REPUBLIC OF NAMIBIA

"Reportable"

CASE NO. LC 80/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

PURITY MANGANESE (PTY) LTD **APPLICANT**

and

TJERIPO KATZAO **1ST RESPONDENT**
PHILIP MWANDINGI **2ND RESPONDENT**
THE LABOUR COMMISSIONER **3RD RESPONDENT**
THE MINISTER OF LABOUR **4TH RESPONDENT**

CORAM: DAMASEB, JP

Heard: 20TH JUNE 2011
Delivered: 11TH JULY 2011

Summary: *True purpose of a conciliation proceeding under Part B of chapter 8 of the Labour Act. Such procedure not to be confused with arbitration under Part C of chapter 8***.**

Facts: A conciliator was designated in terms of s 82 (3) of the Labour Act in order to conciliate a dispute. After hearing the version of the employee who referred a dispute of unfair dismissal to the Labour Commissioner in terms of s 82(7) for conciliation, and in the absence of the employer who had notice of the conciliation meeting but failed or neglected to attend, conciliator purported to make a binding and enforceable determination in terms of s 83 (2) (b). On the strength of that determination the employee sought and obtained what purports to be a compliance order in terms of s 90.

Held:

1. That a conciliator acting under Part B of chapter 8 is not a *court* or *tribunal* within the meaning of article 12 (1) (a) of the Namibian Constitution. A conciliation proceeding lacks the trappings of a court or tribunal and is an informal avenue for resolving labour disputes.
2. To the extent that the conciliator by his determination, purportedly under s 83(2) (b), sought to determine the *civil rights* and *obligations* of the parties, he usurped the powers of a court or tribunal and thus acted *ultra vires.*
3. A conciliator has no competence to make a legally binding award against a party against whom a dispute has been reported and who fails to attend a conciliation meeting. If such party fails to attend, a conciliator remains seized of the matter and may call for further meetings if he or she is satisfied that there are prospects of a settlement; and if satisfied that there is no such prospect, or the 30-day period runs out in the meantime, he or she must refer the dispute to arbitration.
4. A compliance order in terms of s 90 of the Labour Act is only competent in respect of an arbitration award made under Part C of chapter 8 of the Labour Act.
5. The determination by the conciliator declared null and void and accordingly set aside, including the compliance order issued by the labour inspector purportedly in terms of s 90 of the Labour Act.
6. Dispute remitted to the conciliator to either proceed with the conciliation or to determine the matter in accordance with law, guided by this judgment.

JUDGMENT

DAMASEB, JP: [1] This is an application for review under the Labour Act, No: 7 of 2007. Mr Van Vuuren appears for the applicant while Mr Chanda appears for the 2nd and 3rd respondents. The 1st and 4th respondents do not oppose the application.

[2] Three issues fall for decision in this case. The first is whether the Applicant had notice of a conciliation meeting that took place before 2nd Respondent on 30 March 2010. On the assumption that the Applicant had notice of the 30 March meeting but defaulted to attend, the second issue is the validity of a determination made by the 2nd Respondent on 30 March 2010 in the absence of the Applicant. A related issue, even if I should find that the Applicant had notice of the 30 March 2010 meeting, is whether it was competent for the 2nd Respondent to serve a notice of the conciliation meeting on either party in the first place.

[3] The first question involves a factual determination, while the second implicates the interpretation of Parts B and C of chapter 8 of the Labour Act. As far as the factual disputes are concerned, these being motion proceedings, I must accept the version of the Respondents unless it is farfetched and can be rejected merely on the papers.

[4] After the record of the proceedings sought to be reviewed was filed, the Applicant amended its notice of motion which now reads:

> "1. Condoning applicant's non-compliance with the Rules of Court, in so far as it may be necessary.
> 2. Reviewing and setting aside the proceedings conducted by the second respondent on 30 March 2010 and the subsequent "Determination" made by the second respondent on 1 April 2010.
> 3. Declaring the "Determination" dated 1 April 2010 of the second respondent and any purported decision taken by second respondent in this matter null and void.
> 4. Declaring the "Determination" dated 1 April 2010 of the second respondent null and void for non-compliance with the provisions of

section 86(4), 86(5), 86(6) of the Labour Act, Act 11 of 2007, as read with the provisions of rule 6, 20(1), 27 and 34 of the Rules for the conduct of Conciliation and Arbitration.

5. In the alternative to prayers 1, 2, 3 and 4 above, that the "Determination" of the second respondent dated 1 April 2010 and any purported decision taken by second respondent in this matter be declared null and void as being in conflict with Articles 12 and 18 of the Namibian Constitution.
6. Reviewing and setting aside second respondent's decision not to grant applicant's application for the reversal of his "Determination" dated 1 April 2010.
7. In the alternative to prayer 6 above, that second respondent's refusal to grant applicant's application for the reversal of second respondent's "Determination" dated 1 April 2010 be declared null and void as being in conflict with Articles 12 and 18 of the Namibian Constitution.
8. That in the event of this application being opposed, such opposing party be ordered to pay the costs of this application, jointly and severally, if applicable, only if the above Honourable Court deems it appropriate within the circumstances; and
9. Granting such further or alternative relief as this Honourable Court may deem meet.

CONDONATION

[5] Prayer 1 of the notice of motion is aimed at remedying the Applicant's alleged failure to launch the review application within 30 days after an award was served on it. It appears to me that the acceptance by the applicant that it was out of time in launching the review application is based on a misreading of the Labour Act. It is common cause that the review application was filed 30 days after the determination by the 2nd respondent. Given that, as will soon become apparent, the determination made by the 2nd respondent was not enforceable and was not an arbitration award as erroneously assumed, the labour inspector's compliance order, presumably in terms of s 126 of the Labour Act, was a nullity and it was not incumbent on the applicant to have appealed it to this court within 30 days as required by s 89 (2) or s 126(3). It was conceded in argument that the step initially taken by the Applicant in applying to the 2nd Respondent to reverse his

determination of 1 April 2010, was inept and that the relief sought in prayers 6 (and in the alternative, 7) seeking to have reviewed and set aside the 2nd Respondent's refusal to reverse his determination of 1 April 2010, is no longer being pursued. The application for review was launched on 21 October 2010 – this after the Applicant had approached this Court on an urgent basis on 5 August 2010 in order to arrest a notice to comply with the 1 April 2010 determination. Although Parker J dismissed Applicant's attempt to stay the notice to comply, he allowed the Applicant to, not later than 1 November 2010, "*bring appropriate proceedings challenging the ... determination of 1 April 2010."* The application was launched before the expiry of the deadline set by Parker J and that alone should dispose of the matter.

Common cause facts relative to the referral of a dispute of unlawful dismissal

[6] The 1st Respondent, together with a co-employee, Fussy Katjizemine, was dismissed by the Applicant following a disciplinary enquiry. On 21 September 2009, 1st Respondent referred a dispute for conciliation or arbitration with the 3rd Respondent, claiming unfair dismissal. The joint dispute of 1st Respondent and Katjizemine was set down, with notice to the Applicant, for conciliation before another conciliator for 5 November 2009. At Applicant's request, the disputes were separated.

[7] Following separation of the disputes, the 1st Respondent on 16 February 2010, again referred the dispute to the 3rd Respondent. On 1 March 2010, the 2nd Respondent was designated by the 3rd Respondent to conciliate the dispute between Applicant and 1st Respondent. It is not in dispute that the 3rd Respondent issued a "*notice of conciliation or arbitration in terms of section 82(a) (c) or 86(4) (c) of the Labour Act*" and in terms thereof designated the 2nd respondent as conciliator.

Disputed facts relative to applicant's failure to attend conciliation meeting

[8] The Applicant denies that it was served with the notice issued by the 3rd Respondent and alleges that, consequently, it was not aware that the matter was set down for conciliation on 30 March 2010. It claims that the matter was therefore heard in its absence on 30 March 2010 when the 2nd Respondent, after hearing the evidence of 1st Respondent, entered a '*determination'* which is the subject of the present review application. The following critical averments are made on this score in an affidavit deposed to by one Asi Eretz on behalf of the Applicant:

> "On 30 March 2010 the second respondent proceeded to hear the dispute in the absence of applicant. Applicant did not attend the proceedings since no notice had been provided to it of the date, time or venue. I am advised and respectfully submit *that second respondent could never have conducted any conciliation or arbitration without the applicant having been properly notified.*
>
> On 30 March Mr Harold Kavari, applicant's Human Resource Consultant after 14h30, *by chance discovered* that the matter had been set down for hearing during that morning. He had a discussion with second respondent and subsequently wrote a letter to explain his absence. In this regard I refer to a copy of the said letter annexed hereto and marked as "AE9", as well as Mr Kavari's explanation thereof."

[9] Kavari's letter in question (dated 30 March 2010) is addressed to the 3rd respondent and states the following:

> "We first like to apologize for *failing to attend the conciliation board scheduled for today 30 March 2010* before Mr Phillip Mwandingi, at 09H00. There were an oversight and *I thought this hearing was at 14h30*,I meet the Clerical Assistant Ms Martha and she indicated that the matter were scheduled for 09H00, Mr Mwandingi was not at office until 15H00 when I left the office. We are prepare to listen to the matter and to resolve the matter through the dispute resolution mechanism in place, therefore we would like to request that since this matter was suppose to be conciliated at first, another day can be set down by your office at

> any given time. Against the above *we would like to apologize for any inconvenience cause by me failing to attend the hearing as set down*.' (Emphasis added)

[10] Kavari's letter speaks for itself and no amount of spin or *ex post facto* rationalisation can justify the suggestion that he in fact did not know about the 30 March conciliation meeting. I find the conduct by the applicant to try and wriggle out of the clear acceptance in this letter that they knew about the conciliation meeting reprehensible. Besides there is also evidence to show that the 2nd respondent faxed through a document to the applicant which he says could only have been the notice. The 2nd respondent therefore established that the applicant knew about the date of the conciliation meeting but failed to attend.

Could the 2nd respondent have served the notice on the parties?

[11] The Labour Act empowers the Labour Commissioner (3rd respondent) to serve process.[1] The 2nd Respondent is a designated official[2] of the 3rd Respondent who, under the Labour Act, is vested with the primary responsibility to conduct conciliation and arbitration. [3] If the argument holds that it offends Article 12[4] of the Namibian Constitution for the 2nd Respondent to serve process when at the end of the day he may have to decide that very question, it must also hold for the Labour Commissioner. I see nothing inherently unfair in the 2nd Respondent (*qua* designated conciliator of 3rd respondent) serving process on a party to a dispute in a conciliation proceeding. In view of the conclusion to which I have come, that the Part B, chapter 8 conciliation procedure produces no binding legal effect, I find it unnecessary to decide whether or not the evidence received by the second respondent should have been under oath.

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1 Section 82(9) (c).

2 Section 82(9) (a) read with s 82(3).

3 Section 120 (2); s 121 (1) (c).

4 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

Was it competent for the 2nd respondent to make a binding determination *qua* conciliator with binding legal force?

[12] On 1 April 2010, the 2nd respondent issued a determination duly signed by him as '*Arbitrator*'. In it he states the following, amongst others:

> 'In the absence of any input by the respondent or its representative. I have to accept what was said by the applicant as the probable true version of what transpired. I therefore found that the dismissal of the applicant was substantively unfair. I subsequently issue the following order:
> 'AWARD: The respondent Purity Manganese (Pty) Ltd must reinstate the applicant, Tjeripo Kazao, in the position previously occupied by him with immediate effect, (1st April 2010). Furthermore, the respondent must pay all salaries that were due to the applicant from the date he was unfairly dismissed to date this Award is issued being the T' April 2010, as if he was never dismissed, made up as follows: N$ 1880.00 X 9 months = N$ 16 920. 00 .Payment to be made at the Office of the Labour Commissioner by not later than the 20th April 2010, alternatively proof that such payment was made directly to the applicant must be forwarded to the arbitrator before that date. This Award is final and binding on both parties.'

Armed with this '*final and binding*' award, the first respondent on 29 June 2010 applied for its enforcement as a result of which – and this is common cause - the labour inspector purported to issue a compliance order in terms of s 90 of the Labour Act.[5]

What is the true purpose of a conciliation proceeding?

[13] It is argued on behalf of the 2nd and 3rd respondents that a determination made in terms of s 83(2) (b) is binding and enforceable and that if it were not s 83 (2) (b) would be rendered

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5 **ENFORCEMENT OF AWARDS**
'90. 'A party to an **arbitration award made in terms of this Part** [i.e. Part C] may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of that person.' (My emphasis)

purposeless. It was also argued that the *'Act and Arbitration Rules would not make provision for a determination to be reversed if it was not binding and enforceable'.* It is further argued on behalf of the 2nd and 3rd respondents that after the determination of 1 April 20101 '*it remained for the applicant to have recourse to the Act and Arbitration Rules to apply to have the determination reversed*.' [6] The respondents' counsel confirms that the determination was made in terms of s 83 (2) (b).

[14] The applicant's counsel argued that the 2nd respondent, acting as conciliator was not competent to make a binding determination and that whatever award he made is unenforceable. He argued further that the absence of an avenue in Part B for the revision or appeal against a determination made in terms of s 83(2) (b), is an indicator that any such determination is not binding and not enforceable but only advisory.

[15] Chapter 8 of the Labour Act deals with '*prevention and resolution of disputes*'. Part B of that chapter deals with '*conciliation of disputes*'[7] whereas Part C deals with '*arbitration of disputes*'.[8] In both Parts the Labour Act provides for the method of appointment of a *conciliator (*in case of conciliation) and an *arbitrator* (in case of arbitration) - 'the functionary'- and spells out the procedure each functionary must follow in the performance of their respective functions. It also sets out the powers that the functionary (*qua* conciliator or arbitrator) enjoys. The two roles (of conciliator as opposed to arbitrator) are separate and distinct as will soon become apparent. By referring to himself as '*arbitrator*' in his determination of 1 April 2010, the 2nd respondent failed to appreciate that and that is where he fell in error.

[16] It is common cause that the referral of the dispute initiated by the 1st respondent, to the 3rd respondent who then designated 2nd respondent, was proper. Upon the designation of the 2nd respondent as conciliator, Part B of chapter 8 was engaged. In terms of s 82 (9) of Part B:

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6 Both these arguments assume the right to seek reversal of a s 83(2) determination but as will soon become apparent no such right exists under Part b of chapter 8.

7 Sections 81-83.

8 Sections 84-90.

‘The Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute, must –

(a) refer the dispute to a conciliator to attempt to resolve the dispute through conciliation."

Once a dispute is thus referred, subsection (10) of s 82 kicks in and it states:

'... the conciliator referred to in subsection (9) must attempt to resolve the dispute through conciliation within -

(a) *30 days* of the date the Labour Commissioner received the referral of the dispute; or

(b) Any longer period agreed in writing by the parties to the dispute.’ (My emphasis)

In turn, subsection (11) states:

‘Subject to the rules determined in terms of this Act, the conciliator –

(a) must determine how the conciliation is to be conducted; and

(b) may require that further **meetings**[9] be held within the period contemplated in subsection (10).’ (My emphasis)

[17] Section 83 deals with the consequences of failing to attend conciliation meetings. The relevant provision is subsection (2) which states:

"...the conciliator of the dispute may:

(a) dismiss the matter **if the party who referred the dispute fails to attend** a conciliation meeting; or

(b) determine the matter if the **other party to the dispute fails to attend** the conciliation meeting. ‘’ (My emphasis)

9 Note the use of the word *‘meeting’* as opposed to *‘hearing’* in s 86 (8) (a) in relation to arbitration.

And subsection 3 states:

> '(3) The **Labour Commissioner may reverse** a decision made by a conciliator **in terms of subsection (2) (a)**[10] if –
>
> (a) application is made in the prescribed form and manner; and
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> (b) the Labour Commissioner is satisfied that there were good grounds for failing to attend the conciliation meeting. "

[18] The definitions section states the following in respect of *conciliation:*

> ''conciliation" includes –
>
> **(a)** mediating a dispute;
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> **(b)** conducting **a fact finding-exercise**; and
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> **(c)** making an **advisory award if** –
>
> (i) it will enhance the prospects of settlement; or
>
> (ii) the parties to the dispute agree.'

Arbitration distinguished from conciliation

[19] Part C provides for an arbitration procedure and establishes '**arbitration tribunals** for the purpose of resolving disputes' (my emphasis), as 'contemplated in Article 12(1) (a) of the Namibian Constitution[11] as follows:

> '**In the determination of their civil rights and obligations** ...against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent **Court or Tribunal established by law**...' (My emphasis)

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10 Reversal by the Labour Commissioner is therefore applicable only in the event of a dismissal where the party referring the dispute fails to attend a conciliation meeting.

11 It is significant to note the difference: there is no '*tribunal*' created in respect of conciliation. There is no reference in respect of conciliation to Article 12(1) (a) of the constitution. In terms of that article, only a competent court or a *tribunal* can determine the *civil rights and obligations of a person*. Part B deliberately refers to the conciliation procedure as a '*meeting*' as opposed to a' *tribunal'*.

[20] Unlike *conciliation*, the Labour Act in respect of *arbitration* procedure states the effect of an arbitration award [12] and, in subsection (2) of s 87, has a provision not provided for in respect of *conciliation*, in the following terms:

> 'If an **arbitration award** orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of the Prescribed Rates of Interest Act, 1975 (Act No. 55 of 1975) unless the award provides otherwise. '

Arbitration given trappings of judicial forum

[21] To sum up, the arbitration procedure envisaged in Part C of chapter 8 is a *tribunal* and is accorded the trappings of a judicial forum: In the first place, and as already shown, it is created as a tribunal in terms of the constitution. A decision following arbitration is by specific provision given binding effect and made enforceable[13] . The arbitrator is required to give reasons for his award[14]. An award sounding in money attracts interest[15]. An aggrieved party can seek its variation or rescission and the law specifically makes it subject of appeal and review.[16] These trappings of a *judicial forum* are singularly lacking in respect of the conciliation procedure.

Section 83(2) (b) properly construed

[22] To make an enforceable determination or award in terms of s 83 (2) (b) is a *'determination of [a person's] civil rights and obligations'* within the meaning of Article12 (1) (a) of the Namibian Constitution. It can only survive if the instance making it is a *Court or Tribunal* as contemplated in that Article. I have shown that the Labour Act under chapter 8, Part B does not establish the

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12 Section 87 (1) states: **EFFECT OF ARBITRATION AWARDS**
'An arbitration award made in terms of this Part – (a) is binding unless the award is advisory;
(b) becomes an order of the Labour Court on filing the award in the Court by –
(i) any party affected by the award; or
(ii) the Labour Commissioner.'

13 Section 90.
14 Section 86(18).
15 Section 87 92.
16 Sections 88 and 89.

conciliator as a *'tribunal'* and consequently could not have intended that any determination made by a conciliator shall have binding legal effect. That such a result was not contemplated by the Legislature is apparent from the scheme adopted in respect of conciliation and arbitration. Firstly, where the person who reports the dispute fails to attend, the Labour Act provides for the dismissal of the dispute. It provides for no specific procedure for an award and its effect in default of appearance by the person against whom a dispute is reported (referee). It only says that the conciliator must determine the matter. That is perfectly reasonable: the referrer of the dispute sets the legal machinery in motion and his failure to attend is presumed by the law to be a lack of interest. If he does not pursue the matter, it would be otiose to require the referee to expend time and resources on the matter. But the defaulting referrer is afforded the right to have the matter reinstated on good cause shown. The same does not apply to the person against whom the machinery of the law has been set in motion, because – in my view – it is intended to be an informal and inexpensive avenue for the resolution of labour disputes.

[23] Additionally, the Labour Act makes no provision in terms of which the referee seek the rescission thereof – assuming the binding effect as intended. I conclude that, the fact that the labour Act has a specific procedure in terms of which the referrer of a dispute may seek the reversal of a dismissal due to absence, while not providing for a similar procedure in respect of the referee, is a clear pointer that the Legislature did not intend that punitive consequences would follow default of appearance by the referee. Contrary to Mr Chanda's rather courageous and unsubstantiated suggestion to the contrary, there is no reversal procedure for a determination made by a conciliator under s 82 (b), ie where the referee fails to attend a conciliation meeting. Neither the *Labour General Rules*[17] nor the *Rules relating to the conduct of conciliation and Arbitration before the Labour Commissioner* [18] provide for a reversal procedure in respect of a conciliation determination or award.

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17 Government Notice 261 of 2008: Regulation 19 provides for a reversal procedure only in respect of a dismissal of a dispute in terms of s 82(a). No mention of a determination in terms of section 83(b).

18 Government Notice 262 of 2008: Rule 27 simply repeats s 83(2) of the Labour Act.

[24] The definition of '*conciliation*', which clearly excludes any punitive or coercive measure, is another barometer that no binding effect is contemplated in respect of a determination or award under Part B (s 83(2)(b)). The definitions section states that the conciliator may make a *fact-finding* award, and issue an *'advisory award'* only if the parties *agree* to the making such award. Against this backdrop, the leap from 'advisory' to 'enforceable' contended by Mr Chanda is plainly untenable, not least because unlike with arbitration awards, there is no procedure provided in Part B for the enforcement of an award made by a conciliator.

[25] The argument on behalf of 2nd and 3rd respondent is so fundamentally flawed and shows clearly that the 2nd respondent completely misconstrued the difference between conciliation under Part B and arbitration under Part C of chapter 8. This is shown by the fact that he refers to himself in the award of 1 April 2010 as an '*arbitrator'* while at the same time strenuously maintaining that the determination was made under s 83(2) (b). The two are irreconcilable!

[26] The answer to Mr Chanda's suggestion that if no binding effect was intended in a conciliation proceeding, s 83(2) (b) would become purposeless is the following: Subsection (15) of s 82 states in relevant part:

'... a conciliator **must issue a certificate that a dispute is unresolved if** –

(a) The conciliator believes **that there is no prospect of settlement** at that stage of the dispute; or

(b) the **period contemplated in subsection (10) has expired.' (**my emphasis).

Subsection (16) in turn states:

'When issuing a certificate under subsection (14) the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration in terms of Part C of this Chapter.' While subsection (17) states:

'(17) A conciliator referred to in terms of subsection (9) (a)-

> (a) **remains seized of the dispute until it is settled**; and
>
> (b) must continue to endeavour to settle the dispute through conciliation in terms of section 137. '(my emphasis)

[27] In my view, the cumulative effect of subsections (15) to (17) *supra* is that if a referee fails to attend a conciliation meeting, the conciliator remains seized of the matter and can call further meetings if he entertains prospects of settlement before the expiry of the 30-day period. If he considers that there are no prospects of settlement, or the 30-day period had expired, he *must* refer the matter to arbitration. Such is the determination contemplated in s 83 (2) (b) – no other. That is the proper role for conciliation under the Labour Act and it is untenable to suggest that unless a determination made by a conciliator under s 83 (2) (b) is binding and enforceable, it's purposeless. The legislative intended it to be a precursor to arbitration.

[28] Not being a court or tribunal, a conciliator appointed under the Labour Act is an administrative functionary: He or she is a creature of statute and enjoys only such powers as are given to them under the Labour Act. A conciliator may not perform any function or exercise any power beyond that conferred on them by the Labour Act. It is trite that all public power must be sourced in law.[19] As Hoexter correctly observes:[20]

> '...administrators have no inherent powers. Every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal or ultra vires – that is to say, beyond the powers of the administrator.'

[29] I am satisfied that the 2nd respondent acted *ultra vires* his powers in making a determination or award which purported to have binding legal effect and to be enforceable against the applicant by way of a compliance order. Section 90 is applicable only in respect of arbitration which falls

19 *Fedusure Life Assurance v Greater Jhb TMC* 1999 (1) SA 374 (CC) paras 58-59.
20 Cora Hoexter, *Administrative Law in South Africa*, 2007 (Juta) at p. 227.

under Part C of chapter 8. It cannot be invoked under Part B. To the extent that the conciliator by his determination, purportedly under s 83(2) (b), sought to determine the *civil rights* and *obligations* of the parties, he usurped the powers of a court or tribunal and thus acted *ultra vires.*

The relief sought

[30] Since I am satisfied that the applicant had due notice of the proceedings of 30 March 2010, it would be inappropriate to grant the relief sought in prayer 2 of the amplified notice of motion. As it is the 2nd respondent's case that he acted as a conciliator and made a determination in that capacity in terms of chapter B (s 83(2) (b)) and not chapter C, the relief sought in prayer 4 is not competent. In view of the concession that the attempt to seek from the 2nd respondent the reversal of his own decision was equally incompetent, the relief sought in prayers 6 and 7 also falls away.

[31] The relief sought in prayers 2 and 5 accords with the tenor of this judgment. It is important though not to leave the matter in *limbo*. The 2nd respondent remains seized of the matter and he should be required to perform his proper functions as contemplated in Part B of chapter 8 as interpreted in this judgment. The effect of my judgment is that the 2nd respondent remains seized of the matter and he should proceed to complete the process and exercise his powers, properly defined by this judgment, and bring the matter to finality. I will therefore add an order to make that possible.

Costs

[32] The applicant asks the Court to order costs against the respondents opposing the review. Under s 118 of the Labour Act I can only order costs if the conduct of the respondents is shown to have been frivolous or vexatious. It appears that the 2nd and 3rd respondent genuinely misconstrued the conciliation procedure and acted *bona fides* in terms of a longstanding but wrong practice. On the other hand, some of the defences advanced in the papers[21] , including in

21 For example that they thought condonation was required when clearly it was not.

the heads of argument, show that the applicant too misunderstood certain provisions of the Labour Act. I do not think in such circumstances a case is made out that the respondents acted frivolously or vexatiously. In the first place, the applicant got itself in this situation because it, while knowing of the conciliation meeting, failed or neglected to attend it. Besides, the issues raised in this case are of great public importance. I will therefore not make a costs order as asked.

The order

[33] The notice of motion includes a prayer for alternative relief. Certain of the relief I will grant, while not specifically asked for in the notice of motion, follow from the grant of relief asked by the applicant. The court has inherent power to frame relief to give effect to its judgment.

[34] Accordingly, I make the following order:

(i) The 2nd respondent's determination dated 1 April 2010 and any purported decision taken by such respondent in consequence of that determination is hereby declared null and void and as being *ultra vires* the Labour Act and Article 12 (1) (a) of the Constitution;

(ii) The dispute between the 1st respondent and the applicant is remitted to the 2nd respondent who, being seized of the dispute, must determine it according to law.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT: **Adv Van Vuuren**

Instructed By: **Peter J De Beer Legal Practitioners**

ON BEHALF OF THE 2ND AND 3RD RESPONDENTS: **Mr Chanda**

Instructed By: **Government-Attorneys**