REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LCA 51/2011

In the matter between:

ANDREW LWEENDO SHAAMA **APPELLANT**

And

DAAN CORNELIUS ROUX **RESPONDENT**

Neutral citation: *Shaama v Roux* (LCA 51-2011) [2014] NALCMD 39 (30 September 2014)

Coram: VAN NIEKERK J

Heard: 17 February 2012

Delivered: 30 September 2014

Flynote: **Arbitration** – Sections 89(1)(a) and 89(4) of the Labour Act, 2007 (Act 11 of 2007) - Appellant raising issue of whether arbitrator conducted proceedings in fair and just manner based on certain procedural defects – This is a question of law – Where defect complained of does not appear from record itself, a party would have to employ procedure provided by section 89(4) of the Labour Act because fact that such defect occurred or exists must be established by way of application supported by affidavits – Labour Act does not expressly or impliedly prohibit raising of defects which do not need to be proved by affidavit – The only limitation in section 89(1)(a) is that right to appeal exists only in respect of questions of law – Where defect in proceedings raises question of law and such defect is apparent from record, a party would be able to bring the matter before the Labour Court either by way of appeal or review.

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ORDER

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1. The award by the arbitrator dated 8 June 2011 is set aside.

2. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to hear the arbitration *de novo*.

JUDGMENT

VAN NIEKERK J:

[1] The appellant in this matter is a former employee of the respondent. In terms of the Labour Act, 2007 (Act 11 of 2007), the appellant referred to arbitration a dispute concerning his claim against the respondent for payment for work allegedly performed on Sundays and public holidays during the period August 2006 and November 2010.

[2] On 8 June 2011 the arbitrator held as follows:

> 'The applicant failed to substantiate his claim and how did he come (*sic*) to the amount his (*sic*) claiming, as there was no agreement that was presented by the applicant to substantiate the claim. The law is very clear, section 86(2)(b) of the Labour Act (Act 11 of 2007) states that any party to a dispute may refer the dispute to the Labour Commissioner within one year after the dispute arising, in any other case (*sic*). In this case the dispute arose in 2006 and it was only referred to the Labour Commissioner in 2010 upon his resignation.
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> The applicant's claim has prescribed considering the fact that the applicant is alleging he never received payment for the Sundays and Public holidays since 2006 when he stated (*sic*) working for the respondent. I believe the applicant had ample time to institute his claim within the time frame stipulated in the Labour Act.'

[3] The arbitrator thereupon found that the appellant had no case and dismissed his claim.

[4] On 23 June 2011 the appellant filed a notice of appeal in which he gave notice that he would ask this Court for an order (1) upholding the appeal and setting aside the arbitration award; and (2) that the respondent should compensate the appellant for work performed on Sundays and public holidays during the period of 12 months

immediately preceding the date of referral of the dispute, i. e. 1 December 2010. The appellant set out certain grounds for the appeal.

[5] After the transcribed record became available, the appellant filed an amended notice of appeal in which a so-called point *in limine* was included. I say 'so-called' because what was included is really an additional ground of appeal. The grounds of appeal referred to in the previous paragraph (*supra*) were retained and the order sought by the appellant remained unaltered. The full grounds for the appeal are set out as follows in the amended notice of appeal:

'1.

In limine: The arbitrator failed to conduct the proceedings in a fair and just manner.

(i) The arbitrator erred in law to properly explain the process to be followed in the arbitration;

(ii) The Arbitrator failed to inform the applicant on (*sic*) his right to testify personally;

(iii) The Arbitrator erred in law in failing to allow the Appellant/Applicant to cross-examine the Respondent and/or to challenge the Respondent's evidence through cross-examination.

1.1 The Arbitrator determined that the Appellant's total claim for payment for work performed on Sundays and public holidays since 2006 has become prescribed in terms of the Labour Act.

1.2 Consequently, the following question of law fall (*sic*) for determination:

(a) "Whether the arbitrator erred in law in finding that the Appellant's total claim has indeed become prescribed?"

1.3 The grounds on which the appellant relies are the following:

(i) The appellant, a former employee of the respondent has referred a dispute claiming payment for work performed on Sundays and Public Holidays during the period August 2006 to November 2010. Such dispute was referred on 1 December 2010. In respect of the period November 2009 to November 2010, the Appellant's claim could not have been prescribed.'

[6] The respondent opposes the appeal on several grounds. The first is that the grounds raised in the so-called point *in limine* relates to defects and irregularities in the proceedings which should have been raised by way of review and not by way of appeal. In this regard Mr *de Beer*, who appears on behalf of the respondent, submitted that the Labour Act distinguishes between appeals and reviews and referred to subsections (1), (4) and (5) of section 89 of the Labour Act, which provide as follows:

> '(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86, except an award concerning a dispute of interest in essential services as contemplated in section 78-
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> (a) on any question of law alone; or
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> (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.
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> ....
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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.
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> (5) A defect referred to in subsection (4) means-
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> (a) that the arbitrator-
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> (i) committed misconduct in relation to the duties of an arbitrator;
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> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
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> (iii) exceeded the arbitrator's power; or
>
> (b) that the award has been improperly obtained.'

[7] Mr *Philander*, who appears on behalf of the appellant, on the other hand, in effect submitted that the grounds of appeal based on the irregularities committed by the arbitrator raise a question of law, namely whether the appellant received a fair and just hearing. As such, he submitted, the matter is appealable.

[8] Mr *Philander* referred to the matter of *Roads Contractor Company v Nambahu and Others* 2011 (2) NR 707 (LC) in which the appellant followed the same procedure by raising, on appeal, irregularities which rendered the arbitration hearing unfair. The specific ground of appeal in that amended notice of appeal was also labelled a 'point *in limine'* and read as follows: '*In limine*: The arbitrator failed to conduct the proceedings in a fair and just manner.' (see 708H).

[9] From the reasons for the judgment it is not possible to establish whether Muller J heard any argument on the issue of whether the matter should have been dealt with in terms of section 89(4) of the Labour Act by way of review and not by way of appeal. However, I can hardly imagine that section 89(4) would have been overlooked. Be that as it may, in that case the respondent's counsel objected to the specific ground of appeal and submitted that 'this is a procedural issue and not a substantive one and that the particular ground of appeal in the amended notice of appeal is not stated clear enough' (at 711F). Muller J, without specific discussion of the submissions, summarily rejected them as having 'no substance' (at 711F).

[10] It seems to me that what weighed throughout with the learned judge is that the particular conduct of the arbitrator complained of rendered the arbitration hearing unfair and therefore unlawful. This was abundantly clear from the record as he illustrated by way of numerous quotations from the transcription. Throughout the judgment he emphasized the appellant's right to a fair trial and stated as follows (at 710E-F):

> '[9] Article 12 of the Namibian Constitution guarantees that any person is entitled to a fair trial. Article 12(1)(a) reads as follows:
>
>> '(1)(a) In the determination of the 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.'

[11] Although the more specific focus of the Court in the case of *Roads Contractor Company v Nambahu* was the irregularity that the arbitrator was not impartial in the manner he conducted the hearing, the learned judge also considered other irregularities which contributed to the result that the arbitration hearing was unfair. For example, he stated (at 711H-I):

> 'Furthermore, the whole procedure and the way that the hearing was conducted, made it impossible for any witness to testify, because the arbitrator constantly and nearly after each and every sentence in the evidence of a witness, intervened and asked questions which were not only based on assistance or clarification. The arbitrator not only interfered in the evidence and cross-examination of witnesses, but he seemed the most active questioner. In this regard certain guidelines in respect of the manner in which arbitration ought to be conducted to ensure a fair hearing will be provided for the edification of arbitrators at the end of this judgment.'

[12] Muller J also cited several instances in the record of proceedings which provided indications 'that the arbitrator was at a loss as to how the arbitration should be conducted' (e.g. at 711J; 712C-G; 712G-713B; 713B-G). These were all concerned with the proper procedure to be applied in order to provide a fair hearing to all parties. In this regard he said with apparent approval (at 710I-711A):

> '[12] Mr *Philander* submitted that throughout the arbitration before him the conduct of the arbitrator can be regarded as misconduct in respect of his duties and that he consequently committed a gross irregularity. In this regard he referred to the case of *Klaasen v CCMA and Others* (2005) 10 BLLR 964 at 27 and *Naraindath v CCMA and Others* (2000) 21 ILJ 1151 (LC) at 27. In respect of what has to be understood from the expression of misconduct, Mr *Philander* referred to the 4 edition of re-issue of *Halsbury*, vol 2 para 694, where the following is stated:
>
> > 'Misconduct has been described as such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice . . . An arbitrator will misconduct himself if he acts in a way that is contrary to public policy. In particular, it will be misconduct to act in a way which is, or appears to be, unfair.''

[13] The learned judge eventually concluded as follows (at 722D):

> '[25] In the light of my finding that the arbitrator did not act in an independent and neutral manner and that the applicant (and even the two respondents) did not receive a fair trial before the arbitrator, the arbitrator's award has to be set aside.'

[14] As promised the Court provided guidelines for a fair hearing after stating the following (at 724E-G):

> '[31] It is against this background and having considered the manner in which the current arbitration had been conducted, as shown above, that the distinct impression is gained that some guidelines or at least 'tips' to conduct a fair hearing may be necessary. In providing these guidelines the court is conscious of the more informal manner that the Labour Act requires proceedings of the arbitration tribunal should be conducted, as well as the empowerment of the arbitrator in this regard. Despite these legislative provisions contained in the Labour Act and its rules, the forum remains a tribunal and the requirements of the Namibian Constitution in respect of a fair hearing remains paramount. Other legal requirements in respect of what constitutes a fair hearing, cannot be ignored.'

[15] It is not necessary to set out the guidelines in full. Most of them are concerned with the impartiality of the arbitrator. However, the first three mentioned by the learned judge pertain to other matters (at 724H-I):

> '(a) The arbitrator must acquaint himself with what the dispute(s) of the complainant are.
>
> (b) The arbitrator has to be aware on whom the onus rests and determine who should commence.
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> (c) The arbitrator should ensure that the parties are properly informed and understand how the proceedings will be conducted.'

[16] Counsel for the respondent submitted in paragraph 5.2 of his heads of argument that the appeal before me 'is not based on a question of law alone, but includes aspects which indicate irregularities and that the appeal may not include such matters.' This submission was, in substance, persisted with in oral argument. For this submission counsel relies on the unreported judgment by this Court in *Patrick Geinkop v Commercial Investment Corporation (Pty) Ltd and another* (Case No. LCA 54/2011 – delivered on 18 November 2011).

[17] In that matter the appellant appealed against the ruling of the arbitrator who dismissed his claim arising from an alleged unfair dismissal by his employer. In an amended notice of appeal the appellant included an appeal ground that the arbitrator had misdirected herself and erred in law and in fact by allowing the employer's representative to testify and hand in certain exhibits during the arbitration proceedings. During the appeal the legal point was taken that the appellant's right of appeal was confined to 'any question of law alone' in terms of section 89(1)(a) of the Labour Act, because the dispute referred to the Labour Commissioner was not a dispute in terms of section 7(1)(a) of the Act, i.e. a dispute concerning 'a matter within the scope of this Act and Chapter 3 of the Namibian Constitution.' The Court upheld the point and found (at para. [15]) that the appeal was not sanctioned by the provisions of section 89(1)(b) of the Labour Act, but that section 89(1)(a) was applicable to the appeal. This meant therefore that the appellant could not appeal on a question of fact or mixed fact and law.

[18] The Court was further of the view (at para [14]) that '[w]hen one has regard to the grounds as well as the amended grounds then in my view it should be apparent that these grounds are not concerned with questions of law alone, but also include questions of fact as well as an alleged irregular procedure allowed by the arbitrator.' The Court further stated in para. [17]:

> 'The alleged procedural irregularity during the arbitration proceedings referred to in the amended notice of appeal is in my view subject to review proceedings and cannot form a ground of appeal.'

[19] In my most respectful view this finding was correct. The manner in which the appeal ground relating to the said procedural irregularity was framed precluded an appeal. It alleged that the arbitrator erred 'in law and in fact'. I do not think that the *Geinkop* judgment can be read as authority for the general proposition that procedural irregularities which raise questions of law only may never be raised by way of appeal.

[20] It is evident that, where the defect complained of does not appear from the record itself, a party would have to employ the procedure provided by section 89(4) of the Labour Act because the fact that such a defect occurred or exists would then have to be established by way of application supported by affidavits as envisaged in

rule 14 of the Labour Court rules. Clearly such matters can never be raised by way of appeal as in an appeal one is bound to the four corners of the record. However, the Act does not expressly or impliedly prohibit the raising of defects which do not need to be proved by affidavit. The only limitation in section 89(1)(a) is that the right to appeal exists only in respect of questions of law. (For purposes of this discussion I do not include matters which fall within the provisions of section 89(1)(b) of the Labour Act as they do not apply to this case).

[21] It seems to me that where a defect in the proceedings raises a question of law and such a defect is apparent from the record, a party would be able to bring the matter before the Labour Court either by way of appeal or by way of review.

[22] In passing I note in the context of this discussion that this Court in *Labour Supply Chain Namibia (Pty) Ltd v Hambwata* (Case No. LCA 14/2010, Unreported, 3 February 2012, at para. [34]) was inclined on appeal to set aside arbitration proceedings on the basis of fatal irregularities which were apparent from the record, were it not for the fact that the Court had already decided that the appeal should be upheld and the award set aside on the basis of one of the questions of law raised by the appellant.

[23] In my respectful view a pragmatic approach is to be followed, especially where the defects are raised as questions of law, or where the defects provide the basis for a question of law to be raised, in an appeal wherein other questions of law are also raised. Otherwise litigants would have to approach this court in the same matter by way of both appeal and review. This would certainly mean increased work and costs.

[24] Having said this I think it is wise to sound a word of caution. Although the procedure contemplated by section 89(4) and rule 14 of the Labour Court rules may be more cumbersome, it seems to me that it might often be preferable as it avoids the pitfalls inherent in the appeal procedure, concerned as it is with questions of law. A reading of relevant case law both in Namibia and in South Africa indicates that the formulation of questions of law is notoriously tricky. An appellant therefore always runs the risk of the appeal ground not being entertained because of defective formulation or because this Court might hold that the question is not a question of law, but one of fact, or one of mixed fact and law. The requirement that the facts on

which the question of law is to be decided should not be in dispute should also not be overlooked.

Does the complaint that the arbitrator failed to conduct the proceedings in a fair and just manner amount to a question of law?

[25] The next question to be answered in this appeal is whether the *in limine* statement in the amended notice of appeal raises a question of law only. Put differently, does the complaint that the arbitrator failed to conduct the proceedings in a fair and just manner by (i) failing to properly explain the process to be followed in the arbitration; (ii) failing to inform the applicant of his right to testify personally; and/or (iii) failing to allow the Appellant/Applicant to cross-examine the Respondent and/or to challenge the Respondent's evidence through cross-examination, amount to a question of law?

[26] In *S v Basson* 2004 (1) SACR 285 (CC) the Constitutional Court of South Africa considered whether the determination of what is fair in the context of an accused's right to a fair trial under section 35(3) of the South African Constitution raises an issue of fact or of law. In this regard it stated the following (at 310F-H):

> '[54] The State seeks to challenge the decision of the High Court that the bail record was inadmissible as evidence in the criminal trial. In essence, the High Court found that the admission of the evidence against the respondent would, in all the circumstances, be unfair. The SCA correctly held that an accused was entitled to a fair trial, that it was necessary for the High Court to determine what would be fair under the circumstances and that s 35(3) of the Constitution justifies the exclusion of evidence the admission of which would be unfair to an accused. However, the SCA, relying on certain reasoning in *Attorney-General, Transvaal v Kader* [1991 (4) SA 727 (A) at 740F-J] held that the determination of the High Court as to what was fair raised an issue of fact and not an issue of law. It is now necessary to consider whether this decision was correct.'

[27] During the course of the Court's reasoning that followed, it stated as follows (at 311F-313A):

> 'The ruling of the High Court was in effect that the evidence of the bail record was not admissible. The part of the judgment in *Magmoed* [*v Janse van Rensburg and Others* 1993 (1) SACR 67 (A)] which dealt with admissibility challenges, is instructive.

In determining whether the High Court's refusal to admit evidence given in inquest proceedings by the accused raised a question of law, the Court held:

> 'The admissibility of evidence may well turn solely on an issue of fact. An obvious example of this is the case where the admissibility of an extra-curial statement by the accused is in issue and this depends on whether it was made freely and voluntarily and without undue influence or whether it was induced by some form of physical coercion. This is a question of fact; and the only way in which it could be raised by an accused person as a point of law reserved would be to pose the question as to whether there was any legal evidence upon which the Judge could properly have found that the prosecution had discharged the onus on this issue (see *R v Nchabeleng* 1941 AD 502 at 504; *R v Ndhlangisa & Another* 1946 AD 1101 at 1103 - 4). Admissibility may, on the other hand, turn purely on a question of law, for example whether a certain statement constitutes a confession (see *R v Becker* 1929 AD 167 at 170; *R v Viljoen* 1941 AD 366 at 367). Furthermore, in a particular case admissibility may depend upon both law and fact.
>
> It seems to me that the decision of Williamson J on the admissibility of the inquest evidence falls into the last-mentioned category. In effect he found (i) that the failure, after a certain stage in the proceedings, on the part of the respondents (and their counsel) to object to answering incriminating questions was the result not of a free election to do so, but of their having been discouraged or inhibited from so objecting by the general ruling of the magistrate and his approach to this issue; and (ii) that this rendered the evidence of the respondents inadmissible. Finding (i) is clearly one of fact or of factual inference; whereas finding (ii) is a matter of law.'

[58] It is apparent from this passage that there is a two-step process in the adjudication of issues concerning the admissibility of evidence. The first is to determine the facts. These may be primary facts provable by direct evidence or secondary facts established by inference. The determination of the facts is essentially separate from the second enquiry. The second stage is concerned with whether, on the basis of the facts determined in the first stage, it is fair for the evidence to be admitted.

....

[60] The reasoning in *Magmoed* in relation to admissibility is sound both in principle and in law. It is, moreover, directly applicable to the admissibility challenge in this case. The High Court in considering the admissibility challenge did two things. In the first place, it determined the facts. In the second place, it measured the facts against the test of fairness in order to determine whether the evidence was admissible. The

> second enquiry raised a question of law. We conclude therefore that in this regard, as well, the SCA erred.'

[28] In my respectful view the same reasoning should be applied in the present matter. I have no doubt that when this Court is faced with the enquiry of whether arbitration proceedings measure up to the standard of a fair trial, a right expressly protected by the Constitution, the standard employed is a legal one. This was also, in effect, the approach followed throughout by this Court in *Roads Contractor Company v Nambahu* (*supra).*

[29] In the present matter the appeal ground is based on the assumption that the facts are clear from the record. In other words, the fact that the alleged procedural defects set out in paragraphs (i) – (iii) of the amended notice of motion occurred must be common cause or appear clearly from the record. Whether these procedural defects, singly or jointly, have the effect that the trial was not just and fair, is a question of law.

[30] To conclude, the finding of this Court is therefore, that the amended notice of appeal does raise a question of law on the issue under discussion ('the first question of law') and that the appellant may use the appeal procedure to bring this matter before this Court.

<u>The first question of law – was the arbitration hearing fair and just?</u>

[31] I now turn to a consideration of the merits of the first question of law. In my view parts of the heads of argument filed by the appellant's counsel venture outside the scope of the procedural errors mentioned in the amended notice of appeal. I shall therefore only consider those arguments which a covered by the said notice.

(i) *The failure to properly explain the process to be followed in the arbitration*

(ii) *The failure to inform the applicant of his right to testify personally*

[32] The first two errors complained of may conveniently be considered together, as the failure to inform the appellant of his right to testify in person is a specific instance of the failure to properly explain the process to be followed in the arbitration.

[33] It is common cause that both parties are lay persons who appeared in person at the arbitration proceedings. A reading of the transcribed record shows that the arbitrator commenced with a very general explanation of the various stages through which the proceedings would be conducted. She did this as follows (at p12, line 8 – p13, line13)(the extract is rendered exactly as it appears in the record):

> 'The 1st (first) stage it's the introduction where I will introduce myself and the parties. Also they will have a chance to introduce themselves. And we'll go to the 2nd (second) stage, that is the opening, opening statement uh by the parties. In this opening statement the parties will enable or applying what exactly they want and what they are claiming and the outcome they seek from all this. And the 3rd (third) stage is narrowing all the issues where you will clarify what is in dis, in dispute and what is admitted. Then there is the 4th (fourth) stage, that is conciliation. If parties still wish to go back to conciliation I will switch off my recording and then go back to negotiate, to, to, to conciliation and negotiate this matter. Then we will move to if, if, if, if, parties they don't seek to go back to conciliation we will move to the 5th stage (fifth) uh stage, that is evidence where parties will call witnesses. If you have witness, witnesses you will examine your witnesses and uh the Respondent is also given a chance to cross-examine and then you will re-examine again. From the 5th (fifth) stage we go to the 6th (sixth) where you present your argument. In this you explain what is the legal conclusion that you want to draw from all the evidence that is presented uh through in these proceedings. Then the 7th (seventh) stage and the 8th (eighth) it will be mine, my, my, my 7th (seventh) its closure where I will explain what will happen after the hearing is over. And then the last stage is the Award that I'm required to write within 30 (thirty) days to make a decision of what has transpired and uh...'

[34] After this explanation the proceedings went through the said stages in some form or other until the fifth stage was reached. The following was then recorded (at p24, lines 1-10):

> 'MADAM CHAIRPERSON: Okay. Then we move to the 5th (fifth) stage where parties will prevent, present their evidence. And in this case uh if you have witnesses uh you may call your witnesses to come. But uh I just want to know how many witnesses do you now, do you have?
>
> FOR APPLICANT: I have 3 (three) that are on their way and then there's 1 (one) that was here. He's left because time is catching up with him. He had to go to work,

> as I mentioned earlier. I wanted us to deal with that one and that he could be released and a, and at an earlier stage.'

[35] The record then indicates that a recess was taken after which the arbitrator explained the difference between taking the oath and making an affirmation, where after the first of the appellant's witnesses was sworn in. He called four witnesses. After the evidence of the fourth witness was completed, the arbitrator called on the respondent to present his evidence as follows (at p59, line 20-p60, line 5):

> 'MADAM CHAIRPERSON: Uhm since we are done with the applicant's witnesses and evidence uh its your turn Mr ...
>
> CASE FOR THE APPLICANT:
>
> FOR RESPONDENT: Uh yes as I said uh, uh ...
>
> MADAM CHAIRPERSON: Shaama ...
>
> FOR RESPONDENT: uhm.
>
> MADAM CHAIRPERSON: I mean Mr Daan to present your evidence.'

[36] At no stage did the arbitrator explain to the appellant (or to the respondent) that he was entitled to testify in support of his claim. What did occur is that the appellant made an unsworn 'opening statement' in respect of which the arbitrator on various occasions invited him to state 'what exactly' he 'wants', what he is claiming, and what outcome he seeks (p12, line 13-14); to 'explain ... what this dispute is all about' and 'what outcome you seek in this matter' (p14, lines 7-9); and 'to start from the beginning that you started working for the Respondent from this period and what transpired, exactly the whole thing that happened ' (p15, lines 3-6). (Further examples occur on p15, line 16; p15, line 22 – p16, line 14).

[37] Mr *de Beer* in effect submitted that as the appellant had an opportunity to state exactly what his claim was all about and what exactly he wanted, he cannot really complain. In his opening statement he did not set out precisely on which Sundays and public holidays he worked and therefore did not present proper information about the computation of his claim. This was also not indicated by way of any

documentation handed in during the hearing, although the respondent during his opening statement challenged the appellant to provide proof of exactly which days he did work.

[38] I take note of this, but to my mind the invitation to make a full opening statement cannot take the place of a proper explanation to a party that he has the right to testify in support of his own claim. In any event, an 'opening' statement merely sets the stage of what is to follow. In it a party is supposed to state what the case is about and what is intended to be proved by way of presenting evidence when that stage of the proceedings is reached. An opening statement cannot properly take the place of evidence under oath. In fact, the arbitrator should have explained to the appellant that what he stated in his opening statement does not constitute evidence and that, if he wanted the court to take notice of the contents, he should repeat it under oath. However, I remain mindful that this failure does not constitute part of the notice of appeal.

[39] While it is tempting to speculate that the appellant would probably not have stated his case better under oath and that he would, therefore, in any event not have substantiated his claim as the arbitrator indeed found, the fact is that one simply does not know what he would have stated in evidence if he had availed himself of that opportunity after proper explanation of his right to testify in person. The failure to provide this explanation constitutes a gross irregularity which renders the trial unfair.

(iii) *The failure to allow the appellant to cross-examine the respondent and/or to challenge the respondent's evidence through cross-examination*

[40] As far as the third error is concerned, it is clear from the record that after the appellant closed his case, the arbitrator invited the respondent to present his evidence. Without being sworn, he proceeded to hand in a series of documents, including written calculations, which were marked as exhibits and in regard to which he gave certain explanations. While he was still busy with this, the arbitrator intervened and asked the appellant whether he wanted to say something (p64, line 18-19). The appellant then handed in a document which he claimed provided some indication that a certain aspect of the respondent's evidence's is not correct. After

this the respondent continued to explain the documents he had handed in. At the end of the explanation the arbitrator stated:

> 'Lets move on to argument. In this stage you have to explain what legal conclusion do you seek from the evidence that is, that was given to your side and his side.'

[41] It is abundantly clear that the arbitrator did not provide any opportunity to the appellant to cross-examine the respondent. Included amongst the documents which the respondent handed in were documents which, according to the respondent, indicated the Sundays that the appellant worked and those on which he did not work (p61, lines 16-19). This is obviously a document on which the appellant might have posed questions or which he might have sought to challenge in some way if he had had the opportunity. Besides, during cross-examination a party is entitled to elicit evidence in his favour. Also in this respect one will never know what may have been stated in evidence if the appellant had had the chance to pose questions in cross-examination. The failure to provide him with such a chance is fatal to the procedural fairness of the hearing (see also *Novanam Ltd v Jose MT Crespa* (Case No. LCA 10/2009 – Unreported judgment delivered on 21 January 2011).

[42] Mr *de Beer* submitted that the arbitrator merely exercised her discretion in terms of section 86(7)(a) of the Labour Act to conduct the arbitration in a manner she considered appropriate to determine the dispute fairly and quickly and that she dealt with the substantial merits of the dispute with the minimum of legal formalities as required by section 87(7)(b).

[43] While taking note of the provisions of section 87(7), I do not agree with these submissions. These provisions may never be used to fundamentally undermine the right to a fair hearing under the Constitution. Essentially the same view is also expressed in *Roads Contractor Company v Nambahu* (*supra*) (at 724A-G) and in *Strauss v Namibia Institute of Mining & Technology & Others* NLLP 2014 (8) 390 LCN (para. [51]).

[44] Mr *de Beer* submitted that if one party is required to testify under oath but the other is not, it would suggest irregularity. However, the submission continued, in this matter both the appellant and the respondent were allowed to make verbal statements to present their case; both did not testify under oath and both were not

given the chance to cross-examine. Both were treated equally. There is no merit in this submission. It amounts to saying that if the arbitrator is equally unfair to both parties the hearing is fair. The fact that both parties in this case were subjected to the same irregularities by failure to explain their right to testify; to take their evidence under oath; and to allow cross-examination by the opposing party, cannot save the hearing from being judged a fundamental miscarriage of justice. At most it might mean that the arbitrator was impartial in committing those irregularities which ultimately rendered the trial unfair to both parties, although in this case the respondent is not inclined to complain about it. Clearly the fairness of a hearing should be judged not only by assessing whether the tribunal treated both parties equally.

[45] Mr *de Beer* relied on an *obiter* remark made by Smuts, J in *Labour Supply Chain Namibia (Pty) Ltd v Hambata* (*supra)* at para. [33] where he stated as follows:

> '[33] In setting aside the award, I also wish to refer to certain irregularities which occurred in these proceedings. Despite the representative expressly requesting it, the arbitrator declined to require that the respondent give her evidence under oath. She merely made a statement even though the arbitrator permitted cross-examination of her. On the other hand, he required that the appellant's witnesses to (*sic*) give their evidence under oath. This amounts to an irregularity. Parties are to be treated alike.'

[46] I do not consider this passage to be support for counsel's submission. Seen in context with the very next passage in the judgment the learned judge was concerned with irregularities which were of such a nature that he felt inclined to set aside the proceedings. The failure to place a party under oath when he or she is about to give evidence is irregular, but in the context of arbitration proceedings, this irregularity in itself might not necessarily be fatal to the proceedings. However, if the other party is required to present evidence under oath, the treatment will be unequal and this latter irregularity would probably be fatal, as indeed the learned judge was inclined to find (see para. [34]). What probably also weighed with the learned judge is that the arbitrator did not merely by way of oversight omit to put the respondent under oath, but specifically declined to do so while requiring the appellant's witnesses to testify under oath. This suggests a deliberate decision to treat the parties unequally.

[47] In the matter before me the irregularities complained of are, by their very nature, such that they render the hearing fundamentally unfair and no amount of 'equal treatment' can rescue the hearing from its fate of being set aside.

The second question of law – 'prescription' of claim

[48] Although I have come to the conclusion that the appeal must succeed on the first question of law, I wish to deal briefly with the second question of law in order to provide clarity. In *Roads Contractor Company v Nambahu* (*supra*) Muller J dealt with the very same issue as follows (at 723C-I):

> '[28] Section 86(2) of the Labour Act 2007 provides as follows:
>
> '86(2) A party may refer a dispute in terms of ss (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.'
>
> What is commonly referred to as prescription, is in fact not prescription in the sense of a debt being prescribed according to the Prescription Act 68 of 1969. It is more of a limitation on the institution of a claim. This is not a matter of unfair dismissal and consequently s 86(2)(b) is applicable. Consequently, the claim has to be instituted within one year from the time when the dispute arose. This is common cause. Mr *Philander* referred to the decision by Henning AJ, a judgment delivered on 30 November 2010 in the case of *Nedbank Namibia Ltd v Louw* [Now reported at 2011 (1) NR 217 (LC) — Eds.] where an arbitration award was based on a dismissal in terms of s 86(2)(a) of the Act and where the claim had been launched out of time. The learned acting judge held that the arbitrator was not authorised to consider this issue at all; ' . . . (it) was *ultra vires* his authority and consequently a nullity.' On that basis the award was also a nullity and that award was set aside.
>
> [29] The situation in this matter is somewhat different. The two respondents (co-complainants) claimed for underpayment over a long period. It seems to me that Mr *Barnard* considered that part of the payment, namely before May 2008, might be *ultra vires* the authority of the arbitrator in terms of the provision of s 86(2)(b), but that the salary payment from May 2008, as well as future payments, are not affected by the provisions of s 86(2)(b). If I had to consider this issue, called 'prescription', I would only have dealt with claims arising from May 2008, depending of course if it

could be found that the claimants were indeed entitled to such salary payments. In the light of my decision that the award should be set aside and referred back, I do not make any finding in respect of this issue.

[49] Before me the parties are in agreement that the arbitrator did err in holding that the whole claim for the full period of August 2006 to November 2010 has 'prescribed', but that the appellant's claim in respect of the one year period before he instituted the claim has not 'prescribed'. In the amended notice of appeal the statement is made that 'In respect of the period November 2009 to November 2010, the Appellant's claim could not have been prescribed'. However, I agree with Mr *de Beer* that a proper calculation results therein that the period commences on 1 December 2009 and ends on 30 November 2010.

Order

[50] In conclusion the following order is made:

1. The award by the arbitrator dated 8 June 2011 is set aside.

2. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to hear the arbitration *de novo*.

______(Signed on original)_______________

K van Niekerk

Judge

APPEARANCE

For the appellant: Mr S R Philander

of LorentzAngula Inc

For the respondent: Mr P J de Beer

of De Beer & Keulder Legal Practitioners