.

[19] In dealing with the computation of when the year should start, it must be stated that in terms of section 86 (2), the court must determine when the dispute arose. According to the respondent, the dispute arose on 17 October 2011. This, according to the respondent, is when it published new terms and conditions of employment which changed those that were previously applicable to the appellant regarding his entitlement to be paid medical aid after retirement. It is thus claimed by the respondent that it is from that date that the appellant became aware of the dispute and therefore the same day when the dispute arose. It is claimed on the respondent's behalf that the appellant lodged the dispute some thirty months later and is for that reason grossly out of time.

[20] The appellant, on the other hand contends that he became aware that he would no longer be entitled to the said benefit in March 2013 and it is on that realization that the dispute must be regarded to have arisen. As indicated earlier, if I find that the appellant is on *terra firma* on that date, then I must perforce dismiss this ground in the cross-appeal.

[21] In the heads of argument, the appellant claims that his dispute was lodged within the stipulated time as he first had to exhaust domestic or internal remedies before lodgment of same. For this proposition, he relied on the interpretation he contended, that was accorded the provisions of s. 86 by the Supreme Court in *National Housing Enterprise v Maureen Hinda-Mbazira.*[6] At para [30] thereof, the Supreme Court expressed itself thus on this issue:

'Therefore, the Court *a quo* was correct in the interpretation it accorded to s 86 (2) (a), that is, the six months time limit in terms of s 86 (2) (a) begins to run after all reasonable or internal remedies have been exhausted and failed to resolve or settle the dispute. Such

[6] Case No. SA 42/2012.

interpretation does not violate or offend the intention of the legislature in its use of the words “dispute” and “date of dismissal” in s 86 (2) (a).’ (Emphasis added).

[22] In the *Hinda* case, the respondent had been dismissed by the appellant, subject to an appeal against same. The appeal was noted to the relevant body and by the time the dismissal was confirmed, the period of six months stipulated in s. 86 (2) (a) had lapsed. The Supreme Court upheld the decision of the Labour Court to the effect that the running of the period does not commence immediately after the initial dismissal but should allow internal processes and remedies availed for appeal, until it was clear that the dispute cannot be settled internally.

[23] In seeking to bring the interpretation of the *Hinda* judgment to bear, the appellant claims that although he was aware of the promulgation of the new terms and conditions which would have affected his eligibility to receive pension after retirement, he had no cause for alarm as other colleagues he had worked with continued to receive their medical aid benefit, which suggested he was also in a comely and comfortable position. The only time, he states, he became aware that there had been a breach, was when he did not receive the medical aid benefit and this was in March 2013. Is his proposition sustainable in all the circumstances of the case?

[24] I am of the view that the *Hinda* judgment is good law in as much as it is binding on this court. Properly construed, I am of the considered opinion that on the facts, the *ratio decidendi* thereof is inapplicable in the case under scrutiny. I say so for the reason that in the instant case, there were no internal appellate remedies that the appellant had exhausted or attempted to exhaust. The decision of the respondent allegedly unilaterally changing the terms and conditions of the appellant’s employment contract appears from all indications to have been final in nature and effect and therefore the sufficient cause of a dispute properly so called. This accordingly gave rise to an industrial dispute at that very point. It is not established that the appellant was entitled to bring that decision on appeal before some internal appeal body of the respondent.

[25] As indicated above, the *Hinda* judgment was a different kettle of fish altogether. I say so for the reason that the decision to dismiss Ms. Hinda was not final in nature or effect but was subject to internal appeal processes which were in the event delayed by the employer, the appellant in that case. The situation in this case is a horse of a different colour in my view. The appellant's complaint is not that there had been a breach of his contract of employment but rather that the respondent had unilaterally changed the terms and conditions of his employment to his disadvantage and it would seem, within the meaning of s. 50 (1) (e) of the Act.

[26] I am of the considered view that once the said terms and conditions were unilaterally changed, as the appellant claims, at that very point, a dispute arose and which could be referred to the Labour Commissioner in terms of the Act. From the time the appellant became aware of the change in his terms and conditions of employment, it would seem to me, the die had been cast and the appellant could and should have taken action at that point to challenge what he perceived to have been a disadvantageous and unilateral change to his terms or conditions of his employment.

[27] It has been argued on his behalf that he only became aware, not of the altered terms and conditions of his employment, but of the implementation of same, when his salary did not include the benefit in issue. Is this argument tenable? In this regard, the respondent referred the court to *SACCAWU v Edgars Stores Ltd*[7]where the views expressed in *Durban City Council v The Minister of Labour*[8] to the effect that 'the word "dispute" must mean the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions' were endorsed.

[28] I am of the considered view that what should have set the dispute ball rolling, so to speak, in the instant case, was not the implementation of the alleged unilaterally altered terms or conditions by not paying him the benefit. That was something done in line with the policy adopted. His gripe should have been at the promulgation of the new terms and conditions of employment. It is at that stage that he became aware of the

[7] (1997) 10 BLLR 1342 LC.
[8] 1953 (3) SA 706 (D).

alleged unilateral alteration of a term or condition of his employment and should have taken steps at that point to challenge the legality of the unilateral action of the respondent. He had every right to refer a dispute and did not have to wait until there was a breach, so to speak, of his terms and conditions of employment, before he acted. I therefore agree wholeheartedly with the respondent that what should have been the trigger for a dispute was not the non-payment of the medical aid benefit to the appellant but rather the alleged unilateral alteration of a term or condition of employment.

[29] There is in my view, a further reason why the contention by the appellant cannot be upheld, and it is this: For argument's sake, if the appellant had say ten years of service with the respondent before he retired at the time he became aware of the altered terms and conditions, would it be fair, proper and just that he should wait and not lodge a dispute, while being aware of the unilateral alteration, until the decision is implemented at his retirement? I think not. It would appear to me that part of the legislative solicitudes in placing a time limit on the referral of disputes to the Labour Commissioner, is to ensure that disputes are not allowed to fester for a long time before they are ventilated and hopefully settled early.

[30] Furthermore, it would seem to me, it is in the public interest that all the parties to a dispute are made aware of the existence of same at the earliest opportunity in order to try and resolve same. Allowing the argument by the appellant to stand would, in my opinion serve to subvert the legislative intent and would allow uncertainty to reign in the employment situation, with parties keeping potential disputes in the freezer, so to speak, until they subjectively find it prudent or convenient to refer same as disputes or worse still, until it becomes inconvenient for them to keep the disputes under wraps as it were any longer, when they have otherwise known of the existence of the dispute for a number of months, if not years.

[31] In that event, other supervening events may derail the issues. For instance, it is important that disputes are referred very early to enable the parties to try and resolve them speedily. The opposite of that is that when disputes are referred very late, witnesses may no longer be available to the parties; or if available, their memory may

have faded over time, and furthermore, institutional memory, including lack or disappearance of relevant documentary evidence in respect of legal persons may work against them, resulting in one of the parties being prejudiced irreversibly.

[32] In *Social Security Commission v Inonge Vivian Mutwa and Two Others*[9] Schimming-Chase A.J. dealt with a case where a delay of over four years in lodging the dispute was in issue. At para [7], the learned Judge stated the following regarding the timely reporting of disputes:

> 'Although employees have the right of recourse in terms of the Labour Act to refer disputes relating to their employment, it is not acceptable that they drag their feet beyond the time clearly set out by section 86 (2) (b) of the Labour Act. As Mr. Tjombe correctly pointed out, the first respondent's claim for the remuneration would also have prescribed by virtue of the Prescription Act, 68 of 1969.'

[33] In the instant case, it would appear to me that whatever else may have been said, the conduct of the respondent complained of appears unmistakably to fall within the provisions of s. 50 (1) (e) of the Act. That this is so is plain from the referral document. Such conduct, alleged, as it is, to being the unilateral alteration of any term or condition of employment, takes place at the time the alteration occurs and not necessarily at the time of implementation of same.

[34] An employee who gets to know of the unilateral alteration of his or her terms of employment and folds his arms, apparently being content to wait and to act only when the alteration is implemented, in my view is guilty like the Emperor of fiddling with his thumbs while Rome burns. As someone once eloquently put it, one who plays with fire can hardly complain of burnt fingers. The court cannot be expected to lend its processes to assist such an employee. He or she must be held to endure the consequences of his or her inaction, which inexorably leads to the dispute falling outside the period of referral to the Labour Commissioner carefully set by Parliament in its manifold wisdom.

---

[9] Case No. LCA 56/2014 [2016] NALCMD 2 (18 January 2016).

[35] I should mention in this regard that in his summary of the dispute, the appellant in para 8 thereof stated that the unilateral change in his terms or conditions of employment occurred on or about 31 October 2010. A year from that date would fall on 1 November 2011 by which date the dispute would have had to be referred to the Labour Commissioner in terms of s. 86 (2) (b). It will be seen, however, that even if the court were to adopt a date most benevolent to the appellant's interests, such date would be 1 November 2011, on which date the said terms or conditions were gazetted. Computing a year from that date still shows ineluctably that the appellant lodged the dispute more than a year after the date of the alleged unilateral change in the terms or conditions of employment, which is when the dispute arose.

[36] I am accordingly of the view that the critical time when the dispute arose was not in March 2013, when the medical aid payment was withheld by the appellant, but was, at the latest, on the promulgation of the new terms or conditions of which the appellant was undoubtedly aware. This time, as I have previously stated, was taking the latest period which is advantageous to the appellant, on or about 17 October 2011 when the said terms were published in the Gazette. I am of the considered view, in the circumstances, that the period of a year, as contemplated in s. 86 (2) (b), would have elapsed on 18 November 2012. The dispute in this case was lodged on 28 April 2013 more than thirty months after the time when the dispute arose. This delay is in my view unconscionable and throws the dispute well outside the parameters set by Parliament in its wisdom.

[37] I am of the considered opinion, in the circumstances, that the point of law raised by the respondent is well taken and ought to be upheld, as I hereby do. The Arbitrator, in my view erred in not upholding the point of law raised by the respondent herein, namely, that the dispute was lodged outside the time limit set by Parliament.

Dispute of interest versus dispute of right

[38] The second issue raised by the respondent is that the Arbitrator did not have the jurisdiction to arbitrate the dispute in question because the terms or conditions were changed in 2011, as part of the 1991 conditions of employment. It is accordingly argued that at the time of the appellant's retirement in 2013, he no longer had a right to medical aid and could thus not enforce any such rights in 2013. In this regard, the respondent contends that if there was any dispute, it was one of interest and not of right. I turn to deal with this issue presently.

[39] In order to do justice to this argument, it is important to have regard, once again, to the relevant provisions of the Act. Section 1, the interpretation section of the Act provides the following regarding a dispute of interest, namely, 'any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that this Act or any other Act requires to be resolved by-
(a) adjudication in the Labour Court or other court of law; or
(b) arbitration;'

[40] In dealing with the two categories of disputes, the learned author Dr. Parker, states the following about disputes of interest:[10]

'They are therefore disputes as to new and "wished for" terms. Consequently, they are not justiciable: their resolution is left to the parties to exercise their economic and industrial power. Thus where employees want new employment rights to be created, they should bargain for them; they cannot refer a dispute in this regard to a court for determination.'

[41] It is interesting to note that the Act does not provide a definition for a dispute of right. It is accordingly in order to search for what authorities say about this issue. Dr. Parker (*op cit*) states the following about this type of dispute at p. 172:

'A dispute of right, on the other hand, concerns the interpretation and application of terms and conditions of employment in a contract of employment, collective agreement or statute: the right relates to benefits or conditions of service to which an employee may be

[10] Labour Law in Namibia, UNAM Press, 2012 at p. 171-172.

entitled by virtue of legislation or an employment contract or collective agreement. Indeed, by their very nature, it is suitable to have such disputes resolved by the courts.'

[42] In his work, the learned author refers to a judgment of Strydom JP in *Smit v Standard Bank Namibia Ltd*[11] where the learned Judge said:

'… But, when employees negotiate for higher wages or better conditions of employment the dispute in such a case is not one relating to rights but is one relating interests. . .'

The learned author concludes by saying:

'The distinction between the dispute of interest and dispute of right is based primarily on the distinction between two processes, namely "the process of applying and interpreting existing agreements, as against the process of formulating new ones". The main purpose of the conceptualization of the two types of industrial dispute is to encourage or ensure that employers and employees seek to resolve their disagreement concerning disputes of right peacefully through a tribunal or such adjudicative forum rather than resort to industrial action.'

[43] I am of the view that the respondent has a good point in this regard. I am in agreement that at the time the dispute arose, namely, when the terms or conditions were unilaterally changed as alleged, it was one of right as the appellant was then in the employ of the respondent. The failure by the appellant to lodge the dispute at that time, which time appears to have been of the essence in the circumstances, has had a deleterious effect on the nature of the dispute.

[44] It is my finding that at the time the appellant referred the dispute to the Labour Commissioner, his employment with the respondent no longer provided for the medical aid benefit. Put simply, on the date he referred the dispute, he was no longer entitled to the medical aid benefit. His contract which came to an end on 7 February 2013 no longer had provision for the medical aid benefit. It is my view therefore that at retirement and at the time when the dispute was referred by the appellant to the Labour

[11] 1994 NR 366 (LCC).

Commissioner, he no longer had a right to medical aid and this rendered his dispute one of interest and no longer one of right. For that reason, I conclude that that dispute was not one that was amenable to arbitration in terms of the law. See in this regard *Standard Bank Namibia v Crace.*[12]

[45] In the premises, I am of the considered opinion that the points of law raised by the respondent are meritorious. In the circumstances, I am of the firm view and conclusion that the Arbitrator was incorrect in determining the dispute at all as she, in the first instance, erred in finding that the dispute was launched within the time period prescribed by s. 86 (2) (b) of the Act. I also find that this being a dispute of interest and not of right, same was not amenable to arbitration in terms of the Act. The Arbitrator accordingly erred in arbitrating the said dispute.

[46] As an aside, it would be remiss of me not to convey the court's appreciation to Counsel on both sides for their assiduousness and for worthily discharging their duty to the court by filing voluminous, comprehensive and very illuminating heads of argument which have assisted the court in determining the issues at play. Sadly, not all the laborious toil could be put to use considering the peculiar circumstances of how the matter was eventually determined.

[47] I am therefore of the considered view that there is no need for the court in the circumstances to deal with the issues raised by the appellant in the main appeal.

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

1. The appellant's appeal is dismissed.
2. The respondent's cross-appeal is upheld.
3. There is no order as to costs.

[12] LCA 42/2010, Per Muller J.

_____

T. S. MASUKU

JUDGE

APPEARANCES

APPLICANT:	S. Vlieghe
	Instructed by Koep & Partners
RESPONDENT:	V. Soni
	Instructed by Murorua & Associates