REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: **HC-MD-LAB-APP-AAA-2021/00029**

In the matter between:

MINISTER OF EDUCATION, ARTS AND CULTURE **APPELLANT**

and

THE LABOUR COMMISSIONER **FIRST RESPONDENT**

DIONYSIUS LOUW N.O. **SECOND RESPONDENT**

HERMANUS VAN WYK **THIRD RESPONDENT**

Neutral citation: *Minister of Education, Arts and Culture v The Labour Commissioner* (HC-MD-LAB-APP-AAA-2021/00029) [2022] NALCMD 17 (8 April 2022)

Coram: Schimming-Chase J

Heard: **8 October 2021**

Delivered: **8 April 2022**

Flynote: **Labour Law** — Section 86(2)*(b)* of the Labour Act 11 of 2007 — A dispute, other than one concerning a dismissal, to be referred to the Labour Commissioner within one year of dispute having arisen — On the facts the third respondent's dispute regarding his overtime payment arose on 25 October 2017 – Third respondent referred his dispute to the Labour Commissioner two years and

seven months after the dispute arose — Arbitrator dismissed appellant's point *in limine* that the respondent's dispute had prescribed — Arbitrator misdirected himself in finding that the dispute had not prescribed — Appeal upheld.

Summary: The third respondent, a previous employee of the appellant, was aggrieved by what he termed an 'underpayment of remuneration' in respect of overtime. On 25 October 2017 he addressed email correspondence to the appellant's Permanent Secretary complaining of the alleged underpayment. The Permanent Secretary responded to his email by a letter dated 17 December 2017, in which she advised the respondent that the overtime payment had been correctly calculated and denying the respondent's allegations to the contrary.

Over the next two and a half years the respondent continued to send correspondence to officials of the appellant voicing his grievance, but did not receive any response thereto.

The last correspondence addressed by the respondent to the appellant was on 20 May 2020.

On 24 June 2020 the respondent referred a dispute to the Labour Commissioner. At the onset of the arbitration proceedings the appellant raised a point *in limine* on the basis that the dispute had prescribed in terms of s 86(2)*(b)* of the Labour Act 11 of 2007. The appellant argued that the dispute arose on 25 October 2017 when the respondent first addressed his complaint to the appellant, whereas the respondent contended that the dispute arose on 20 May 2020, being the date on which he sent his last correspondence to the appellant.

The arbitrator found in favour of the respondent and dismissed the appellant's point *in limine*, resulting in the appellant lodging the current appeal.

Held; A claim is said to arise when the claimant has full knowledge and appreciation of the claim and is fully possessed of the particulars of the claim. The issue as to when a dispute arises is a question of fact to be determined on the basis of evidence.

Held further; On the facts, and by 25 October 2017, the respondent was aware that he had, according to him, been underpaid. He had at that stage an understanding and appreciation of the fact that there was a disagreement between him and the appellant concerning his remuneration.

Held further; The dispute therefore arose on 25 October 2017 and for purposes of s 86(2)*(b)* of the Labour Act, the respondent's dispute prescribed prior to its referral to the Labour Commissioner.

The appeal was accordingly upheld and the dispute was declared to have prescribed in terms of s 86(2)*(b)* of the Labour Act.

ORDER

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1. The appeal against the award of the arbitrator succeeds and his award is set aside in its entirety.
2. The respondent's dispute against the appellant is declared to have prescribed in terms of s 86(2)*(b)* of the Labour Act 11 of 2007.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] This is an unopposed appeal against an award granted by the second respondent ("the arbitrator") dismissing a point *in limine* of prescription raised by the appellant in arbitration proceedings launched by the third respondent ("the respondent").

[2] The appellant seeks an order in the following terms:

'1. Setting aside the Arbitrator's finding/ruling that the Appellant's application is thrown out with both hands for lack of merit.

2. Upholding the points of law raised by the Appellant that the 3rd Respondent's dispute referral is defective and has prescribed.

3. Further and/or alternative relief.'[1]

[1] Appellant's notice of appeal dated 30 March 2021.

[3] This court is tasked with determining whether or not the arbitrator erred in his finding that the respondent's dispute had not prescribed at the time of its referral to the Labour Commissioner.

Background

[4] The respondent was employed as a part-time lecturer by the appellant in 2006 until termination of his contract of employment in December 2017.

[5] On 24 June 2020 the respondent referred a dispute to the Labour Commissioner. The nature of the dispute complained of – as per the referral form LC 21 – related to the appellant's 'underpayment of remuneration' owed to the respondent. The respondent provided a summary of dispute, wherein he elaborated that the underpayment complained of was in respect of overtime remuneration owed to him in the amount of N$66 542, calculated for 17 months over the period December 2006 to December 2017.

Proceedings before the arbitrator

[6] Prior to the arbitration which took place on 16 March 2021, the appellant brought an application in terms of r 28(1)*(c)* of the ConArb Rules[2] seeking dismissal of the respondent's dispute on the basis of two points *in limine*. The first objection was that the dispute had prescribed in terms of s 86(2)*(b)* of the Labour Act 11 of 2007[3] ("the Act"), as well as in terms of s 33 of the Public Service Act 13 of 1995. The second objection was that the dispute had been prematurely referred to the Labour Commissioner by virtue of the respondent's failure to comply with s 33(2) of the Public Service Act.

[7] The application, dated 8 September 2020, was unopposed by the respondent who did not deliver a notice of opposition together with an answering affidavit as prescribed by r 28(5) of the ConArb Rules.

[8] At the commencement of the arbitration proceedings the arbitrator suggested that the he first make a determination on the issue of prescription and thereafter –

[2] Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.
[3]

and in the event that the first point *in limine* were to be dismissed – schedule a further hearing for determination of the second point *in limine*, namely that of premature referral. Both parties agreed to this suggested course of proceedings.

Appellant's arguments

[9] The contentions of the appellant may be summarised as follows: The respondent's dispute was referred to the Labour Commissioner on 24 June 2020.[4] The respondent, however, had knowledge or must have reasonably been aware of the dispute by as early as October 2017. This was evidenced by an email sent by the respondent to the appellant's Permanent Secretary (now referred to as the Executive Director), Sanet Steenkamp, dated 25 October 2017.[5]

[10] In his email, the respondent complained that he was underpaid in respect of his overtime remuneration as the calculations were based on an incorrect salary notch. Further issues were raised in the email which are not of relevance to the issue at hand and as such do not require addressing.

[11] Ms Steenkamp reverted to the respondent's complaint by letter dated 18 December 2017.[6] I will deal with the content of the letter in more detail later on in this judgment. Essentially, the letter quashed the respondent's allegation that he had been underpaid and proffered reasons for this assertion. The appellant's representative contended that it was on this date that the dispute arose between the parties.[7]

[12] In terms of s 86(2)*(b)* of the Labour Act the respondent was required to refer the dispute within one year of the dispute arising. The respondent, however, referred the dispute some 2 years and 17 months after the dispute arose, by which time the dispute had prescribed. Consequently the arbitrator did not have jurisdiction to adjudicate the matter and it stood to be dismissed.

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[4] At the hearing it was noted that the LC 21 contained two date stamps, one for 23 June 2020 and one for 24 June 2020. For purposes of these proceedings the parties agreed that 23 June 2020 would be considered as the date of referral.

[5] "Exhibit 1" on page 106 of the indexed record.

[6] "Exhibit 3" on page 109 of the indexed record.

[7] This is contrary to what was contended in the r 28 application and in the appeal, wherein the appellant claims that the dispute arose on 25 October 2017.

Respondent's arguments

[13] The respondent did not dispute receiving Ms Steenkamp's response to his grievance. After receipt of the letter, however, he still 'tried to negotiate'[8] with the appellant.

[14] The respondent averred that the dispute arose in 2020 because during the years 2017, 2018, 2019 and 2020 he corresponded with the appellant's officials but did not receive a response. The last time he engaged with the appellant was on 28 May 2020, on which date he addressed a series of emails[9] to various officials of the appellant, reiterating the basis of his complaint and appealing to the officials to correct their error. Having failed to have his grievance attended to, the respondent then referred the dispute to the Labour Commissioner on 24 June 2020, less than a month after the dispute arose.

The arbitrator's ruling on the point in limine

[15] On 17 March 2021, the arbitrator pronounced himself in favour of the respondent, delivering the following ruling:

'a. The application of Mr J. J. Ludwig *obo* the Respondent pertaining to prescription is thrown out with both hands for lack of merit.'[10]

[16] The arbitrator's ruling was mainly based on the judgment in *National Housing Enterprise v Hinda-Mbazira*[11] wherein our apex court found that the 'prescription clock under s 86(2) of the Labour Act starts to tick after all reasonable or all internal remedies have been exhausted and failed to resolve or settle the dispute'.[12]

[17] The arbitrator applied the dicta in *Hinda-Mbazira* to the facts before him, stating the following:

'16. Question: when did Hermanus van Wyk exhausted the internal remedies available to him. In danger of rehashing myself, Annexure "1", Annexure "2" and Annexure "3" indicated that he engaged the Respondent for the very last time on 28 May 2020 on the

[8] Page 27 of the indexed record.
[9] "Annexure 1", "Annexure 2", "Annexure 3" and "Annexure 4" on pages 112 – 115 of the indexed record.
[10] Page 45 of the indexed record.
[11] *National Housing Enterprise v Hinda-Mbazira* 2014 (4) NR 1046 (SC).
[12] Para 22 of the arbitrator's ruling on page 43 of the indexed record.

subject matter with the view of finding an amicable solution to his problem. But this was to no avail.

…

17. In the prelude of the above, I am in agreement with Mr Hermanus van Wyk that the dispute arose on 28 May 2020 and not on 25th October 2017 when he allegedly *"had knowledge or reasonable had knowledge of the claim for payment of the remuneration"* as counsel for the Respondent would like to believe.

18. Following the dicta in *Hinda-Mbazira* and *Shipepe,* the prescription clock of the dispute of Hermanus van Wyk only started to run on 28 May 2020 and not on 25th of October 2017. In the result, the dispute of Mr Hermanus van Wyk has not prescribed.'[13]

Legal principles and application of the law to the facts

[18] Sections 86(1) and (2) of the Labour Act provide that:

'(1) Unless the collective agreement provides for referral of disputes to private arbitration, any party to a dispute may refer the dispute in writing to –

(a) the Labour Commissioner; or

(b) any labour office.

(2) 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.' (emphasis added)

[19] The point of departure in determining whether a dispute was timeously referred in terms of s 86(2)*(b)* is to ascertain the date on which the dispute arose. In other words the court must determine from when the period of one year is reckoned to run.

[20] Section 1(1) of the Act defines a dispute as 'any disagreement between an employer or an employers' organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter.'

[13] Arbitrator's ruling on pages 43 – 44 of the indexed record.

[21] A claim is said to arise when the claimant has full knowledge and appreciation of the claim and is fully possessed of the particulars of the claim.[14] Further, the issue as to when a dispute arises has been held by this court to be a question of fact to be determined on the basis of evidence led in a matter.[15] I now proceed to consider the facts particular to this appeal.

[22] During the arbitration proceedings the appellant's representative tendered into evidence the letter written by the appellant's Permanent Secretary in response to the respondent's email of 25 October 2017 recording his grievance. The pertinent portions of the letter dated 18 December 2017 read as follows:

'1. My office took cognizance of your email letter dated 25 October 2017. In considering your request the following is brought to your attention:

a) Kindly be advised that the calculations of overtime payments were done on the advice of the Ministry of Finance – Treasury, based on professional scrutiny and evaluation of available facts that, in terms of your appointment letters (since 2006-2017) you have been appointed as a Part-Time Lecturer not as an Administrative Officer, hence the said Ministry could not grant authorization for the salary underpayment, but advised the Ministry to consider your plight in line with the position in the appointment letters.

b) …Kindly take note that the calculation of overtime were not made to satisfy you as you alleged, but to remunerate you accordingly. In light thereof, your matter was dealt with procedurally and my office has no further role to play in this regard.

…

3. In light of the above, it is trusted that your discontentment has been addressed and that this response clarifies the matter.'

[23] It is the appellant's case that the dispute arose on 25 October 2017 being the date of the respondent's correspondence to the Permanent Secretary. He now contends that the dispute arose on 18 December 2018. The respondent on the other hand, argues that the dispute arose on 20 May 2020, being the date of his last correspondence to – and his final attempt in 'negotiating' with – the appellant.

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[14] *Musheti v Auditor-General of Namibia* (HC-MD-LAB-APP-AAA-2019/00048) [2020] NALCMD 3 (6 February 2020).

[15] *Aveng Water Treatment (Pty) Ltd v Nakwafila* (LCA 2/2017) [2017] NALCMD 32 (08 November 2017) para 15.

[24] On the facts, and by 25 October 2017, the respondent was aware that he had, according to him, been underpaid. He had at that stage an understanding and appreciation of the fact that there was a disagreement between him and the appellant concerning his remuneration. That formed the basis of his correspondence to the appellant's Permanent Secretary. Given that the respondent disagreed with the amount of overtime he had been paid by the respondent by this date already he cannot be said not to have knowledge of the particulars of his claim.

[25] I accordingly agree with the initial contentions advanced by the appellant. The respondent disputed the correctness of the amount that had been paid in overtime, and he had one year from this date to institute his complaint in terms of the Labour Act. It should have been apparent to the respondent at that stage that his complaint would no longer be entertained by the appellant. The appellant's decision to further engage the appellant at different intervals in the succeeding two and a half years, in hopes of obtaining a positive response does not alter when the dispute arose for purposes of s 86(2)*(b)*. It is doubtful that the respondent had the expectation that his correspondences – which were a regurgitation of his erstwhile email of 25 October 2017 – would have elicited a different response to that of 17 December 2017. The respondent's attempts at 'negotiation' protracted the dispute and resulted in its prescription.

[26] Even were I to consider the letter emanating from the Permanent Secretary of the appellant dated 18 December 2017 in response to the respondent in the respondent's favour (for purposes of prescription) as the formal recognition and understanding of the particulars of his dispute for purposes of the claim, this does not assist the respondent either, as the matter remains prescribed for purposes of the Act. In this regard and in any event, the disagreement between the parties pertaining to the payment of overtime was merely reinforced (as it were) when the Permanent Secretary gave an explanation of how his overtime payment was calculated and made it clear that the dispute was not up for negotiation with the words '…your matter was dealt with procedurally and my office has no further role to play in this regard'

[27] The facts and findings of the court in *Luderitz Town Council v Shipepe*[16] are also apposite in this case. In *Shipepe,* the Town Council in July 2010 discontinued granting certain benefits to Mr Shipepe maintaining that the benefits had not been approved by the relevant Minister and were thus illegal. Mr Shipepe referred the dispute to the Labour Commissioner in February 2012, alleging that the dispute arose in December 2011 when the respondent had formally raised the unilateral change to his employment conditions under the attention of the Acting Chief Executive Officer in a grievance process which did not yield the response sought by Mr Shipepe. It was argued on behalf the Town Council that 'a dispute had already arisen at least by 25 July 2010 when the respondent together with certain of his colleagues who were likewise affected by the withdrawal of benefits had addressed a letter complaining of that very fact to the appellant. The fact that there was correspondence exchanged thereafter and the matter had not become resolved which eventually led to a grievance procedure being lodged by the respondent in December 2011, followed up by the referral of the dispute to the office of the Labour Commissioner in February 2012 would not alter the position that the dispute itself had already risen by at least 25 July 2011 when the respondent together with certain of his colleagues took up the issue with his employer, the appellant.[17]

[28] The court in *Shipepe* agreed with the Town Council, holding that the referral of the dispute concerning withdrawal of the benefits, other than the housing benefit, was made way outside the time period prescribed by s 86(2)*(b)* of the Act. As a consequence, the award based upon the withdrawal of those benefits, was determined to be a nullity and set aside.[18] Smuts J (as he then was) interpreted the statutory intention of s 86(2)*(b)* as a call for disputes to be resolved and determined expeditiously.[19] This court confirmed those sentiments in *Cloete v Bank of Namibia*[20] where the learned judge stated the following:

'It becomes clear at this juncture already that the legislature, through the enactment of the 'time-bar-provisions' - contained in Sections 86(2)(a) and (b) of the Labour Act - intended to achieve two things: firstly, it set the periods – obviously deemed to be fair and

[16] *Luderitz Town Council v Shipepe* 2013 (4) NR 1039 (LC).
[17] *Luderitz Town Council v Shipepe* 2013 (4) NR 1039 (LC) para 9.
[18] *Shipepe* para 11.
[19] *Shipepe* para 10.
[20] *Cloete v Bank of Namibia* (HC-MD-LA-APP-AAAA-2019/00071) [2020] NALCMD 34 (23 October 2020).

sufficient - within which such referrals could be made – and – secondly – it provided for the cut-off points – after which such referrals would be time-barred - obviously intended to avoid 'endless' and 'forever- ongoing' referrals and arbitrations. Similar considerations as for the enactment of the Prescription legislation would have prevailed in all probability.'[21]

[29] I accordingly find that for purposes of s 86(2)*(b)* of the Labour Act, the respondent's dispute prescribed prior to its referral to the Labour Commissioner. The arbitrator accordingly misdirected himself when he held that the dispute had not prescribed, and dismissed the appellant's point *in limine.* The judgment in *National Housing Enterprise v Hinda-Mbazira,*[22] to the effect that the prescription clock under s 86(2) Act starts to tick after all reasonable or all internal remedies have been exhausted and failed to resolve or settle the dispute, was with respect, incorrectly applied by the arbitrator and distinguishable. That case concerned a referral of a dispute in terms of section 86(2)*(a)* of the Act, as a result of a dismissal. It stands to reason that all the internal remedies relating to a dismissal should be exhausted before instituting a labour complaint, because the Act makes express provision for the internal remedies to be exhausted to ensure substantial compliance with the procedures relating to a dismissal.

[30] In light of the foregoing, the following order is made:

1. The appeal against the award of the arbitrator succeeds and his award is set aside in its entirety.
2. The respondent's dispute against the appellant is declared to have prescribed in terms of s 86(2)*(b)* of the Labour Act 11 of 2007.

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EM SCHIMMING-CHASE

Judge

[21] *Cloete* para 35.
[22] *National Housing Enterprise v Hinda-Mbaziira* 2014 (4) NR 1046 (SC).

APPEARANCES

APPELLANT:	Mr J Ludwig
	Office of the Government Attorney