REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2020/00047

In the matter between:

THE NATIONAL DISABILITY COUNCIL OF NAMIBIA **APPELLANT**

and

BEN SHIKOLALYE **FIRST RESPONDENT**
MAGDALENA KATJINAMUNENE **SECOND RESPONDENT**
FERDINAND MATENDERE **THIRD RESPONDENT**
EPHRATH KATJIRUA **FOURTH RESPONDENT**
MARIA NDENGU **FIFTH RESPONDENT**
LYDIA DAVID **SIXTH RESPONDENT**
LUCIA AMUPADHI N.O **SEVENTH RESPONDENT**

Neutral citation: *The National Disability Council of Namibia v Shikolalye* (HC-MD-LAB-APP-AAA-2020/00047) [2021] NALCMD 30 (16 June 2021)

Coram: ANGULA DJP
Heard: **18 February 2021**
Delivered: **16 June 2021**

Flynote: Labour Law – Section 86(2)*(b)* of the Labour Act, 11 of 2007 – Dispute to be referred to the Labour Commissioner within one year of having arisen –

Internal remedies available to the employees must be exhausted before dispute is referred to the Office of the Labour Commissioner – An arbitrator had no jurisdiction to hear the dispute until and unless internal remedies have been exhausted.

Summary: This is an appeal against the award of the arbitrator whereby the arbitrator found that she had jurisdiction to hear the matter notwithstanding the fact that internal remedies had not been exhausted.

Held; that the arbitrator was correct in finding that on the facts of the matter internal remedies were not exhausted. However the arbitrator erred in holding that she still had jurisdiction to adjudicate the dispute notwithstanding that internal remedies had not been exhausted.

Held; that the arbitrator had no jurisdiction to hear the matter.

Held; that the matter is referred back to the appellant to attend to and finalise respondents' grievance as per internal grievance procedure.

ORDER

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1. The appeal is upheld.

2. The matter is referred back to the appellant to attend and to finalise the respondent's grievance as per internal procedure.

3. There is no order as to costs.

4. The matter is removed from the roll and regarded finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an unopposed appeal against the award granted in favour of the first to sixth respondents ('the respondents') on 25 August 2020 by the seventh respondent ('the arbitrator'). The crispy question for determination is whether the arbitrator erred when she held that internal remedies had not been exhausted and yet proceeded to hold notwithstanding that she had the jurisdiction to adjudicate the dispute. The arbitrator reasoned that the dispute was referred to the Labour Commissioner within the prescribed time and the claim had not prescribed and for that reason she had jurisdiction to adjudicate the matter.

The parties

[2] The appellant is the National Disability Council, which is a State owned entity, established by the National Disability Council of Namibia Act, 26 of 2004, with its principal place of business situated at Erf 684, No. 6, Davey Street, Windhoek-West. For ease of reference throughout this judgment, I will refer to the National Disability Council of Namibia as the applicant.

[3] The first to the sixth respondents are all major persons with legal capacities who were employed by the appellant before the dispute which gave rise to the present proceedings arose. They have however not opposed this appeal. They will jointly be referred to as 'the respondents' in this judgment.

[4] The seventh respondent is Lucia Amuphadi, a major female arbitrator, so employed as an arbitrator by the Office of the Labour Commissioner, situated at No. 32 Mercedes Street, Khomasdal, Windhoek. She has likewise not opposed the appeal.

Brief background

[5] The respondents are employed by the appellant. As one of the conditions of their employment they received housing allowances of 15 per cent and 30 per cent

of their gross remuneration, depending on whether the property occupied was owned or rented.

[6] It would appear that the appellant, as a government owned entity, had to align the conditions of employment of its employees with those of the staff members of the government. During October 2017 the appellant was directed by the line ministry under which it resorts that effective from the said month it had to align the housing allowances of its employees with the government prescribed guidelines set out in the Public Service Staff Rules. Acting in compliance with the said ministry's directive, the appellant reduced the rate at which the respondents' housing allowance had been paid.

[7] The respondents were aggrieved by the appellant's action much, particularly because the change was done without their consent or consultation. Accordingly, they lodged a grievance with the appellant contending that the appellant's conduct constituted a unilateral change in the employment conditions which is contrary the law. According to the respondents, various meetings were held and correspondence exchanged between the parties regarding the said allowance. It would appear that there was no firm commitment from the appellant to engage the respondents in order to resolve the dispute. As a result the respondents filed the dispute with the Office of the Labour Commission during November 2019.

Proceedings before the arbitrator

[8] Before the arbitrator, the appellant raised as a point *in limine* contending that the dispute arose during October 2017 and was only filed in November 2019, it had therefore been filled out of the prescribed time period and has therefore prescribed in terms of s 86(2) of the Labour Act, 2007. The section provides that a party may refer a dispute within one year after such dispute has arisen. It followed therefore, so the appellants submitted, as a consequence that the arbitrator lacked the jurisdiction to adjudicate the dispute. The arbitrator decided that she had the jurisdiction to hear the matter. It is that decision by the arbitrator which is the subject matter of this appeal.

[9] As indicated earlier, the respondents' case was that they lodged a grievance concerning the reduction of their housing allowance during February 2018 however

the grievance was not resolved since then the appellant has not resolved their grievance.

[10] According to the respondents, various meetings were held and correspondence exchanged between the parties regarding the said allowance. They pointed out that for instance a meeting was held on 27 September 2019 between the parties, where the issue of the change of housing allowance was discussed. The respondents thereafter addressed a letter to the appellant on 23 October 2019 to the appellant, in which they requested the appellant to provide them with a copy of the ministerial directive in terms whereof the housing allowance was changed. The appellant failed to provide that with a copy of such directive.

The findings and order by the arbitrator

[11] The arbitrator relied for her main finding on the pronouncement by the Supreme Court in *National Housing Enterprise v Maureen Hinda-Mbazira*[1] where it was held at para 24 that -

> 'Section 86 (2)*(a)* when read together with s 82(9) leaves no doubt that a referral can only be considered by the Labour Commissioner once all internal remedies in an undertaking have been exhausted.'

[12] On the basis of the above holding by the Supreme Court the arbitrator found that the internal remedies had not been exhausted.

[13] The arbitrator reasoned that because there was no evidence that the letter dated 18 February 2019 addressed by the respondents to the appellant had received no feedback and therefore that the internal remedies had not been exhausted. The arbitrator put it as follows in her ruling:

> 'The failure to respond and or object to the applicant's issue (read respondents) issues in the letter dated 18 February 2019, in reference to HR letter of June 2018 and November 2018 Management meet circumstances. I find that the respondent (read

[1] *National Housing Enterprise v Maureen Hinda-Mbazira,* Case no.: SA 42/2012, delivered on 4 July 2014.

appellant) failed to advance his arguments that domestics / internal remedies were exhausted, and that the matter be subjected to prescription as per section 86(2)*(b)*.'

[14] Having found that the internal remedies have not been exhausted, the arbitrator proceeded to consider whether the dispute had been referred for arbitration within a period of one year from the date it had arisen in order to determine whether she had jurisdiction to adjudicate the dispute.

[15] In my view, the arbitrator adopted a wrong course of action. I say this for the reason that it was contrary to her finding that internal remedies had not been exhausted. The approach was also in conflict with the legal position which was set out by Smuts, J (as he then was) in *Shoprite Namibia (Pty) Ltd v Haoses*[2]*, addressed the question of, when a dispute as provided in s 86(2)(a) is regarded as having arisen.*

> 'Where conditions of employment entitle an employee to an internal appeal procedure and an employee makes use of that internal remedy, then that employee cannot be said to have been finally dismissed until the outcome of that procedure invoked by that employee. A dispute had thus not yet arisen in the sense contemplated by the Act as the cause of action itself – a dismissal – has not as yet been completed.'

Determination

[16] It follows therefore from the above that: The arbitrator was correct to find that the internal remedies had not been exhausted.

[17] The arbitrator's decision to assume jurisdiction after finding that internal remedies were not exhausted was however a misdirection or an error taking into account the legal principles laid down in the *Shoprite* and *NHE* judgments referred to above, if the internal remedies were not exhausted, one cannot say a dispute as contemplated in s 86(2)*(b)* had arisen.

Conclusion

[2] *Shoprite Namibia (Pty) Ltd v Haoses* (LCA 18/2014) [2014] NALCMD 46 (26 November 2014).

[18] In the result, the appeal must succeed. In the light of the finding that the arbitrator did not have jurisdiction to adjudicate the dispute, the matter cannot be referred back to her. One of the relief sought by the respondents is that the matter be referred to the appellant for the internal remedies to be concluded by the parties. In my view that would be the appropriate route under the circumstances of this matter.

Order

[19] I therefore make the following order:

1. The appeal is upheld.

2. The matter is referred back to the appellant to attend and to finalise the respondent's grievance as per internal procedure.

3. There is no order as to costs.

4. The matter is removed from the roll and regarded finalized.

H Angula

Deputy-Judge President

APPEARANCES:

APPELLANT:	J BOLTMAN Of Köpplinger Boltman Legal Practitioners, Windhoek
RESPONDENTS:	Self Represented