REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 129/2012

In the matter between:

RIAAN FRANS SAMARIA	**APPLICANT**
and	
ONO ANGULA N.O.	**1ST RESPONDENT**
LABOUR COMMISSIONER N.O.	**2ND RESPONDENT**
RÖSSING URANIUM LIMITED	**3RD RESPONDENT**

Neutral citation: *Samaria v Angula & 2 others* (LC 129/2012) [2013] NALCMD 25 (24 July 2013)

Coram: **UEITELE, J**
Heard: 18 July 2013
Delivered: 18 July 2013

Reasons released on: 24 July 2013

Flynote: Labour law- review- notice of motion- whether the review was brought outside the period contemplated in section 89(4) of the Labour Act, 2007- Interpretation of statutes- ordinary grammatical meaning - the meaning which must

be given to the words ‘may apply to court’ is the meaning in favour of an injured party-“may apply to court’ means that the application is issued out of court- Act.

Summary: The applicant was employed by the third respondent in this matter. Following a disciplinary hearing the applicant was dismissed from the services of the third respondent. The dismissal took effect on 16 November 2011. During May 2012, the applicant referred a complaint of unfair dismissal and unfair labour practice to the second respondent. The second respondent appointed the first respondent to conciliate and arbitrate the dispute. On 10 August 2012 the first respondent dismissed the complainant on the ground that the applicant referred the dispute to the first respondent outside the time frame stipulated in section 86 of the Labour Act, 2007. The applicant is aggrieved by the dismissal of the complaint and instituted proceedings (by way of a notice of motion) seeking the first respondent’s decision to be reviewed and set aside.

The third respondent opposed the application and raised a point *in limine* namely that the applicant’s notice of motion was launched outside the 30 days period stipulated in section 89(4) of the Labour Act, 2007. As a result of the point *in limine* the applicant launched an application for the condonation (in so far as it may be necessary) of the late serving of the notice of motion on the third respondent. The third respondent opposed the condonation application on the ground that, in the absence of a statutory provision empowering the court to condone non-compliance with a statutory provision, this court does not have the power to condone the late application for review.

Held that it has long been accepted that the correct approach to interpret any legal instrument is to give the words in that instrument their ordinary grammatical meaning.

Held further that the interpreter should evaluate the consequences of various possible interpretations - the idea being that the Legislature must be presumed to have a sensible, fair and workable result’.

Held that the meaning which must be given to the words ‘may apply to court’ is the meaning in favour of an injured party: A favourable construction is that “may apply to court’ means that the application is issued out of court.

Held that the applicant's application for review was made to Court within the period stipulated in section 89 (4) of the Labour Act and that there is therefore no need for him to apply for condonation.

ORDER

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a. That the applicant's application for review was made to Court within the period stipulated in section 89 (4) of the Labour Act; and as a result there is no need for him to apply for condonation for the late serving of the notice of motion and its annexure on the third respondent.

b. That there is no order as to costs.

JUDGMENT

UEITELE J:

[1] This is an application in which Mr Riaan Frans Samaria (to whom I will, in this judgment) referred to as the applicant applies for an order in the following terms:

> "1. An order condoning the applicant's late filing of his application for review, in so far as that may be necessary.
>
> 2. Any alternative relief this Honourable Court finds meet.
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> 3. Costs of this application in the event of it being opposed."

[2] The background to the applicant's application is briefly as follows. The applicant was employed by Rössing Uranium (Pty) Limited, who is the third respondent in this matter and I will in this judgment refer to it as the third respondent. Following a disciplinary hearing the applicant was dismissed from the services of the third respondent. The dismissal took effect on 16 November 2011.

[3] During May 2012, the applicant referred a dispute of unfair dismissal and unfair labour practice to the Labour Commissioner (who is cited as the second respondent in the application). The second respondent designated Mr Ono Angula as the Arbitrator/Conciliator of the dispute. Mr Ono Angula is cited in this application as the first respondent (I will in this judgment refer to Mr Angula as the first respondent).

[4] The applicant's compliant was set down for conciliation on 10 August 2012. On that date, the third respondent's representative raised a point *in limine* that the referral was made outside the six months' time limited set by the Labour Act, 2007[1]. The first respondent found in favour of the third respondent and dismissed the applicant's complaint.

[5] Following the dismissal of the complaint, the applicant brought an application for the review and setting aside of the dismissal of the compliant. The application for review was issued by the Registrar of this court on 10 September 2012. After the registrar issued the application, the plaintiff's legal practitioner instructed the Deputy Sheriff to serve the application on the first, second and third respondents. The notice of motion together with the supporting affidavit and the annexures thereto were served on the first and second respondent on 10 September 2012, but on the third respondent only on 24 October 2012.

[6] The reason why the notice of motion and its annexure were only served on third respondent on 24 October 2012 is that the Deputy Sheriff could not serve the notice of motion on the third respondent on 10 September 2012, because the address which was provided to him or her (by the applicant's legal practitioner) was the wrong address. The applicant's legal practitioner however only noticed that the notice of motion and its annexures were not served on the third respondent after she

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[1] Act No.11 of 2007. Section 86 (1) & (2) provides as follows:

'**86 Resolving disputes by arbitration through Labour Commissioner**

(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.'

was alerted (on 19 October 2012) by the third respondent's legal practitioner that their client had not received the notice of motion.

[7] On 12 November 2012 the third respondent gave notice that it will oppose the application for review. On 12 November 2012 the third respondent filed its answering affidavit. In the answering affidavit the third respondent raised five points in *limine*. The only point *in limine* which is relevant for determination in this application is the alleged failure by the applicant to bring the application within a period of 30 days from the date that the arbitration award was served on him. The matter was allocated to me for case management and was called for the initial case management conference on 12 June 2013.

[8] Prior to the holding of the case management conference scheduled for 12 June 2013, the applicant on 22 May 2013 launched the condonation application. On 25 May 2013, the third respondent gave notice that it will oppose the condonation application. When the matter was called at the case management roll of 12 June 2013, the applicant's legal representative and the third respondent's legal representative indicated that I must deal with the condonation application, before I deal with the substantive review application. I accordingly set down the application for hearing the condonation application on 18 July 2013. After I heard arguments from both Mr Rukoro who appeared for applicant and Mr. Boltman who appeared for the third respondent I made an order that it is not necessary for the applicant to have apply for condonation. I further indicated that I will give reasons for my order at alter stage. The reasons for my order are contained in this judgment.

[9] Having set out the brief background of this application, I will now proceed to consider the merits or otherwise of the application. But before I do that I will briefly restate the facts which are not in dispute in respect of this application, and they are:

(a) The first respondent dismissed the complained on 10 August 2012.

(b) The applicant caused the notice of motion, the supporting affidavit and the annexures thereto to be issued out of this court by the Registrar on 10 September 2012.

(c) The notice of motion and the annexures thereto were served on the first and second respondents on 10 September 2012 and on the third respondent on 24 October 2012.

[10] The third respondent opposes the application for condonation on the grounds that the review application was not brought within the time period provided for in section 89(4) of the Labour Act, 2007 and that this court does not have the power to condone the failure to bring review outside those time periods.

[11] I am of the view that the question which is determinative of this matter is whether or not the application for review was in fact brought outside the period contemplated in section 89(4) of the Labour Act, 2007. Section 89(4) of the Labour Act, 2007 provides as follows:

> '89 (1)…
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> (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
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> (b) if the alleged defect involves corruption, within six weeks after the date that the applicant discovers the corruption.'

[12] The starting point is thus to interpret the wording of section 89(4). It has long been accepted that the correct approach to interpret any legal instrument is to give the words in that instrument their ordinary grammatical meaning. In the matter of *Venter v R*[2] Innes CJ held that:

> 'By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'

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2 Venter v R 1907 TS 910 at 913.

[13] The above pronouncements were approved by the full bench of this court in the matter of *Van As and Another v Prosecutor-General*[3] Levy, AJ said:

> 'It is true that a Court must start with the interpretation of any written document whether it be a Constitution, a statute, a contract or a will by giving the words therein contained their ordinary literal meaning. The Court must ascertain the intention of the legislator or authors of document concerned and there is no reason to believe that the framers of a Constitution will not use words in their ordinary and literal sense to express that intention.'

[14] The question therefore is whether the ordinary and literal sense of the words "may apply to the Labour Court …" is capable of more than one meaning. In the matter of *Theunissen v Payne*[4] where the words 'the application shall be made within 14 days' were to be interpreted, the court per Neser, J said[5]:

> 'The question I have to decide is what is meant by the words ''and the application shall be made within fourteen days thereafter''. The simple question is: Is an application made on the date on which it is served on the respondent, or is it made on the date for which it is set down for hearing?'

[15] In the matter of *Fisher v Commercial Union Assurance Co of SA Ltd*[6] Vos, J was of the view that the similar words were ambiguous, he said:

> 'In my opinion the expression "application is made" is ambiguous: Indeed, this appears from the conflicting decisions to which I have referred to above. The expression can mean "is made in court", or "is made by having the application set down", or again "is made by the issue and service of process".'

[16] This court in the matter of the *Government of the Islamic Republic of Iran v Berends*[7] had the opportunity to consider the interpretation of Rule 31(2)(b) which stipulates that:

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3 2000 NR 271 (HC) at 278.
4 1946 TPD 680.
5 at 682.
6 1977 (2) SA 499 (C).
7 1997 NR 140 (HC).

> '31(2)(b) A defendant may within 20 days after he or she has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of N $200 set aside the default judgment on such terms as to it seems meet.'

[17] The question that arose for decision in that matter was whether the words *'apply to Court'* were to be interpreted as meaning:

(a) that the application should be set down for hearing or called in Court or both called and heard in Court within the specified period of 20 days; or

(b) that the application must merely be lodged with the Registrar and served on the respondent within the stipulated period?

Silungwe, AJ agreed with the views of Vos, J that the words which are similar to the words 'may apply to court' are ambiguous he said[8] *'As previously indicated, the words 'application is made', etc, are, for the reasons stated, ambiguous and capable of bearing at least three meanings'*.

[18] It may be so that the words 'apply to court' are ambiguous in that they are capable of more than one meaning. In the *Theunissen v Payne*[9], it was held that

> 'From those authorities it appears clear that, when it is provided in a statute, rule or Ordinance that an application shall be made before a certain date. The application must be set down for hearing before that date. It is not sufficient if the notice, as in the present case, falls within the period fixed. The application itself must be made within the period which has been fixed by the Ordinance.'

[19] Vos, J disagreed with that conclusion he said[10]:

> 'Respectfully, I differ. The effect of the reasoning referred to above is that a procedural step, namely "set down" which is not within applicant's power must

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8 *Supra* at 151.
9 *Supra* footnote 4.
10 In Fishers's case supra footnote 6 at 501.

> be taken before it can be said that an applicant has carried out the provisions of sec. 24 (2) of the statute. This suggests that the Legislature requires the applicant to do the impossible. How is an applicant going to bring an opposed motion into Court within, e.g. the 14 days provided by certain Ordinances? Rule of Court 6 allows certain days to elapse when a motion is opposed. Thus time is allowed for notices and affidavits by the respondent; in all some 26 Court days. It is only after the expiry of those 26 Court days that an applicant may normally apply for a date of set down. After such application the Registrar normally takes some time before he allocates a date and needless to say the actual date of set down is sometimes nine to twelve months ahead.

[20] I am of the view that in a situation where the words used in a statute are capable of more the one meaning the guidance given in the matter of *Ebrahim v Minister of the Interior*[11] namely that 'the interpreter should evaluate the consequences of various possible interpretations - the idea being that the Legislature must be presumed to have a sensible, fair and workable result' is fitting. Also see professor Devenish[12] who opines that:

> 'When there is ambiguity, or even the slightest doubt, due to, *inter alia*, the inherently flexible and qualitative nature of language, or where more than one interpretation is possible,…then the Courts should give expression to the presumption that the Legislature must have intended a meaning that will avoid harshness and injustice.'

[21] In this matter the Labour Act, 2007 simply states that a person who alleges a defect in the arbitration proceedings may apply to the Labour Court to have the proceedings reviewed and set aside within thirty days from the date that the arbitration award is served on that person. In view of the guidance given in the matter of *Ebrahim* the consequences of following the different meanings is that if the meaning advocated for by the third respondent is accepted then the rights of an injured party to bring an a matter before court will be severely curtailed. It must not be forgotten that the rights of an injured party have already been curtailed by reducing the normal period of prescription from three years to thirty days. In the matter of the *Government of the Islamic Republic of Iran v Berends*[13] Silungwe, AJ

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11 1977 (1) SA 665 (A) at 674.

12 G E Devenish Interpretation of Statutes, 1992, 1st ed at 162.

13 *Supra* footnote 7.

said[14] that it is linguistically permissible to construe the words "make an application" as meaning the initiation or launching of the application.

[22] I am of the view that the meaning which must be given to the words ‘may apply to court’ is the meaning in favour of an injured party: A favourable construction is that “may apply to court’ means that the application is issued out of court.

[23] In the present matter the decision which the Court is asked to review is the decision of the first respondent. The Notice of Motion and the annexures to that Notice of Motion were served on the Registrar and the first respondent on 10 September 2012 which is within the thirty days contemplated in section 89(4) of the Labour Act, 2007. I am thus of the view that the applicant complied with the provisions of section 89(4) of the Labour Act, 2007.

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

1 That the applicant’s application for review was made to Court within the period stipulated in section 89 (4) of the Labour Act; and as a result there is no need for him to apply for condonation for the late serving of the notice of motion and its annexure on the third respondent.

2 That there is no order as to costs.

SFI Ueitele

Judge

[14] at 148

APPEARANCES

APPLICANT:	S Rukoro Instructed by Sisa Namandje & Co Inc, Windhoek
RESPONDENTS:	J Boltman Of GF Köpplinger Legal Practitioners, Windhoek