

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: LCA 2/2017

In the matter between:

**AVENG WATER TREATMENT (PTY) LTD
(ERONGO DESALINATION PLANT)**

APPELLANT

and

**ARMANDO NAKWAFILA
GERTRUDE USIKU N.O.
THE LABOUR COMMISSIONER**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Neutral citation: *Aveng Water Treatment (Pty) Ltd v Nakwafila* (LCA 2/2017)
[2017] NALCMD 32 (08 November 2017)

Coram: USIKU, AJ
Heard on: 09 June 2017
Delivered: 08 November 2017

Flynote: Labour Law – Labour Act, Act No. 11 of 2007 – Provisions of s 86(2)(b) of the Labour Act – The question of when a dispute arose, is a question of fact to be determined on the basis of the evidence presented – No evidence was led from

which one could determine when “the dispute” arose – The ruling by the Arbitrator on when the dispute arose, constitutes a ruling which no reasonable arbitrator could have made in the circumstances as there was no foundation in fact for it – Arbitrator’s ruling set aside and matter referred back to the arbitrator to hear evidence in respect of all disputed facts.

Summary: The Appellant raised a point in limine at the outset of arbitration proceedings that part of the 1st Respondent’s overtime-claims that arose before the 20 June 2015 had lapsed and the Arbitrator accordingly lacked jurisdiction to adjudicate over the same – 1st Respondent insisted that the dispute between the Appellant and 1st Respondent arose on the 30 October 2015 and all his overtime-claims falls within the time-period prescribed by s 86(2)(b) of the Labour Act – Arbitrator ruled that the dispute between the parties arose on the 30 October 2015 and that the Arbitrator had jurisdiction to hear matter – Court on appeal holding that there was no evidence led before the Arbitrator from which the Arbitrator could determine when the dispute between the parties arose – Court therefore holding that the ruling of the Arbitrator constitutes a ruling which no reasonable arbitrator could have made in the circumstances – Ruling of Arbitrator set aside and matter referred to the Arbitrator to hear evidence on all disputed facts.

ORDER

1. The ruling made by the Arbitrator in Case No. CRSW 82-16, on the 09 December 2016 is hereby set aside.
2. The matter is hereby referred back to the Arbitrator to hear evidence on all disputed facts, including the issue on when the dispute in respect of all overtime-claims arose and thereafter determine the matter in terms of the relevant provisions of the Act.
3. No order as to costs is made.

JUDGMENT

USIKU, J:

Introduction

[1] In this matter the Appellant launched an appeal against the ruling by the 2nd Respondent (“the Arbitrator”), delivered on the 09 December 2016. In that ruling the Arbitrator ruled that the dispute between the Applicant and the 1st Respondent arose on the 30 October 2015 and that the whole claim of the 1st Respondent falls within a one-year-period from the date on which the dispute arose, in terms of section 86(2) (b) of the Labour Act¹ (“the Act”) and, therefore, the Arbitrator has jurisdiction to hear the matter.²

[2] The aforesaid ruling is a sequel to a point in limine raised by the Appellant at the outset of the arbitration proceedings in terms of the provisions of s86 of the Act. The point in limine raised by the Appellant was that, part of the 1st Respondent’s overtime-claims that arose before the 20 June 2015 had lapsed and the Arbitrator accordingly lacked jurisdiction to adjudicate over the same.

[3] The Arbitrator made the ruling aforesaid after hearing arguments from the legal representative for the Appellant and the representative for the 1st Respondent.

[4] The Appellant, feeling aggrieved by the ruling, appealed to this court praying for the appeal to be upheld, and that the matter be referred back to the Office of the Labour Commissioner to deal with only that part of the 1st Respondent’s claim which was lodged within the time period prescribed in the Act.

[5] None of the Respondents have opposed the present appeal.

[6] The following facts are either common cause or at least not disputed:

¹ Act No. 11 of 2007.

² Page 118 of the Indexed record.

- (a) the 1st Respondent was employed by the Appellant since May 2010. He was dismissed from such employment on the 30 October 2015, for unrelated acts of misconduct;
- (b) on 20 June 2016, the 1st Respondent lodged a dispute with the Office of the Labour Commissioner, claiming remuneration in respect of overtime worked by him between the period of November 2014 and 30 October 2015;
- (c) in his referral of dispute to arbitration form ("Form LC21"), the 1st Respondent indicates that the dispute between himself and the Appellant arose on the 30 October 2015, for the purposes of the provisions of s86(2)(b) of the Act;
- (d) on the 09 December 2016, at the outset of the arbitration hearing, the Appellant raised the aforesaid point in limine and the Arbitrator handed down the ruling referred to earlier on;
- (e) the parties have agreed that the arbitration proceedings be stayed pending the outcome of the present appeal.

Point in limine at arbitration proceedings

[7] During argument of the point in limine, the legal representative of the Appellant argued that, overtime becomes due upon 1st Respondent having worked overtime. The 1st Respondent claims for overtime allegedly owed to him by the Appellant for overtime-work performed from November 2014 to 30 October 2015, when he was dismissed. For the overtime worked in November 2014, the time-limit for the 1st Respondent to lodge a dispute in respect thereto, is November 2015.

[8] Counsel for the Appellant further argued that since the 1st Respondent referred the dispute to the Office of the Labour Commissioner on the 20 June 2016, the Arbitrator can only hear the dispute of overtime-claims that arose from 20 June 2015 to 20 June 2016. Any overtime worked before the 20 June 2015 is outside the

time-frame prescribed by s86(2)(b) of the Act and therefore the Arbitrator has no jurisdiction to entertain any claim that arose before the 20 June 2015.

[9] On the basis of the foregoing argument, counsel for the Appellant requested the arbitrator to dismiss the claims which fall outside the one year period, namely any claim for overtime worked before the 20 June 2015, as such claims have prescribed.

[10] On the other hand, the representative of the 1st Respondent submitted at the arbitration proceedings that, the whole claim of the 1st Respondent is within the time-limits prescribed by s86(2)(b) of the Act and that the Arbitrator has jurisdiction to preside over the matter.

[11] The representative of the 1st Respondent also underlined that the requirement of s86(2)(b) is that the 1st Respondent must refer the dispute to the Office of the Labour Commissioner within one year after the dispute arising.³ He also pointed out that there is no evidence on record that the 1st Respondent was aware in November 2014, that he was entitled to payment in respect of overtime.⁴

Issue for determination before the Arbitrator

[12] From the record of the proceedings it is clear that there was disagreement between the Appellant and the 1st Respondent as to when the dispute referred by the 1st Respondent to the Office of the Labour Commissioner, on the 20 June 2016, arose. The Appellant contended that any overtime-payment claim that arose before the 20 June 2015 has lapsed. It can thus be inferred from this argument that the Appellant seems to contend that “the dispute” in respect of the overtime claims falling between 20 June 2015 and 20 June 2016 arose on the 20 June 2015 and has therefore lapsed.

[13] On the other hand the 1st Respondent contends that “the dispute” between himself and the Appellant, in respect of all overtime-claims, arose on 30 October 2015, and falls within the time-limit prescribed in terms of s86(2)(b) of the Act.

³ Page 100 of the Indexed record.

⁴ Page 101 of the Indexed record.

Analysis

[14] In terms of the provisions of the Act, a “dispute” means any disagreement between an employer and an employee, which disagreement relates to a labour matter.⁵ In terms of s86(2)(b) of the Act, a party may refer the dispute to the Labour Commissioner “within one year after the dispute arising”.

[15] The issue as to when a dispute arose, is a question of fact to be determined on the basis of the evidence led in a matter.

[16] As it appears from the record of the proceedings before the Arbitrator, no evidence was led by either of the parties as to when “the dispute” in question arose. The oral arguments presented before the Arbitrator by the representatives of the parties was at variance with each other as to when the dispute arose. Furthermore, such arguments had no factual basis.

[17] From the record of the proceedings it is apparent that when the Arbitrator was called upon to rule on the point in limine, she bemoaned the difficulty inherent in determining the question of when the dispute arose, on the basis that she had no evidence before her to determine the issue.⁶ However, she nonetheless boldly proceeded to determine that the whole dispute arose on the 30 October 2015 and that she had jurisdiction to hear the matter.

[18] As it stands, the ruling of the arbitrator is flawed in material respects, in the sense that it has no factual foundation. When the Appellant disagreed with the version of the 1st Respondent that the dispute between the parties arose, in respect of all overtime-claims, on the 30 October 2015, such disagreement should have had the effect of placing the evidentiary burden on the 1st Respondent to rationalize his claim that the dispute arose on the 30 October 2015. The correct approach should

⁵ Section 1(1) of the Labour Act.

⁶ See pages 118 and 119 of the indexed record.

have been to refer the issue to evidence by both parties and then rule thereon thereafter, on the basis of the evidence led.

[19] It is trite law that an arbitrator has no jurisdiction to entertain a “dispute” that arose outside the one-year time-limit.⁷

[20] For example, in the matter of *Luderitz Town Council v Shipepe*⁸, the facts were briefly as follows:

(a) in July 2010 the Town Council discontinued granting certain benefits to Mr Shipepe on the basis that such benefits were not approved by the relevant Minister and were therefore illegal;

(b) in February 2012 Mr Shipepe referred the dispute to the Office of the Labour Commissioner, alleging on his Form LC21, that “the dispute” arose in December 2011 when the matter was brought to the attention of the CEO.

(c) when evidence was led, the facts established that Mr Shipepe had addressed a letter to the Town Council on 25 July 2010, complaining about the discontinuation/withdrawal of the benefits in question;

(d) the Labour Court held that the dispute arose on the 25 July 2010 when Mr Shipepe addressed the aforesaid letter to the Town Council, and the matter was not resolved. The Court further held that the referral of the dispute concerning the withdrawal of the benefits was made outside the time-period prescribed by s86(2)(b) of the Act. As a consequence, the award by the Arbitrator based upon the withdrawal of those benefits was, accordingly, a nullity and had to be set aside.⁹

[21] As can be seen from the *Luderitz Town Council* matter, the Labour Court was able to determine that the dispute arose on the 25 July 2010 (and not in December 2011 referred to on Form LC 21), on the basis of the evidence adduced by the parties to that effect.

⁷ *Luderitz Town Council v Shipepe* (Unreported) (LCA 42/2012) delivered on 27 March 2013 at para [11].

⁸ *Supra*.

⁹ *Supra* at para [11].

[22] Another example is the matter of *Luckhoff v Municipality of Gobabis*¹⁰, where the facts were briefly as follows:

(a) on the 17 October 2011 the Municipality published in the Gazette varied terms and conditions of service in terms of which Mr Luckhoff (and other employees) would no longer be entitled to medical aid benefits after retirement;

(b) in year 2013 Mr Luckhoff retired and after retirement he did not receive medical aid benefits. Mr Luckhoff claimed that the Municipality had unilaterally changed his conditions of service, when it withdrew medical aid benefits after retirement;

(c) on 28 April 2013 Mr Luckhoff referred the dispute to the Office of the Labour Commissioner, claiming on his Form LC21, that the dispute arose in March 2013, when he retired, and was not given medical aid benefits after retirement;

(d) at the arbitration proceedings the Municipality raised a point in limine that the dispute was lodged outside the time-limits prescribed by s86(2)(b) of the Act, and therefore, the arbitrator had no jurisdiction to arbitrate the dispute. The Arbitrator dismissed the point in limine, and the arbitration proceeded on the merits;

(e) on appeal to the Labour Court, the Municipality contended that the arbitrator had no jurisdiction, as the referral of the dispute was outside the time-limits prescribed by section 86(2)(b) of the Act;

(f) the Labour Court held that the dispute arose on the 17 October 2011 when the terms and conditions withdrawing entitlement to medical aid benefits after retirement were published in the Gazette. The court therefore held further that the dispute was lodged outside the time-limit set by s86(2)(b) of the Act, and the Arbitrator had no jurisdiction to entertain the dispute.¹¹

¹⁰ *Luckhoff v Municipality of Gobabis* (Unreported) Case No. LCA 46/2014 delivered on 02 March 2016.

¹¹ *Supra* para [36].

[23] As it can be seen in the *Luckhoff's* case, the matter proceeded on the merits, at arbitration, during which proceedings evidence was led, which enabled the Labour Court to determine that the dispute arose on the 17 October 2011 when the withdrawal of the medical aid benefit were published in the Gazette. The Court refused to accept, on the basis of evidence available, the version of Mr Luckhoff reflected on his Form LC21, that the dispute arose in March 2013.

[24] In the present matter there is no evidence led as to when the dispute arose.

[25] For the foregoing reasons, I hold that the ruling of the Arbitrator in this matter constitutes a ruling which no reasonable arbitrator could have made in the circumstances, as there was no foundation in fact for it. The ruling therefore falls to be set aside and the matter be referred back to the Arbitrator to hear evidence on all disputed facts, including the issue on when the dispute in respect of all overtime-claims arose, and then determine the matter in terms of the relevant provisions of the Act.

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

1. The ruling made by the Arbitrator in Case No. CRSW 82-16, on the 09 December 2016 is hereby set aside;
2. The matter is hereby referred back to the Arbitrator to hear evidence on all disputed facts, including the issue on when "the dispute" in respect of all overtime-claims arose and thereafter determine the matter in terms of the relevant provisions of the Act;
3. No order as to costs is made.

B Usiku
Judge

APPEARANCES

APPELLANT

Etzold Duvenhage

Instructed by Etzold Duvenhage legal
practitioners

RESPONDENT:

No appearances

