REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LC 39/2013

In the matter between:

1.1.1.1. **BEN ESAU BIWA**
APPLICANT

and

NAMIBIA AIRPORTS COMPANY (NAC) **RESPONDENT**

Neutral citation: *Biwa v Namibia Airports Company* (LC 39/2013) [2013] NALCMD 11(5 April 2013)

Coram: Schimming-Chase, AJ
Heard: 28 February 2013, 1 March 2013
Delivered: Order made on 4 March 2013
Reasons delivered on 5 April 2013

Flynote: Urgent application for stay of disciplinary proceedings pending finalisation of a referral of a dispute between the parties for conciliation / arbitration to the Labour Commissioner in terms of Chapter 8 of the Labour Act, 11 of 2007 – Applicant's urgency self-created – In the alternative, on its own papers, it failed to show that it would not obtain substantial redress in due

course.

Summary: The applicant launched an urgent applicant for the stay of disciplinary proceedings instituted against him and scheduled for hearing by an independent chairperson by agreement between the parties on 28 February 2013 pending finalisation of a referral of a dispute between the parties for conciliation and medication / arbitration to the Labour Commissioner. The application was instituted and set down for hearing at 09h00 on 28 February 2013. The respondent's legal practitioners were served with the application on 28 February 2013 at approximately 08h30. The dispute was referred to the Labour Commissioner and was lodged on 27 February 2013.

The gravamen of the applicant's complaint was that the dispute referred to the Labour Commissioner on 27 February 2013 (after it became clear on 25 February 2013 that the respondent had every intention of continuing the disciplinary hearing, which was by agreement between the parties (on 5 February 2013) scheduled to take place on 28 February 2013)) related to whether disciplinary proceedings could be instituted against the applicant in the first place, because the respondent *inter alia* failed to investigate or lay charges in the time frame set out in its disciplinary policy and because the applicant was charged with a number of offences not listed in the disciplinary policy.

On the papers it was clear that the applicant blew hot and cold on the respondent. It indicated that the proceedings should be discontinued for the above reasons. The applicant then requested information on what sanctions could be imposed in the event of a guilty finding at the hearing on 22 February 2013. On 25 February 2013, after a response from the respondent's representatives, the applicant raised a dispute on the interpretation and application of the disciplinary policy, and that the Labour Commissioner would be approached for a determination. They also delivered a request for further particulars to the charges in respect of the scheduled disciplinary hearing on the same date, which particulars were provided on 27 February 2013 in the morning. On 27 February 2013 this dispute was referred to the Labour Commissioner followed by a request for postponement of the hearing pending finalisation of the dispute. The respondent's representatives indicated that they would agree to the postponement if the applicant agreed to the cessation of full

pay and benefits relating to his suspension. Instead of applying for a postponement of the hearing and setting out their questions, applicant approached the Labour Court for urgent interdictory relief.

Held, the applicant created his own urgency, alternatively failed to make out a case as required by the Labour Court Rules. The applicant could have applied for a postponement of the disciplinary hearing and set out the basis why the hearing should not continue. Instead it launched this application on less than one hours notice.

ORDER

The application is struck from the roll for want of compliance with Rules 6(24) and 6(26) of the Rules of Court.

REASONS

Schimming-Chase, AJ

7.2. On 4 March 2013 after hearing arguments presented by counsel on behalf of the applicant and counsel for the respondent, I made an order striking the application from the roll for want of compliance with Rules 6(24) and 6(26) of the Labour Court Rules. My reasons for the order appear below.

7.3.

7.4. This is an application for urgent interim interdictory relief in terms of Rules 6(24) and (26) of the Labour Court Rules, pending the finalisation of a dispute between the parties referred to conciliation / arbitration to the Labour Commissioner by the applicant on 27 February 2013 in terms of Chapter 8 of the Labour Act, 11 of 2007 (“the Labour Act”).

7.5.

7.6. This application was instituted on 28 February 2013 and set down for hearing at 09h00. The application was served on the legal practitioners of the respondent, who accepted such service at approximately 08h30 on 28 February 2013. The court received copies of the application at 08h15 on 28 February 2013. A notice to oppose was delivered on behalf of the respondent at the commencement of the hearing of the application. Dr Akweenda, appearing for the respondent, indicated that he had also just received the application and sought time to peruse the papers in order to prepare an answering affidavit. The court had also at that stage not had sufficient time to study the papers, either as a result of which the matter was stood down until 14h15 for hearing. After the court reconvened at 14h15, answering affidavits had been delivered on behalf of the respondent in which the respondent took the point of urgency only. The applicant then sought time to file a replying affidavit and the matter again stood over for hearing at 12h00 on 1 March 2013.

7.7. The applicant's application for urgent interim relief is formulated as follows:

> "1. That the rules of this Honourable Court in respect of forms, service and time periods be dispensed with due to the urgency of this Application;
>
> 2. That a Rule Nisi is issued calling upon the respondent or any other interested parties to show cause (if any) why a final order should not be granted in the following terms:
>
> 2.1 Interdicting the disciplinary proceedings embarked upon by the respondent in respect of Applicant on the 28th February 2013 or any date thereafter pending final determination of the dispute between the parties referred to conciliation / arbitration to the Labour Commissioner on 27th February 2013 relating to unfair labour practice and unilateral alterations of terms and conditions of employment of the Applicant.

2.2 Interdicting the Respondent from stopping the Applicant's full salary until the finalisation of the referred dispute and disciplinary hearing held thereafter.

2.3 ...

3. Directing that paragraphs 2.1 and 2.2 above, operate as an interim interdict with immediate effect."

7.8. Both parties referred me to section 117(1)(a) of the Labour Act which provides that the Labour Court has exclusive jurisdiction to grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8. It is also common cause that the dispute referred to conciliation / arbitration to the Labour Commissioner on 27 February 2013 relating to alleged unfair labour practice, unilateral practice and unlawful alleged alterations of terms and conditions of employment of the applicant falls within Chapter 8 of the Labour Act and that the Labour Court has jurisdiction to grant an urgent interdict pending resolution of the dispute.[1]

7.9. In the background to the application, summarised in the founding papers, the applicant alleged that the application is brought on an urgent basis due to the fact that the disciplinary hearing, which is the subject matter of the conciliation / arbitration dispute lodged by the applicant on 27 February 2013, is scheduled to commence on 28 February 2013 and 1 March 2013 and that the "respondent is insisting to continue with the disciplinary hearing unless the applicant agrees to the stopping of the remuneration currently paid to him".

7.10. The applicant further stated that he was only approaching the court now because the dispute between the parties in respect of the issues submitted for arbitration only arose on 22 February 2013.

7.11.

[1] Titus Haimbili v TransNamib Holdings Ltd, unreported judgment of the Labour Court delivered on 14 May 2012 in case no LC 22/2012 at paras [13] and [14]

7.12. The background to the launching of this application which in the main are common cause are summarised below.

(a) The applicant lodged a complaint with the Labour Commissioner on 30 November 2012 relating in essence to his suspension as chief executive officer of the respondent. This complaint is still pending. This was the first referral made by the applicant to the Labour Commissioner.

(b) On 24 January 2013, the applicant was served with notice of a disciplinary hearing by the respondent which hearing was scheduled to take place on 5 and 6 February 2013. The applicant alleged that he was at that stage not provided with documentation relating to the charges and that despite some time being spent between the parties on settlement negotiations, no indication was give to him of the allegations being investigated. The applicant further pointed out that on 30 November 2012 already, his legal representatives requested the respondent to provide performance appraisal reports and to indicate what allegations were made against him because the respondent's code of discipline required the respondent to inform the applicant of the allegations against him within 10 days from the date that the allegation are known to the respondent, or at the time of the applicant's suspension.

(c) On 24 January 2013, after service of the notice of disciplinary hearing the applicant was for the first time apprised about the charges against him.

(d) On 25 January 2013, the applicant's legal representatives transmitted additional correspondence to the respondent's legal representatives indicating certain concerns with regard to the application of the respondent's disciplinary policy, and that certain documentation in terms of the policy had not been provided. I point out that the correspondence referred to is not dated 25 January 2013, but 25 February 2013. In this regard, some of the annexures referred to in the application were not annexed or numbered, creating some confusion, however the allegations do not appear to be disputed by the respondent.

(e) On 31 January 2013 and on 1 February 2013, the respondent's legal practitioners provided the applicant's legal practitioners with a bundle of documents. On 4 February 2013, one day before the scheduled disciplinary hearing, the applicant's legal practitioners in writing indicated to the respondent that it would be impossible to prepare for the hearing one day before it was scheduled to commence. The respondent was also informed of certain alleged instances of non-compliance with its disciplinary code and procedure in respect of the disciplinary process, as well as the charges and the scheduled hearing. This letter, referred to as annexure "BEB8" in the founding papers was unfortunately not annexed to the founding papers.

(f) On the same date (4 February 2013), the representatives of the respondent responded to this letter indicating the possibility of a postponement. The letter stated the following:

> "Your letter of even date and the subsequent telecon between yourself and writer refers.
>
> Kindly take note that your request for a postponement has been acceded to by our client without prejudice to any of its rights. The disciplinary enquiry will accordingly proceed on 28 February 2013 and 1 March 2013 at the same venue."

(g) It is common cause that the representatives of both parties agreed to dates of 28 February 2013 and 1 March 2013 for the hearing of the disciplinary enquiry. It is also not disputed that the chairperson of the disciplinary enquiry was identified to the applicant's representatives on the same date.

7.13. The applicant further alleged that the written response of the respondent's representatives dated 4 February 2013 referred to above did not address the applicant's concerns with regard to the compliance with the policy, and was simply dismissed as "non-essential content" of the letter. There is

nothing in that letter containing such a statement.

7.14.

7.15. On 15 February 2013, the applicant's representatives transmitted a further letter indicating that they had now perused the documents and consulted with the applicant. The applicant's representatives requested further outstanding documentation relevant to the charges levelled against the applicant and also highlighted certain additional issues. The additional documentation requested comprised the minutes of the board meetings of the respondent and the relevant board resolution relating to the suspension and charging of the applicant, as well as the minutes of all board meetings convened during the period February 2012 to November 2012.

7.16. The applicant's representatives further pointed out to the respondent's representatives that all charges should be withdrawn against the applicant due to *inter alia* the respondent's failure to comply with certain provisions of its disciplinary policy, in particular the respondent's failure to have notified the applicant of the allegations against him within 10 working days from the date the allegations were brought to the attention of the respondent. In addition, it was alleged that as the charges related to the applicant's performance, the matter should be handled in accordance with the respondent's performance management policy and that the procedures provided for in the performance management policy should be exhausted before disciplinary charges, if any, could follow.

7.17. In the alternative, the respondent's representatives indicated that approximately 7 of the 10 disciplinary charges against the applicant should be withdrawn because the respondent's disciplinary policy provided that all disciplinary charges should be disposed of within 90 days from the date the breach was brought to the attention of the respondent. It was also mentioned that the investigator in the disciplinary proceeding had not compiled witness statements before the decision was taken to charge the applicant and that the applicant was not furnished with those witness statements. The witness statements were also requested to be furnished. Finally the respondent's representatives were advised that the respondent had failed to comply with its disciplinary policy in respect of a number of aspects such as the charging of the

applicant, and that the applicant was charged with a number of offences not listed or referred to in the disciplinary policy.

7.18. In the result a request was made in the letter that the disciplinary hearing be discontinued and that the parties could still "continue and negotiate termination by agreement instead of using bogus charges to get rid of the employee".

7.19. On the same date (15 February 2013), the applicant's representatives addressed further correspondence to the respondent's representatives, requesting the list of witnesses that the respondent intended to call for both the arbitration hearing, (the first referral referred to above) and the scheduled disciplinary hearing in order to enable the applicant's representatives to determine whether they would like to call any of the respondent's board or staff members that the respondent would not wish to call as witnesses for the arbitration and the disciplinary hearing.

7.20. On 22 February 2013 the applicant's legal practitioners addressed a further letter to the respondent's representatives requesting information on what sanctions could be imposed on the applicant at the disciplinary hearing.

7.21. On the same date (22 February 2013), the respondent's legal practitioners responded to the correspondence of the applicant's representatives (the applicant in this regard alleged that the fax was only received on 25 February 2013) and provided some of the information requested. The respondent's representatives generally maintained their attitude that the applicant's concerns regarding non-compliance with the respondent's company policy were unfounded. I quote the salient parts of the letter:

> "2. As your client has pointed out during the arbitration proceedings, the Personnel Code of the NAC does not provide for the discipline for its CEO. In terms of the law, generally accepted standard procedure for internal disciplinary proceedings needs to be followed. Also, the generally accepted minimum requirements of a fair hearing would entail: adequate notice, the employee must be present at hearing, employee is

entitled to representation, presiding officer should keep minutes and must be impartial and the decision must be made on the evidence without reference to the employee's disciplinary record.

3. Distilled to its bare essence, the basic elements of procedural fairness are that the employee must have been given a fair opportunity to influence the decision whether or not he should be dismissed and the person taking the decision should be impartial. This the NAC avails to its CEO.

4. Due to the nature of the disciplinary process and the person involved, the Chairperson of the Inquiry will make a determination on conviction and sanction (if necessary), which the NAC will follow. This was previously communicated to yourself. Regarding the appeal (if necessary), the CEO is at liberty whether he wants to exercise that right availed to him. Again, should he wish to do so, common sense would determine that the members of the Board would not be fit to adjudicate the appeal, just as it would not be proper for them to sit in adjudication on the disciplinary enquiry. "

7.22. In response to the above letter dated 25 February 2013 the applicant's representatives advised that many of the concerns[2] they had previously addressed were not properly addressed by the respondent's representatives and that in the result "a dispute regarding the interpretation and application of the NAC Disciplinary Policy" had arisen and that the necessary steps would be taken to safeguard the applicant's rights. They were further informed that the Office of the Labour Commissioner would be approached for a determination. Further settlement options were mentioned in this letter which I do not propose to deal with in this judgment.

7.23. On the same date (25 February 2013), the applicant's legal practitioners also delivered a request for further particulars to the disciplinary charges levelled against the applicant for purposes of the disciplinary hearing. On

[2]Stated in the letter to include the nature, seriousness and classification of the offences and the sanctions they may attract, compliance with time frames and disclosure of required information.

26 February 2013 the further particulars were provided, but were transmitted via fax to the applicant's representatives on 27 February 2013 at 09h22.

7.24. On 27 February 2013, one day before the scheduled disciplinary hearing, the applicant then referred this other dispute (the second referral) for conciliation and arbitration in terms of Chapter 8 of the Labour Act. The applicant alleged that this second referral related to "... the issue of non compliance with company policy in respect of performance management, probation and probation period and the conduct of the disciplinary hearing". In this regard the applicant further alleged that these matters had a direct bearing on the disciplinary hearing scheduled for 28 February 2013 and 1 March 2013.

7.25. On the same date (27 February 2013) the applicant's representatives transmitted further correspondence to the respondent's representatives requesting the postponement of the disciplinary hearing until the finalisation of the second referral. The respondent's representatives were further advised that the issues for determination in the second referral had a direct bearing on the charges against the applicant and the conduct of the disciplinary hearing, hence the reasons for the request for a postponement of the disciplinary hearing. Finally, the respondent's representatives were informed that if no written undertaking was provided that the disciplinary hearing would not proceed until the Labour Commissioner had an opportunity to adjudicate the dispute or alternatively until settlement was reached, whichever comes first, the applicant would be left with no option but to approach "a competent forum" for relief.

7.26. In a response to this letter transmitted on the same date the respondent's representatives indicated a willingness to agree to the postponement of the disciplinary hearing, provided the applicant agreed to the cessation of the remuneration paid to him during the period of suspension and to hand over all benefits held by him.

7.27. In the founding papers, the applicant alleged that the above events led to the institution of the urgent relief sought. He stated in particular that "the present application is sequel to the above developments and correspondence between the

parties". The applicant stated that it should be clear that the applicant has not and is not delaying the launching of this application and has thereby taken expeditious steps to "ward off the non-compliance with the policy".

7.28. In support of urgency the applicant alleged the following:

> "I could not determine before 22 February 2013 that the respondent has no intention to and is adamant to not comply with and apply company policy and to correct errors made. I could also not instruct my representatives to approach this Honourable Court whilst efforts were being made to address the concerns we had."

7.29.

7.30. The respondent in its answering affidavit took the point *in limine* of urgency and averred that the application is not urgent and further if it is urgent the urgency was self-created. It was also argued that the application and particularly the manner in which it was brought was vexatious and frivolous and warranted a costs order in terms of section 118 of the Labour Act.

7.31. The respondent further alleged that the applicant approached this court on an extremely urgent basis and that the application was served on the morning of 28 February 2013 (the date on which the application was set down for hearing) at the offices of the respondent's representatives, giving them less than an hour to appear.

7.32. The respondent also highlighted its willingness to agree to a postponement of the second referral subject to the applicant's continued suspension being without pay pending the finalisation of the second referral. This response, according to counsel for the applicant, Mr Kurtz, was a punitive and unwarranted action.

7.33. The respondent further averred in support of the point *in limine* that the urgent application was premature as the applicant could have applied for a postponement of the disciplinary hearing and addressed the chairperson on why a postponement of the hearing should be granted, failing which the applicant

could have appealed the decision of the chairperson, which the applicant failed to do and in these circumstances, Dr Akweenda appearing for the respondent submitted that the court should not come to the applicant's assistance. In addition it was alleged in the answering papers that the applicant suffered no prejudice as he still receives remuneration, the offer by the respondent's representatives above not having been accepted by the applicant.

7.34. It is also necessary at this stage to deal with a point *in limine* raised by the applicant in the replying affidavit, namely that the opposition to the urgent application was purportedly brought on the authority of a round robin resolution of the respondent's Board of Directors and that only two members of the respondent's Board signed the resolution. Mr Kurtz submitted that a round robin resolution is conditional to the ratification by all members of the Board of Directors at a duly convened meeting and that it was not acceptable that the deponent to the answering papers, who is a member of the Board refers to such resolution which is yet to be ratified. He further submitted that as a juristic person, the respondent failed to attach the specific resolution of the respondent's Board of Directors that authorised the deponent to depose to the answering affidavit. The applicant specifically denied that the deponent, who is a director of the respondent's Board had authority to depose to the answering affidavit.

7.35. In support of his submission, Mr Kurtz relief on the unreported judgment of Parker AJ in Disciplinary Committee for Legal Prctitioners v Slysken Makando[3], which concerned in essence whether or not a decision was taken by the disciplinary committee established in terms of the Legal Practitioners Act at a duly constituted meeting. As I understand the judgment on the issue, the court found, as far as the legal practitioner is concerned that it is only at a duly assembled meeting where a requisite quorum is present, that a binding decision of the disciplinary committee can be made, and not, as was submitted, that where a decision is unanimous, a duly assembled meeting is not necessary. It is not authority for the point the applicant raises. The principle that a round robin decision must be unanimous was dealt with in Norval v Consolidated Sugar

[3]Delivered on 18 October 2011 in case numbers A216/2008 and A370/2008.

Investments (Namibia) (Pty) Ltd[4] where Van Niekerk J accepted the principle that a round robin resolution should be reached unanimously, and is otherwise invalid. I also accept the principle.

7.36. In the decision of Otjozondjupa Regional Council v Dr Ndahafa Nghifindaka and Others[5] Muller J dealt in some detail with the legal principles relating authority to institute motion proceedings where a person acts on behalf of an artificial person. The principles are the same with regard to authority to oppose motion proceedings. At the outset, Muller J[6] deal with the ratio for the requirement of authority in respect of artificial persons as set out in the decision of Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk[7] widely regarded as the main authority on the issue and also relied on by Dr Akweenda in his opposition to the point *in limine*. Watermeyer J stated the following in dealing with the argument submitted in respect of the *ratio* behind the requirement that a deponent should be authorised to bring an application on behalf of an artificial person:

> "It must always be proved, so he argued, that the applicant is in fact a party to the proceedings, for if this were not so a successful respondent who is awarded costs might find himself unable to enforce the award against the applicant. There was, he submitted, a special danger when the litigant was an artificial person, like a company, because if it should subsequently transpire that no proper resolution to litigate had been passed the company would be free to take the point that it was not bound by the Court's order because it had never authorised the proceedings to be taken."[8]

7.37. The court thereafter dealt with the position of an artificial person that can only function through somebody else in respect of resolutions taken. The learned Watermeyer J stated the following:

> "There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the

[4] 2007 (2) NR 689 at 705D-I.

[5] Unreported judgment delivered on 22 July 2009 in case number 1/2009.

[6] At 12-14 para [18]-[20].

[7] 1957 (2) SA 347(C).

[8] At 350E-F.

person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example Lurie Brothers Ltd v Arcache, 1927 NPD 139, and the other cases mentioned in Herbstein and van Winsen, Civil Practice of the Superior Courts in South Africa at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf." [9] (emphasis supplied)

7.38. After dealing with the principles in the Mall (Cape) decision as well as the conflicting authority in respect of the question whether authority can be ratified retrospectively Muller J summarised the position as follows in paragraph 21 of his judgment as follows:

"[21] Consequently, the position is mainly as follows:

a) The deponent of an affidavit on behalf of an artificial person has to state that he or she was duly authorised to bring the application and this will constitute that some evidence in respect of the authorisation has been placed before the Court;

b) If there is any objection to the authority to bring the application, such authorisation can be provided in the replying affidavit;

[9] At 351G-352A.

c) Even if there was no proper resolution in respect of authority, it can be taken and provided at a later stage and operates retrospectively;

d) Each case will in any event be considered in respect of its own circumstances; and

e) It is in the discretion of the Court to decide whether enough has been placed before it to conclude that is the applicant who is litigating and not some unauthorised person on its behalf."

7.39. The deponent to the answering affidavit in this application Ms Frieda Aluteni alleged that she is a board member of the respondent and that she is duly authorised to oppose the application and to depose to the affidavit. She attached a round robin resolution signed by two the respondent's three members. One of the signatures is her own. The resolution states that the application is to be opposed and that LorentzAngula Inc is authorised to act on behalf of the respondent in these proceedings. A confirmatory affidavit was signed by Ms Ndeuhala Katonyala, the chairperson of the respondent's Board of Directors in which she *inter alia* confirmed that Ms Aluteni was authorised to depose to the affidavit.

7.40. It is true that the respondent's resolution did not specifically authorise Ms Aluteni to depose to an opposing affidavit. The round robin resolution was also not signed by all three directors, only two of the three, which on the authorities quoted above renders it invalid. Given the time frame within which the respondent was brought to court (less than 1 hour), and that a notice to oppose was handed up at 09h00 at the hearing of the application, and given that opposing papers were filed only 3 hours later, I understand that the round robin would not be signed by all directors in such a short time frame. Furthermore, considering that a member of the Board as well as its chairperson deposed to affidavits confirming the authority of the deponent, herself a board member, I exercise my discretion and find that in these particular circumstances Ms Aluteni was duly authorised by the respondent's Board to oppose the

application on its behalf and to depose to the answering affidavit in this urgent application. Even if I am wrong in the manner I have exercised my discretion, for the reasons advanced below, the finding I make is based on what is contained in the applicant's founding papers only.

7.41. Returning to the point *in limine* concerning the lack of alternatively self-created urgency in this application raised by the respondent, Dr Akweenda relied on the provisions of Rules 6(24) and (26) of the Labour Court Rules. Rule 6(24) provides that in urgent applications the court may dispense with the forms and service provided for in the Rules and may dispose of a matter at such time and place in accordance with such procedure as it consider just and equitable in the circumstances. Rule 6(26) provides *inter alia* that in every affidavit in support of an application brought under sub-rule (24) the applicant must set forth explicitly the circumstances which he or she avers renders the matter urgent as well as the reasons why he or she could not be afforded substantial redress at a hearing in due course. (emphasis supplied)

7.42. The above requirements are similar to those set out in Rule 6(12) of the High Court rules and this court has on numerous occasions set out the principles that are to be applied in order to determine whether a matter should be heard as urgent. In addition, when an applicant wants to be heard on an urgent basis, he or she essentially jumps the queue of litigants who have instituted proceedings in the normal course and who are awaiting the allocation of hearing dates depending on where in the proceedings have reached. The applicant must therefore provide cogent reasons to the court why it needs to jump the queue, why the potential respondent must oppose the relief on truncated time periods, and why the court must on an urgent basis peruse the papers, hear the applicant and grant the relief sought. It is well established that an applicant cannot merely give lip service to the requirements of the applicable Rule and must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter must be set down. [10]

[10] Salt v Smit 1990 NR 87 (HC) at 88C; Luna Meubel Vervaardigers (Edms) Bpk v Makin and

7.43. The applicant disputes this. It was argued that there was dispute as to whether the applicant could have been disciplined in the first place, based on the respondent's non-compliance with its own disciplinary policy set out in the correspondence mentioned above. Mr Kurtz further submitted that an application for postponement to the chairperson of the disciplinary hearing would be the incorrect forum, hence the applicant was left with no other remedy but to approach the court for urgent relief. Further Mr Kurtz argued that it is an established principle of our law that time spent on negotiations for purposes of avoiding litigation cannot be viewed as time that contributed to self-created urgency. For this proposition he relied on Nelson Mandela Metropolitan Municipality v Greyvnouw CC and Others[11]. This matter concerned an urgent application launched to interdict the respondents from continuing to carry on their business as a restaurant and bar in a suburb. The applicants alleged that the respondents were breaching the applicable zoning regulations and that by causing loud music to be played from one of the erven, the respondents were contravening the Noise Control Regulations. The reasons why the court found at paragraph [34] that the applicant did not drag its feet, was because it found on the facts that the applicant made efforts to resolve the problem by notifying the owners of the erven of their alleged non-compliance with the law. It even attended a meeting to resolve the problem and took steps to investigate the noise level further so that it had evidence of the noise level emanating. Thus the court held that the applicant approached its statutory duty of safeguarding the rights and interest of rate payers in a responsible manner by seeking to persuade the respondents to comply and only then approaching the court for relief (emphasis supplied). The facts of this case are different. I do not believe that the applicant, or his representatives, acted in a responsible manner as set out below, and as a result the reliance on this decision is on the facts, misplaced.

7.44. In this matter, the parties agreed to the hearing date of

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Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others 2012 NR 1.

[11] 2004 (2) SA 81 (SE) at 94 para [34].

28 February 2013. The bundle of documents requested on behalf of the applicant's representatives was provided on 31 January 2013 and 1 February 2013. This is what precipitated the postponement of the first hearing by agreement between the parties. On 4 February 2013, the applicant raised his issues with the respondent's non-compliance with the disciplinary code and procedure in respect of the disciplinary process, as well as the charges and scheduled hearing. On 15 February 2013, the applicant's representatives requested further documentation, and pointed out that all charges should be withdrawn against the applicant, due to the respondent's failure to *inter alia* have notified the applicant of the allegations against him within 10 working days from the date that the allegations were brought to the attention of the respondent, and in the alternative, that 7 of the 10 charges should be withdrawn because the charges were not disposed of within 90 days. The request was then already made that the disciplinary hearing be discontinued, and that negotiations could still continue in the meantime. I refer to the factual background sketched above.

7.45. In spite of this, the applicant's representatives on the same day requested a list of witnesses that the respondent intended to call, and on 22 February 2013 requested what sanctions would be imposed on the applicant at the disciplinary hearing. Further particulars to the charges were still requested on 25 February 2013. The respondent's representatives made it clear in their response on 25 February 2013 that internal disciplinary proceedings would still be followed and that the applicant would be accorded all his legal rights at the hearing and that it would be procedurally fair. I must add (without at all having regard to the innocence or guilt of the applicant) that the issue that the applicant has is whether or not he may be disciplined at all because certain aspects of the disciplinary policy were not complied with, in particular the time frame for certain actions, and whether or not the particular misconduct complained of was specifically provided for. Why this could not be dealt with at the disciplinary enquiry, which would be at the very least, the correct forum of first instance, has not been explained or set out in a satisfactory manner.

7.46. By 25 February 2013, it must have been clear to the applicant that the

respondent intended proceeding with the disciplinary hearing. There was no positive response to the letter dated 15 February 2013 requesting discontinuance of the hearing. But more importantly, I reiterate that I hold the view that the applicant could have raised its concerns with the chairperson of the disciplinary hearing and even the jurisdiction of the chairperson if necessary. The applicant could indeed have applied for a postponement, irrespective of whether I agree with the second referral or not. In this regard I find that the urgency was self-created. The convenience of the court does not even appear to have been a remote consideration, let alone the extremely short periods provided to the respondent to oppose. Even if the application was urgent, the applicant failed dismally to show that it could not obtain substantial redress in due course for the reasons set out above. It follows that the application must be struck from the roll for want of compliance with Rules 6(24) and (26).

7.47. That leaves the question of costs. Dr Akweenda argued that the application was a vexatious and frivolous application contrary to the provisions of section 118 of the Labour Act. He submitted that the applicant should be ordered to pay costs on the basis of the frivolous nature in which the application was brought, considering the previous correspondences and the conduct of the applicant in the circumstances. Section 118 provides that the court must not make any order as for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceedings with or defending those proceedings.

7.48.

7.49. In National Housing Enterprise v Beukes and Others[12] Van Niekerk J stated the following at paragraphs [21] and [22] offer an insightful exposition of the principles to be applied when considering the question of the meaning vexatious in the context of attorney client costs, and determining whether those principles should be applied to costs in a labour context:

> "[21] It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it

[12] 2009 (1) NR 82.

> is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'.
>
> [22] While there is merit in the respondents' points taken in the first affidavit, I am not persuaded that this means that applicant was acting frivolously or vexatiously. It rather seems to me that applicant acted prematurely in bringing the application. I have given anxious consideration to the submission that in continuing the proceedings by applying for a postponement after the full answering papers had been filed, applicant has acted frivolously or vexatiously. ..."

7.50. Applying the principles and reasoning of Van Niekerk J, I hold the view that the applicant acted prematurely in bringing the application and that the proceedings in this case fall in the category of proceedings which are vexatious in effect, rather than in intent, although the applicant came very close to the line. As a result, their shall be no order as to costs.

EM Schimming-Chase

Acting Judge

APPEARANCES

APPLICANT:	Mr Kurtz Of Murorua & Associates
RESPONDENT:	Dr Akweenda Instructed by LorentzAngula Inc