

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-REV-2023/00028

In the matter between:

**SIDNEY STEPHANUS**

**APPLICANT**

and

**ROADS AUTHORITY**

**1<sup>ST</sup> RESPONDENT**

**JOSEPH WINDSTAAN**

**2<sup>ND</sup> RESPONDENT**

**THE LABOUR COMMISSIONER**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Stephanus v Roads Authority* (HC-MD-LAB-MOT-REV-2023/00028) [2023] NALCMD 49 (6 October 2023)

**Coram:** USIKU J

**Heard:** 19 June 2023

**Delivered:** 6 October 2023

**Flynote:** Labour law – Labour Act 11 of 2007 – Rule 27 of the Rules Relating to the Conduct of Conciliation and Arbitration – Applicant failing to attend arbitration proceedings – Arbitrator dismissing the matter in terms of rule 27(2)(c) without having first attempted to contact the applicant to establish his whereabouts – Applicant arriving at the arbitration venue about ten minutes late – Rule 27(3) requiring the

arbitrator to attempt to contact the absent party before making a decision in terms of rule 27 – Court finding that the decision of the arbitrator is reviewable and sets the decision aside.

**Summary:** The applicant failed to attend the arbitration hearing at the scheduled time. However, he arrived at the arbitration venue late. By that time, the arbitrator had already made a decision dismissing the applicant's case of unfair dismissal. The arbitrator did not attempt to contact the applicant to establish his whereabouts, before he made his decision. Rule 27(3) requires the arbitrator to attempt to contact an absent party before making a decision in terms of rule 27.

*Held that* the decision of the arbitrator is reviewable and is set aside.

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### **ORDER**

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1. The applicant's application succeeds. The decision made by the arbitrator on 28 April 2022 under case number SRKE 106-21, is hereby reviewed and set aside.
  2. The matter is hereby referred back to the arbitrator to allocate a new hearing date and proceed with the arbitration proceedings.
  3. I make no order as to costs.
  4. The matter is removed from the roll and is regarded finalised.
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### **JUDGMENT**

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USIKU J:

#### Introduction

[1] This is an application for the review of a decision of an arbitrator made on 28 April 2022, in terms of which the arbitrator dismissed the applicant's dispute of unfair dismissal which was then pending before the arbitrator.

## Background

[2] On 19 October 2021, the applicant referred a dispute of unfair dismissal against the Roads Authority, to the Labour Commissioner. The matter proceeded to arbitration and was ultimately postponed to 28 April 2022 at 09h00 for hearing.

[3] On 28 April 2022, at 09h00, when the arbitration proceedings were scheduled to commence, there was non-appearance on the part of the applicant. Having noted the non-appearance of the applicant, the arbitrator, purportedly acting in terms of rule 27 of the Rules Relating to the Conduct of Conciliation and Arbitration ('the Rules'), dismissed the matter.

[4] Aggrieved by the foregoing decision, on 9 February 2023, the applicant brought the present review application.

## The review application

[5] In his application, the applicant seeks an order reviewing and setting aside the decision of the arbitrator made on 28 April 2022, dismissing his matter.

[6] The applicant avers that on 28 April 2022, he made his way to the venue of the arbitration hearing. He arrived there at around 09h10, he found an employee of the Roads Authority seated in the waiting area. He also took a seat in the waiting area, expecting that he and the aforesaid employee would be called by the arbitrator at any moment to commence the arbitration proceedings. About three to five minutes later, the applicant observed the representative of the Roads Authority exiting the office of the arbitrator, and after the said representative greeted him, he overheard the said representative telling the employee of the Roads Authority that they have wasted their time by travelling all the way from Windhoek just for a fifteen minutes session, and that they could go as the matter was dismissed and finalized by the arbitrator.

[7] Thereafter, the applicant stood up and entered the office of the arbitrator and enquired from him about what he had just heard. The arbitrator responded that the hearing started at 09h00 and that as the applicant was late, the arbitrator dismissed

the case on the basis of applicant's non-appearance. The arbitrator informed him that he would be notified and furnished with a written ruling and reasons therefor, within May 2022.

[8] The applicant avers that despite various follow-ups he was not furnished with the promised written ruling, until 10 January 2023, when he was ultimately furnished with a copy of the ruling by a certain Mr Van Wyk at the office of the arbitrator.

#### Grounds for review

[9] The applicant impugns the decision by the arbitrator, among other things, on the following grounds:

(a) when the Roads Authority failed to appear at the hearing which was scheduled for 16 November 2021, the arbitrator made multiple phone-calls to ascertain their whereabouts. On 28 April 2022, the arbitrator did not make any attempt to establish the whereabouts of the applicant; and that,

(b) the arbitrator has a duty, in terms of rule 27(3) of the Rules, to attempt to contact a party to a dispute who is not present, prior to commencing the arbitration proceedings.

[10] The applicant, therefore, submits that the decision of the arbitrator is grossly irregular and should be reviewed and set aside.

[11] There is no opposition filed against the applicant's application.

#### Analysis

[12] Section 89 of the Labour Act<sup>1</sup> ('the Act') deals with reviews of arbitrations and subsections (4) and (5) thereof provide as follows:

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<sup>1</sup> Labour Act 11 of 2007.

'(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

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(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.'

[13] Rule 27 of the Rules deal with failure of a party to attend arbitration and subsections (2), (3) and (4) thereof provide as follows:

'(2) If a party to an arbitration fails to attend a hearing, the arbitrator may –

(a) postpone the hearing;

(b) proceed with the hearing in the absence of the party; or

(c) dismiss the case.

(3) A conciliator or arbitrator must be satisfied that the party has been properly notified of the date, time and venue of the proceedings, and should attempt to contact the absent party telephonically, if possible, before making any decision in terms of this rule.

(4) If a matter is dismissed, the conciliator or arbitrator must send a copy of the ruling to the parties.'

[14] In the context of s 89 of the Act, a review is a process through which the proceedings of an administrative tribunal are brought before the High Court in respect of a misconduct by an arbitrator in relation to his or her duties; or gross irregularity in the conduct of the arbitration proceedings; or the arbitrator having exceeded his or her power; or where the award has been improperly obtained.

[15] For an irregularity to be gross, it must be of such a serious nature that the matter was not fully and fairly determined.

[16] In the present matter, it is apparent that the provisions of rule 27(3) of the Rules requires the arbitrator to attempt to contact the absent party telephonically, if possible, before making the decision to dismiss the applicant's matter. There is no evidence on the record that shows that the arbitrator did attempt to contact the applicant. Furthermore, there is no evidence on record to the effect that it was impossible, in the circumstances, for the arbitrator to contact the applicant. Without having attempted to contact the applicant to establish his whereabouts, the arbitrator would not have been in position to determine whether or not the applicant had good cause for his failure to appear at the proceedings on time.

[17] In my view, by proceeding to dismiss the matter in terms of rule 27(2)(c), without having first attempted to contact the applicant, the arbitrator committed a gross irregularity. Such irregularity resulted in the applicant not having his case fully and fairly determined. I am, therefore, of the opinion that the decision of the arbitrator made on 28 April 2022, stands to be reviewed and set aside.

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

1. The applicant's application succeeds. The decision made by the arbitrator on 28 April 2022 under case number SRKE 106-21, is hereby reviewed and set aside.
2. The matter is hereby referred back to the arbitrator to allocate a new hearing date and proceed with the arbitration proceedings.
3. I make no order as to costs.
4. The matter is removed from the roll and is regarded finalised.

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B USIKU  
Judge

## APPEARANCES:

Applicant: S Stephanus  
( in person), of Keetmanshoop

First Respondent: No appearance

Second Respondent: No appearance

Third Respondent: No appearance