

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**EX TEMPORE JUDGMENT**

Case no: HC-MD-LAB-MOT-REV-2023/00014

In the matter between:

**SERVE INVESTMENTS 84 (PTY) LTD**

**APPLICANT**

and

**SAREL VAN DER MERWE**

**FIRST RESPONDENT**

**JACOLINE VAN DER MERWE**

**SECOND**

**RESPONDENT**

**BESTER MAIBA SINVULA N.O.**

**THIRD**

**RESPONDENT**

**THE LABOUR COMMISSIONER**

**FOURTH**

**RESPONDENT**

**Neutral citation:** *Serve Investments 84 (Pty) Ltd v Van der Merwe* (HC-MD-LAB-MOT-REV-2023/00014 [2023] NALCMD 32  
(8 August 2023))

**Coram:** Schimming-Chase J

**Heard:** 4 August 2023

**Order:** 4 August 2023

**Written reasons: 8 August 2023**

---

**ORDER**

---

1. The arbitration award under case number NERU 21-21 is hereby reviewed and set aside.
  
  2. The matter is referred back to the office of the Labour Commissioner to conduct the arbitration de novo before a different arbitrator.
  
  3. The matter is regarded as finalised and removed from the roll.
- 

**JUDGMENT**

---

SCHIMMING-CHASE J:

[1] On 1 February 2023, the applicant launched an application seeking an order that the arbitration award made by the third respondent under case number NERU 21-21 be reviewed and set aside, and that the matter be referred back to the fourth respondent to conduct the arbitration de novo before a different arbitrator.

[2] The applicant is Serve Investments 84 (Pty) Ltd., a company duly registered in accordance with the company laws of Namibia, and conducting business at No.3 Kerby Street, Windhoek, Republic of Namibia.

[3] The first respondent is Mr Sarel van der Merwe ('Mr van der Merwe'), an adult male person, residing at Farm Shitemu, Kavango East, Republic of

Namibia. The second respondent is Jacoline van der Merwe ('Ms van der Merwe'), an adult female person residing at Farm Shitemu, Kavango East, Republic of Namibia.

[4] The third respondent is Mr Bester Maiba Sinvula N.O. ('Mr Sinvula'), cited in his official capacity as arbitrator, in terms of s 85(3) and (4) of the Labour Act 11 of 2007 ('the Labour Act'). The office of the third respondent is situated at Boma Road, Katima Mulilo, Republic of Namibia. The fourth respondent is the Labour Commissioner, appointed as such in terms of s 120(1) of the Labour Act, with its head offices located at 32 Mercedes Street, Khomasdal, Windhoek, Republic of Namibia.

[5] On 11 March 2021, Mr and Ms van der Merwe referred a dispute to the Labour Commissioner, seeking an order for payment of alleged outstanding overtime. Serve Investments contends that when the matter was instituted, the LC 21 form – the referral, was never served on it.<sup>1</sup>

[6] On 10 March 2022, a year after the referral was lodged, the deponent on behalf of Serve Investments, a certain Mr Venter, the director and operations manager of Serve Investments, received a text message requesting that he send his email address for service of a notice. Mr Venter submits that, at the time, he had no idea who sent him the text message or what it was about, and as a result, he ignored the message.

[7] On 14 March 2022, Mr Sinvula contacted Mr Venter telephonically and informed him of the referral, and requested that he provide his email address for service of the notice. Mr Venter states that, he immediately cooperated with Mr Sinvula and sent him a text message with his email address.

---

<sup>1</sup> Supported by the blank service affidavit – form LG 36, annexure C to the applicant's founding affidavit.

[8] Mr Sinvula subsequently sent him an email with a notice of set down dated 31 January 2022, for a hearing on 16 March 2022 at 09h00, in Rundu.

[9] Mr Venter informed Mr Sinvula that, at no stage did he (Mr Venter) agree to a shorter notice period, and that the two days' notice was insufficient. Mr Venter further requested a postponement to April 2022. In the same email, he requested that Mr Sinvula inform him of the new date for the hearing. Mr Venter further avers that, he never heard from Mr Sinvula again.

[10] On 19 January 2023, Mr Venter received a message via 'WhatsApp' from Ms van der Merwe. The message contained a screenshot of an email sent to her by the office of the Labour Commissioner, containing an arbitration award. The arbitration award is dated 23 October 2022, yet 19 January 2023, was the first time that he and Serve Investments learned of the award. Mr Venter states that, until date of his founding affidavit 31 January 2023, neither he nor Serve Investments had been served with the arbitration award.

[11] In terms of the provisions of s 89(4) and (5) of the Labour Act, a litigant may apply for the review of an arbitral award in circumstances where it is alleged and the reviewing court is satisfied that there is a defect in the award. This presupposes that the arbitrator committed misconduct in relation to his or her duties; committed a gross irregularity in the arbitration proceedings, or he or she exceeded the powers conferred by the Act.<sup>2</sup>

[12] As a result, Mr Venter submits, in terms of s 86(3) read with s 129 and rule 6 of the Conciliation and Arbitration Rules, Serve Investments was never served with the LC 21 (referral) or the LC 49 (notice of set down), further exacerbated by the fact that the LG 36 affidavit (proof of service of documents) is defective.

---

<sup>2</sup> *Beukes v Khrohne* (HC-MD-LAB-MOT-REV-2020/00068) [2022] NALCMD 1 (20 January 2022) para 43.

[13] He states further that, when he initially received notice on 14 March 2022, the two days' notice was too short, and in any event, fell short of the required 14 days' notice. Neither he nor Serve Investments was served with any notice of set down for the hearing of 1 June 2022, and Mr Sinvula failed in his duty as arbitrator to satisfy himself that Serve Investments had notice of the hearing, and further that Mr Sinvula made no effort to contact him on the day of the hearing to enquire about his absence.

[14] In light of the above, Mr Venter contends that the arbitration proceedings were conducted in a procedurally unfair manner and to the detriment of Serve Investments.

[15] During case management, the court mero motu raised the question of service with the legal practitioner of Serve Investments. The court further invited the legal practitioner to address the court during the hearing of the review, on whether service was proper and in terms of the rules of Court. The legal practitioner filed a supplementary affidavit deposed to by the temporary Acting Deputy Sheriff, Mr Gunther von Francois, confirming the content of his returns of service, and further that the full process (that is, the notice of motion, founding affidavit of Mr Venter, annexures A to H and J) were personally served by him on Mr van der Merwe, and on behalf of Ms van der Merwe, as they are married.<sup>3</sup> The process was also personally served on Mr Sinvula.<sup>4</sup> Neither Mr nor Ms van der Merwe opposed the relief sought.

[16] The relevant provisions of the Labour Act provide:<sup>5</sup>

'(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 –

---

<sup>3</sup> Pages 29 – 30 of the record.

<sup>4</sup> Page 30 of the record para 10.

<sup>5</sup> Section 89 of the Labour Act 11 of 2007.

(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.

(5) A defect referred to in subsection (4) means –

(a) that the arbitrator –

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the arbitrator's power; or

(b) that the award has been improperly obtained.'

[17] Serve Investments contends that, Mr Sinvula failed to ensure that its right to procedural fairness was protected, and that Mr Sinvula committed misconduct and a gross irregularity in the conduct of the arbitration proceedings.

[18] In *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*,<sup>6</sup> the South African Supreme Court of Appeal held that:<sup>7</sup>

'Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The *onus* rests upon the appellants in this regard. As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct ... which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely

---

<sup>6</sup> *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) para 21, and the authorities there collected.

<sup>7</sup> See *Swartz v Namwater Corporation Ltd* (HC-MD-LAB-MOT-REV-2021/00180) [2023] NALCMD 6 (14 February 2023) para 19.

inference) of what has variously been described as wrongful and improper... dishonesty and *mala fides* or partiality ... and moral turpitude ... '

[19] Further, in *Ellis v Morgan*,<sup>8</sup> Mason J explained the meaning of 'gross irregularity':

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[19] In *Goldfields Investment Ltd v City Council of Johannesburg*,<sup>9</sup> Schreiner J found:<sup>10</sup>

'The law, as stated in *Ellis v Morgan* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.'

[20] Section 86(3) of the Labour Act places a duty on the referring party to satisfy the Labour Commissioner that all parties to the dispute have been served with a copy of the referral. Mr Sinvula in the arbitration award contends that, he is satisfied with the manner in which the parties were notified, and that both parties were duly notified.<sup>11</sup> Mr Sinvula however fails to provide any explanation as to how service was effected, and how he satisfied himself that such service constituted proper service.

[21] Ex facie the record before court appears two LG 36 affidavits. I refer to

<sup>8</sup> *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581.

<sup>9</sup> *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551. Also see *Telcordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA), para 4, 47-48 and 52 – 79.

<sup>10</sup> *Swartz v Namwater Corporation Ltd* (HC-MD-LAB-MOT-REV-2021/00180) [2023] NALCMD 6 (14 February 2023) para 22.

<sup>11</sup> Page 74 of the record.

annexure C to Mr Venter's founding affidavit,<sup>12</sup> and a second copy of the same affidavit later in the record<sup>13</sup>. The former affidavit is incomplete, in that, it fails to make any allegation as to who was served and in what manner, while the latter affidavit evinced purported service on Mr Venter on 11 March 2021, by Ms van der Merwe. It was contended on behalf of the applicant that, even if the court accepts that the applicant or Mr Venter was served with the initial notice of set down, all subsequent notices, when the arbitration was actually held, were still not served on the applicant or Mr Venter. It was submitted that it is also clear from the record that no conciliation took place, and all this was done despite the request by Mr Venter to have the proceedings postponed. There was no communication to Mr Venter, until Ms van der Merwe sent the award to him via WhatsApp.

[22] It is however evident, if regard is had to the remainder of the record, the first notice of set down is dated 6 April 2021, which set the matter down for 6 May 2021.<sup>14</sup> The second notice is dated 16 November 2021, which set the matter down for 7 December 2021.<sup>15</sup>

[23] No notice of set down for the hearing of 1 June 2022 is found in the record. Part of the record however indicates, under the hand of Mr Sinvula, that the arbitration indeed took place on 1 June 2022. This is gainsaid by the content of the arbitration award, which reads that the arbitration took place on 23 October 2022,<sup>16</sup> supported by the certificate issued by Mr Sinvula on 17 February 2023,<sup>17</sup> that the record is complete, true and correct. It is thus clear, ex facie the record before court that, the conduct of the arbitration before Mr Sinvula and the record in and of itself is fraught with gross irregularities. It follows in terms s 89, that the arbitration award stands to be set aside.

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

<sup>12</sup> Page 13 of the record.

<sup>13</sup> Page 78 of the record.

<sup>14</sup> Page 84 of the record.

<sup>15</sup> Page 93 of the record.

<sup>16</sup> Page 73 of the record.

<sup>17</sup> Page 70 of the record.



1. The arbitration award under case number NERU 21-21 is hereby reviewed and set aside.
2. The matter is referred back to the office of the Labour Commissioner to conduct the arbitration de novo before a different arbitrator.
3. The matter is regarded as finalised and removed from the roll.

---

E M SCHIMMING-CHASE  
Judge

APPEARANCES

APPLICANT:

M Kutzner  
Of Engling, Stritter, & Partners,  
Windhoek