REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Practice Directive 61

<table>
<tr><td rowspan="2">Case Title:

DAVID JOHANNES GOLIATH

VS

LANGER HEINRICH URANIUM (PTY) LTD AND NDAHAFA HAMUKWAYA</td><td>Case No:

HC-MD-LAB-MOT-REV-2022/00007</td></tr>
<tr><td>Division of Court:

LABOUR COURT (MAIN DIVISION)</td></tr>
<tr><td rowspan="2">Heard before:

HONOURABLE JUSTICE SIBEYA</td><td>Date of hearing:

18 AUGUST 2022</td></tr>
<tr><td>Delivered on:

31 August 2022</td></tr>
<tr><td colspan="2">Neutral citation: Goliath v Langer Heinrich Uranium (Pty) Ltd (HC-MD-MOT-REV-2022/00007) [2022] NALCMD 48 (31 August 2022)</td></tr>
<tr><td colspan="2">The order:

1. The applicant’s application for review is struck from the roll for being prosecuted out of the prescribed period of time in terms of s 89(4) of the Labour Act 11 of 2007.

2. There shall be no order as to costs.

3. The application is removed from the roll and regarded as finalized.</td></tr>
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Reasons for the order:

SIBEYA J

Introduction

[1] This is a review application instituted by the applicant on 18 January 2022. In the review application, the applicant seeks the following relief:

'1. Reviewing and setting aside the proceedings and decision of the second respondent handed down on 17 September 2021;

2. An order directing that the point *in limine* was disposed of on 10 July 2017 and a change in legal practitioner does not justify the point to be raised and canvassed again;

3. Costs (if opposed by the 1st respondent);

4. Costs against the 2nd respondent;

5. Further and/or alternative relief.'

Background

[2] The parties are involved in a labour dispute which is pending before the second respondent, the arbitrator. The second respondent ruled on a point of law *in limine* of whether the application for a dispute had prescribed for being launched outside the period of six months as required by the Labour Court Rules. The second respondent adjourned the proceedings until 17 September 2021, to rehear arguments on the point of law raised and consider making another ruling thereon.

[3] On 17 September 2021, the second respondent allowed the first respondent's application to be heard.

[4] It is against this ruling that the applicant is disgruntled and seeks the intervention of this court for relief set out above.

[5] The review application is opposed by the first respondent.

[6] Ms Kandjella appears for the applicant, while Mr Muhongo appears for the first respondent.

Points of law *in limine* raised by the first respondent

[7] The first respondent raised the following material points of law *in limine*:

(a) That the review application was instituted out of the prescribed period of 30 days as stipulated in section 89(4) of the Labour Act, Act No. 11 of 2007 ("the Act");

(b) That the orders sought in prayers 2 and 3 of the applicant's notice of motion seek a declaration of rights, which then contravenes section 117(1)(d) of the Act in that the declaratory relief is not sought as the only relief.

[8] The applicant opposed the points of law *in limine* maintaining that such points lack merit.

The prosecution of the review application

[9] Before I discuss the points of law *in limine* raised, I consider it prudent to address the manner in which the applicant prosecuted the review application.

[10] On 23 June 2022, the applicant was ordered by this court to file his replying affidavit in the review application on or before 30 June 2022. Applicant filed his replying affidavit on 7 July 2022 together with an application for condonation for such late filing. The main reasons provided in support of the condonation application are that Ms Kandjella had no secretary to assist her during the time within which she was due to file the replying affidavit and further that she was booked off sick. The first respondent opposed the condonation application on the basis that it lacked prospects of success, a position disputed by Ms Kandjella.

[11] The matter appeared in court for case management on 21 July 2022 where it was

postponed to 18 August 2022 for a hearing of the condonation application and the review application. The applicant was ordered to file his heads of argument on or before 4 August 2022 and the first respondent was to file on or before 11 August 2022. The first respondent filed its heads of argument on 2 August 2022 while the applicant again filed his heads of argument late on 8 August 2022 and therefore in violation of the court order.

[12] The heads of argument filed by the applicant only covered the application for condonation but not the review application. To this, Ms Kandjella submitted that she was under the impression that the hearing of 18 August 2022 was only in relation to the application for condonation exclusive of the review application. How Ms Kandjella could form such an opinion is astonishing as the order of 21 July 2022, is clear as day that the hearing of 18 August 2022 is regarding the condonation application and the main application. The continuous laxity by Ms Kandjella in the prosecution of this matter is condemned and Ms Kandjella is cautioned that this court will, in future, likely impose sanctions for such conduct.

Section 117(1)(d) of the Act – Declaratory relief

[13] Section 117(1)(d) of the Act provides that:

> 'The Labour Court has exclusive jurisdiction to grant a declaratory order in respect of any provision of this Act, a collective agreement, contract of employment of wage order, provided that the declaratory order is the only relief sought.'

[14] It is beyond dispute that the orders sought by the applicant in prayers 1 and 2 constitute declaratory orders. At the backdrop of s 117(1)*(d)* of the Act, Ms Kandjella, during arguments, abandoned the relief sought in prayer 1 in an attempt not to offend the provisions of the said statutory provision. This approach is supported by the decision of *Meatco v Namibia Food and Allied Workers Union and Others*.[1]

[1] *Meatco v Namibia Food and Allied Workers Union and Others* 2013 (3) NR 777 (LC).

Section 89(4) of the Act – Prescribed time to launch review proceedings

[15] The applicant is discontented by the decision of the second respondent of 17 September 2021, and launched these proceedings only on 18 January 2022. Mr Muhongo argued with might and power with the law on his side that this is way in excess of 30 days.

[16] Section 89(4) of the Act provides that:

‘(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award –

(a) Within 30 days after the award was served on the party, unless the alleged defect involves corruption; or

(b) If the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption.’

[17] The alleged defect in the present proceedings does not involve corruption, therefore, s 89(4)*(a)* finds application herein.

[18] It is settled law in this jurisdiction that an application to review a decision of the arbitrator must be launched with a period of 30 days of the award or decision as provided in 89(4)(a) of the Act, unless if the defect complained of involves corruption, during which the review application must be launched within six weeks after discovering the corruption.

[19] Smuts J in *Lungameni and Others v Hagen and Another*,[2] emphasised that an application to review the decision of the arbitrator must be brought within 30 days in terms of s 89(4) of the Act. He proceeded to remark that the Act does not confer powers on the court to condone a labour review application launched outside the periods stipulated in the Act as the provisions are peremptory. In *Lungameni*, the review application which was launched after a period of six weeks was found to constitute a nullity for non-compliance with s 89(4) of the Act and was consequently, struck from the roll.

[20] In *Puma Chemicals v Labour Commissioner and Another*,[3] Geier J heard a review

[2] *Lungameni and Others v Hagen and Another* 2014 (3) NR 352 (LC) para 7. See also: *Namibia Development Corporation v Mwandingi & Others* 2013 (3) NR 737 (LC).

application where there appeared to have been a gross irregularity committed in which the arbitrator proceeded to arbitration without conciliating the dispute and thus contrary to the provisions of the Act. The *Puma* case revisited and agreed with the finding in the *Lungameni* case that rule 15 of the Rules of the Labour Court Rules vests powers on the court to condone non-compliance with the rules of court, inclusive of rule 14(1)*(a).* Rule 14(1)*(a)* mainly restates what s 89(4) of the Act provides. Both the *Lungameni* and the *Puma* matters found, which finding I am in agreement with, that the authority to condone the non-compliance with the rules as provided for in the Rules of Court does not, and cannot confer authority to condone the non-compliance with the provisions of the Act, considering that the Act is a superior legislation in comparison to the rules.

[21] The court in the *Puma* case went on to dismiss the review application on the premise of non-compliance with s 89(4) and proceeded to express its displeasure with the content of s 89(4) and the fact that it does not confer the court with the authority to condone non-compliance thereof. As part of the order, the court in the *puma* case referred the judgment to the Minister of Labour for consideration. Nothing appear to have turned on such referral.

[22] I share the same sentiments as in the *Puma* case that a court should be afforded powers by the Act to condone non-compliance with the period of time set out in the said Act on good cause shown. The fact that the Act does not provide for condonation for non-compliance with s 89(4), even on the basis of good cause shown, may place the constitutionality of the said provision into question. I am mindful that, in *casu*, there is no constitutional challenge launched against the provisions of s 89(4) of the Act.

[23] The applicant, in his founding affidavit, does not explain the delay why he failed to institute the review proceedings within the prescribed period of 30 days. Even worse, the applicant does explain the reasons why he only launched the review application on 18 January 2022 against a decision of 17 September 2021.

Conclusion

[3] *Puma Chemicals v Labour Commissioner and Another* 2014 (2) NR 355 (LC).

[24] It follows, from the above findings and conclusions reached that the applicant failed to launch the review application within the prescribed period of 30 days in terms of s 89(4) of the Act. Given the finding which I just made, I find it academic to consider the propriety of the applicant's application for condonation for the late filing of the replying affidavit and I decline to do so. As a matter of consequence, I find that it is inevitable that the review application constitutes a nullity for not being prosecuted within 30 days and falls to be struck from roll.

Costs

[25] Mr Muhongo argued that the persistence of the applicant to pursue the review application even after being notified of the applicability of s 89(4) of the Act, attracts adverse costs as it constitutes frivolousness. He argued that costs against the applicant and the applicant's legal practitioners, jointly and severally.

[26] Contrary to other disputes, in labour matters, the Legislature, in its wisdom, included s 118 in the Act.[4] The section provides that no order for costs would be issued by the Labour Court in labour matters, save in situations where the institution, defence, or further pursuit of proceedings is either frivolous or vexatious.

[27] Although, I am of the view that the applicant carries blame for proceeding with the review application in the face of the provisions of s 89(4) of the Act. The applicant on the merits appear to have an arguable case. This, coupled with the intention of the Legislature to stir away costs in labour matters save for circumscribed events, in the exercise of my discretion, I do not find it befitting to order costs against the applicant and the applicant's legal practitioners in this matter. Therefore, no order as to costs will be made.

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

1. The applicant's application for review is struck from the roll for being prosecuted

[4] Labour Act 11 of 2007.

out of the prescribed period of time in terms of s 89 (4) of the Labour Act 11 of 2007.

2. There shall be no order as to costs.

3. The application is removed from the roll and regarded as finalised.

Judge's signature:	**Note to the parties:**
Sibeya Judge	Not applicable.
Counsel:	
Applicant	**1st Respondent**
R Kandjella for the applicant Of AngulaCo Inc, Windhoek	T Muhongo for the 1st respondent, Instructed by ENSAfrica, Windhoek