

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 68/2016

In the matter between:

**REINHARD WAGNER**

**APPLICANT**

and

**VICTOR KEEJA**

**FIRST RESPONDENT**

**THE LABOUR COMMISSIONER OF THE  
REPUBLIC OF NAMIBIA**

**SECOND RESPONDENT**

**Neutral citation:** *Wagner v Keeja* (LC 68/2016)[2017] NALCMD 33 (10 November 2017)

**Coram:** ANGULA DJP

**Heard:** 19 July 2017

**Delivered:** 10 November 2017

**Flynote:** Labour Practice – Application for declaratory order – Applicant seeks an order declaring that an award issued by an arbitrator out of the time period prescribed by section 86(18) of the Labour Act 11 of 2007 is of no force and effect and be set aside – Court relying of the Supreme Court judgement held that it is not a fixed or inflexible rule that an act which is performed contrary to a statutory provision is regarded as a nullity; that evil sought to be addressed by the section was the

problem of delays in handing down of the awards – In the present case, the respondent has not given or shown prejudice suffered by him as a result of the delayed arbitration award and three months delay is not unreasonable and for that reason the prayer to set aside the award is declined.

**Summary:** The applicant brought an application seeking an order from this court to declare an award delivered outside the 30 day period prescribed in section 86(18) of the Labour Act, 2007 of no force and effect and to set it aside – First respondent opposed the application on grounds that there has been substantial compliance by the arbitrator with the provisions of section 86(18) of the Act and for that reason the award is valid.

*Court held:* Section 86(18) does not import a peremptory status and the restriction to deliver an award within 30 days is aimed at addressing the delays in issuing awards. Accordingly court found that the award delivered almost 3 months later was not unreasonable, that there has been substantial compliance; and finally the applicant did not prove any prejudice he might have suffered as a result of the delay. Accordingly the application was dismissed.

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### ORDER

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1. The applicant's application is dismissed.
2. No order as to costs.
3. The matter is removed from the roll and is considered finalised.

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### JUDGMENT

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ANGULA DJP:

## Introduction

[1] The applicant brought this application in terms of section 117(d) of the Labour Act, No.11 of 2007 seeking the following order:

'Declaring that the award issued under case number CROT 78-13, which arbitration award is dated 28 February 2014, is of no force and effect as a result of it not having been delivered within the time period prescribed by Section 86(18) of the Labour Act, Act No. 11/2007.'

[2] The application is opposed by the first respondent.

## Brief background

[3] The first respondent, Mr Keeja, was employed by the applicant, Mr Wagner as a farm labourer for a period of 29 years. The said employment relationship came to an end during 2013. Subsequent thereto the first respondent filed claim against the applicant with the office of the Labour Commissioner alleging that he was unfairly dismissed against the applicant.

[4] The arbitration proceedings were conducted and concluded on 25 November 2013 at Otjiwarongo, before an arbitrator Mr Kleofus Geingob, who delivered the award on 28 February 2014 in favour of the respondent.

[5] The applicant then instituted this proceeding seeking an order declaring the award to be of no force and effect for the reason that it was not delivered within the time period specified in section 86(18) of the Labour Act. Section 86(18) provides that the arbitrator must deliver his or her award within 30 days from the date of conclusion of the arbitration proceedings.

[6] The applicant specifically based his application on the judgment of the court in the matter of *International University of Management vs William S Torbitt & 3 Others*<sup>1</sup> where, Justice Parker held that section 86(18) is couched in the peremptory terms,

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<sup>1</sup> LC 114/2013 [2014] NALCMD 6 (20 February 2014)

taking into account the ordinary grammatical meaning of 'must', and as such an award that is delivered outside the time period prescribed by the said section is a nullity. The applicant contended that he has taken the stance that the award made in favour of the first respondent was a nullity and void ab initio and of no force or effect.

[7] In his opposition to the applicant, the first respondent denied that an award delivered beyond the stipulated period of 30 days is a nullity.

[8] In the meantime the above judgment by Justice Parker was taken on appeal to the Supreme Court. The Supreme Court delivered its judgment on 28 March 2017 in which it overturned the finding of the court a quo. In essence, the Supreme Court found that the word 'must', as used in the Labour Act, should in view of semantic and jurisprudential guidelines developed by the courts, be interpreted as permissive, requiring only substantial compliance in order to be legally effective. Furthermore where an award is not issued within the prescribed period of 30 days such non-compliance cannot have the effect of invalidity in the circumstances where the award was in fact issued subsequently.

[9] The Supreme Court further pointed out at paragraph 61 that in order to determine whether or not there was substantial compliance, a court may consider the following factors:

'The reason for the delay; the period of delay; the prejudice to the respective litigants if the award were to be allowed to stand or were to be dismissed; and the availability of evidence if the matter had to be re-heard. The list is not exhaustive. Each case must be considered on its own circumstances and merits.'

[10] Finally the Supreme Court held at paragraph 63, that 'that the legislature had no intention to visit strict non-compliance with section 86(8) within a nullity ab initio and I am of the view for the reasons provided that substantial compliance therewith will not stultify the broader operation of the Act'.

Submissions on behalf of the applicant

[11] It was contended on behalf of the applicant that the award was delivered three months after the arbitration proceedings were concluded and that the arbitrator has not explained his reasons for the delay.

[12] It was further submitted that there was nothing before court to show to what extent the arbitrator have considerably complied with section 86(18) of the Act; that the arbitrator delivering the award three months later without any explanations of the delay was simply not what is envisaged in section 86(18) of the Act and for that reason the award should not be entertained and be regarded as out of time and invalid.

#### Submission on behalf of the First Respondent

[13] It was submitted on behalf of the first respondent that the arbitrator has substantially complied with section 86(18); and that the arbitrator delivered the award, and provided concise reasons in the award.

[14] It was further argued that the court has to give consideration to the factors listed at paragraph 61 of the *Torbitt*, Supreme Court judgment namely that: the first respondent was not to be blamed for the delay by the arbitrator to deliver the award; the applicant failed to join the arbitrator, and he did so at his own risk; more than two and a half years have passed since the arbitration and as such it would not be practical to have a hearing of the arbitration and first respondent would be prejudiced by a hearing at this stage as considerable amount of time has passed without this matter being concluded. Furthermore, if the arbitration proceedings were to commence again *de novo*, it would result in considerable further expenses and delay for the parties and an entirely unnecessary duplication of work for a different arbitrator; finally, nowhere in the applicant's papers did he alleged that the arbitrator's decision was wrong, as such the only party that will suffer injustice if the award were to be declared a nullity would be the first respondent.

#### Consideration of the parties' respective submissions

[15] As mentioned earlier in this judgment the whole case of the applicant was predicated on the *Torbitt* court *a quo* judgment that non-compliance with the provision of section 86(18) is visited with a nullity. That finding has been held to be incorrect by the Supreme Court. Needless to say the Supreme Court's finding is binding on this court. Similarly it is a sensible and makes good law.

[16] The crux and single issue for consideration is therefore whether there has been substantial compliance on the part of the arbitrator with section 86(18) of the Labour Act.

[17] This court is in full agreement with the submissions on behalf of the first respondent taking into account the factors or guidelines set out in the *Torbitt* Supreme Court judgment. I am satisfied that there has been substantial compliance with the provisions of section 86(18) in that despite the initial delay the award was eventually delivered. The first respondent has no control over the arbitrator in order to ensure strict control with section 86(18).

[18] The applicant has failed to show any prejudice he has suffered as a result of the delay by the arbitrator to deliver the award more than 30 days after the hearing. Neither was the applicant able to prove or show prejudice he may suffer if the award were to be allowed to stand. On the other hand it stands to reason that the first respondent would suffer prejudice if the award were to be declared a nullity. The injustice the first respondent stands to suffer is self-evident. He has been waiting to be compensated for almost three years now since the award was issued in his favour.

[19] I have therefore arrived at the conclusion that the application stands to be dismissed.

[20] The order I make is as follows:

1. The applicant's application is dismissed.
2. No order as to costs.

3. The matter is removed from the roll and is considered finalised.

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H Angula  
Deputy-Judge President

## APPEARANCES

APPELLANT: R T D MUELLER  
Of Mueller Legal Practitioners, Windhoek

FIRST RESPONDENT: R MONDO  
Of Nixon Marcus Public Law Office, Windhoek