REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

LC 5/2015

In the matter between:

STANTOLL PROPERTIES CC APPLICANT

And

JAFET M. SHIIMI AND 180 OTHERS 1ST TO 181ST RESPONDENTS
B.M. SHINGUADJA N.O. 182ND RESPONDENT

Neutral citation: Stantoll Properties CC v Shiimi (LC 5-2015) [2015] NAHCMD 15 (22 July 2015)

CORAM: MASUKU, AJ

Heard: 3 July 2015
Delivered: 22 July 2015

Flynote: LABOUR LAW – application for review of arbitral award in terms of the provisions of section 89 (4) and 117 of the Labour Act considered; procedure for leading

evidence in arbitration proceedings and failure to call witnesses in support of claim ; applicability of rules relating to class action and failure to comply therewith; the procedure to be followed in applications for legal representation in arbitration proceedings revisited – the twin considerations of prejudice and complexity of a dispute.

Summary: The applicant applied in terms of section 98 and 117 of the Labour Act for a review of an award granted against it by the arbitrator. Meaning of the word defect, in terms of the Act discussed. The court considered the record of proceedings and held that the calling of one witness in support of a claim involving 181 other individuals was irregular and that the claim could only have been established with the calling of the said witnesses.

Failure to follow the rules relating to instituting class actions revisited. It was held that failure to follow the mandatory provisions of the said rules was fatal.

Legal Representation – the court set out the procedure to be followed by arbitrators where applications for legal representations are made. Held that where an objection is made to an application for legal representation, the court should consider the complexity of the case, together with issues of prejudice to the other party. Application for review allowed with no order as to costs.

ORDER

Application for review allowed. No order as to costs.

JUDGMENT

MASUKU, AJ

[1] This is an application for review brought in terms of the provisions of section 89 of the Labour Act ('the Act').[1] The applicant, a close corporation, following an award issued by the second respondent, approached this court seeking a review of the said award on grounds that shall be adverted to below.

[2] This application was not opposed by any of the respondents and as such, no opposing affidavits were filed. There was, however, some heads of argument filed on behalf of the 1st to 181st respondent, which appear to support the award. I have taken them into consideration in this judgment.

[3] On 3 July 2015, having listened to argument by Mr. Rukoro, for the applicant, I granted an order reviewing and setting aside the award in terms of prayer 1 captured in paragraph [7] below only and indicated that reasons for the order issued will delivered in due course. I should mention that I took the view that the prayers sought, which as will be seen below, were geared towards addressing every conceivable eventuality, allowing not a drop to escape scrutiny, however had a touch of tautology to them. Granting prayer 1, as indicated above, to my mind serves to impugn the entire proceedings and no offspring therefrom is able to survive independently of the proceedings having been declared irregular. The reasons now follow.

[4] The applicant was the employer of the 1st to the 181st respondent. On 10 September 2014, the respondents referred a dispute to the Labour Commissioner's office, alleging that the applicant was engaging in an unfair labour practice, namely paying the said respondents lesser amounts than those prescribed as the mandatory minimum wage. A month later, a certificate of unresolved dispute was issued by Ms. Martha Shipushu who had been appointed as the Conciliator of the dispute.

[5] The dispute was arbitrated by the 182nd respondent (the 'arbitrator') on 1 December 2014. Having finalized the proceedings, the arbitrator found in favour of the 1st to 181st respondents. In his award, he found and held as follows:

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[1] Act No. 11 of 2007.

(a) that the applicant had committed an unfair labour practice as aforesaid in contravention of a prevailing collective agreement in the construction industry;

(b) the applicant unilaterally changed the minimum wage of Mr. Israel Shikalepo, a formally trained and semi-skilled artisan in accordance with the National Vocational Training Act[2], and the collective agreement in the construction industry;

(c) the applicant shall pay 80 labourers listed the difference owed to them in the total amount of N$ 279 260-95 in accordance with a list which was duly attached to the award; and

(d) that the applicant must pay Mr. Israel Shikalepo a difference of his minimum wage i.e. an amount of N$ 2 689. 00.

[6] The arbitrator further ordered that the money due to the individual employees should be paid into their bank accounts via electronic fund transfer or by signing bank guaranteed cheques bearing the name of each of the said employees by 25 January 2015. Proof of such payment was to be forwarded to the Labour Commissioner. Finally, the award was declared to be final and binding on all the parties. The other parts of the award are not necessary to specify presently.

[7] The applicant, dissatisfied with the award, approached this court seeking the following order:

1. 'Reviewing, correcting or setting aside the entire arbitration proceedings presided over by the 182nd respondent under Case No. NRSO 108-14 as well as the award dated 24 December 2014 issued subsequent thereto;
2. Reviewing, correcting or setting aside the 182nd respondent's decision that the applicant has committed an act of unfair labour practice by unilaterally changing the minimum wages of labourers in contravention of the collective agreement applicable to the construction industry in Namibia;

[2] Act 18 of 1994.

3. Reviewing, correcting or setting aside the 182nd respondent's decision that the applicant has unilaterally changed the minimum wage of Mr. Israel Shikalepo in contravention of the collective agreement applicable to the construction industry;
4. Reviewing, correcting or setting aside the 182nd respondent's decision that the applicant must pay the 90 labourers (whose names appear on the list) the total amount of N$ 279 260.94; and
5. Reviewing, correcting or setting aside the 182nd decision that the applicant must pay Mr. Israel Shikalepo a total amount of N$ 2 689.00;
6. Reviewing, correcting or setting aside the 182nd decision that the applicant must pay a total of N$ 281 949.90 into the respective employees bank accounts by not later than 25 January 2015.
7. An order dismissing the complaint of unfair labour practice by 1st to 181st respondents.'

[8] The grounds upon which the award has been challenged may be summarized as follows:

(a) the provisions of rule 17 (1) were not complied with in relation to the conduct of the conciliation and arbitration

(b) only one witness represented and proceeded to testify on behalf of all the 181 labourers who were applicants in the proceedings;

(c) that the loss or damages claimed were not proven;

(d) that the 182nd respondent should not have presided on the proceedings but one Ms. Martha Shipushu should have;

(e) although 181 complainants, the 182nd respondent made an award only in relation to 90 and the said Mr. Shikalepo;

(f) the Labour Commissioner issued a certificate of unresolved dispute and thus became *functus officio* and could thus not properly conduct the arbitration of the matter.

[9] As indicated above, the application is brought in terms of section 89 (4) as read with section 117 of the Act. Section 89 (4) provides the following:

> '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 –
> (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption.'

It is clear from the papers that the reasons for seeking to impugn the award are not based on any allegations of corrupt conduct and it therefore stands to reason that the applicable section is the one cited above. The question, is whether the application for review was launched within the period stipulated by the section quoted above.

[10] A reading of the award indicates that the hearing was conducted on 1 December 2014 and the award was delivered on 24 December 2014. The notice of application for review on the other hand, is dated 21 January 2015 and it indicates receipt by the 181 respondents' representatives and the 182nd at the Labour Commissioner's office on 23 January 2015. It would appear to me therefore that the application for review was launched timeously and within the time limits stipulated in the above section and nothing serves to indicate a contrary position.

[11] The other provision relevant to review, which has been referred to by the applicant is section 117 of the Act which arrogates exclusive jurisdiction to this court to review arbitration tribunals' awards in terms of this Act.[3] There is no gainsaying that the present proceedings relate to the review of an award issued in terms of the Act. I am of the considered view that all the jurisdictional facts that bring this matter within the purview of the Act have been met and this court is properly placed to consider the merits of the application for review.

Grounds for review

[12] As indicated above, the award has been attacked on a number of bases. I shall not follow the sequence in which these have been raised by the applicant. I propose to

[3] Section 117 (1) (b) (a).

start with the one relating to the evidence led at the arbitration and the effect thereof on the findings.

Leading of evidence

[13] It is common cause that there were 181 complainants in the referral. During the arbitration proceedings, it transpired that the 1st applicant Mr. Jafet M. Shiimi was no longer part of the dispute but he was not removed from the proceedings. I say nothing more of this. The record reflects that of all the applicants who were part of the referral, only one was called as a witness and this is Mr. Israel Shikalepo, a 26 year old male. His sworn evidence reflected that he started working for the applicant on 30 March 2014 as a bricklayer and was informed by a Mr. Nestor that he would receive N$20,80 per hour. It was his further evidence that notwithstanding this information, he was instead paid an amount of N$14,50 per hour.

[14] Upon seeing the disparity between what he was informed he would earn and what he actually earned, he made enquiries and he was informed that he was not qualified to earn the amount he claimed and that his productivity levels were in any event low. The deponent to the applicant's affidavit, Mr. Zaaruka is alleged to have told Mr. Shikalepo that his interest was not in paper qualifications but in the actual productivity levels of the employee concerned. Mr. Shikalepo testified further that he reported the underpayment to a Mr. Fillemon Ndeitwa who promised to address the issue but never did. The applicant was afforded an opportunity to put questions to the witness but I find it unnecessary to chronicle the questions and answers that emanate from that exchange.

[15] It would appear that thereafter, the respondent was afforded an opportunity to place its version to the arbitrator. Its case appears to be that the complainants were unable to reach the set productivity levels that would entitle them to earn the wages they claimed. In support of its case, the applicant called Mr. Ndeitwa, who it is stated had been present during the proceedings and only left the place where the proceedings

were being conducted when it was indicated that he would be called as a witness for the respondent.

[16] His version was that Mr. Shikalepo came to enquire from him about the hourly rate of pay and he undertook to revert to the said Mr. Shikalepo. On enquiry, he discovered that Mr. Shikalepo, was classified into group B which was a group of workers who knew a little bit about the work and who were entitled to N$14,50 per hour. It was his version that Mr. Shikalepo claimed to be a brick layer but he was not good enough as he could not handle the requisite number of bricks. After him, no other witness was called by either party. It would seem that this marked the close of the entire case.

[17] As indicated above, the complainants only called one witness to testify. The arbitrator dealt with the evidence of Mr. Shikalepo and in his award stated that he accepted that the former was unable to meet the required levels of productivity and was for that reason entitled to N$ 15,95 from the date of his employment i.e. 31 March 2014 and N$17,46 from 1 June 2014 till the fixed contract came to an end.[4] At the foot of page 31 of the record, the arbitrator proceeded and said, 'The next category was that of labourers who were 90 in total according to the list and claim at the arbitration. It has been proven that they were extremely underpaid at N$6 and a few at N$7,50 per hour respectively in total violation of the Collective Agreement that set the rate of labourers at N$12,11 per hour till 31 May 2014, and at N$13,26 per hour respectively as from 1st June 2014. It has been proven as an established fact that the respondent has unilaterally altered the conditions of employment of **all the labourers and one semi-skilled artisan.'**

[18] It will have been clear from the foregoing chronicle that no other evidence than that of Mr. Shikalepo was led. Consequently, it remains a mystery as to how the arbitrator was able to make such far-reaching findings and conclusions about the alleged underpayment in the absence of evidence. How he was able to establish the fact of underpayment and the harrowing levels of non-compliance he found is simply

[4] Page 31 of the record.

mindboggling. It does not even appear that he afforded the applicant an opportunity to address those issues, which would have been wrong in any event, in the absence of evidence. As one goes through the record, one sees a litany of documentary exhibits and it is unclear how these were received in evidence and as to who presented them and whether those who did were competent in terms of the law to do so.

[19] A case in point in this regard, to demonstrate the fracture of procedure, was a document entitled 'Breaking down of calculation for applicants', dated 26 November 2014. It is under the signature of Ms. Justinah Hamukwaya, described as the applicants' representative. To it is attached a list of 96 employees with amounts allegedly owing to each one of them. There is no evidence that even this lady was called to adduce evidence, whatever it could have been worth in the absence of the claimants. The procedure followed goes against the prescriptions stipulated by Smuts J (as he then was) in *Springbok Patrols v Jacobs And Others*[5] where the learned Judge made the following lapidary remarks:

> 'This court has made it clear that where parties seek to claim amounts owing to them under the Act, they must not only plead how those amounts arise but also lead evidence and prove those amounts, thus substantiating the exact extent of the claim. The arbitrator however took the view a contrary view and operated from the assumption that it was for the respondent to disprove the entirely unspecified claims of the respondents. Not only that they did not establish any claim in the court by way of evidence, but this approach is also flawed and places the appellant as employer with an evidential burden which is entirely incorrect. The onus of proof of the claims as well as the duty to advance evidence on them rested with the respondents as employees in this matter.
>
> A further disturbing feature of the arbitration proceedings is the fact that the arbitrator seemed to consider that the mere say so by representatives of the parties in the opening statements and in the course of proceedings equated to evidence. This court has previously on more than one occasion referred to a misdirection of this nature which constitutes an irregularity on the part of an arbitrator. Yet this practice seems to continue.'

[5] CLA 7020/2012.

[20] It would appear that Mr. Justice Smuts had, for the most part, this case in mind when he made those enlightening remarks. It is clear that most of what he complained about has not been heeded in the proceedings under review. The onus of proof and evidential burden have been misplaced; the purpose, place and value of opening statements and submissions were elevated to evidence, to mention but a few irregularities apparent in this matter as well. It is in my view apparent that the procedure followed was most irregular and constitutes defects in the proceedings, as envisaged in section 86 quoted above. The award cannot, just on this basis alone, stand.

[21] I have considered the provisions of section 133 (4) of the Act which allow a presumption to operate against an employer, namely that the employer failed to pay his employees at the rate of pay prescribed. For the presumption to hold, the section calls for proof that the employee was in the employ of the employer and that the provision prescribing the rate of pay binds the employer.[6] It is accordingly evident that for the presumption to hold and for it to be properly held to apply, evidence must be led. It is clear, as indicated above, that no evidence was adduced in the instant case to bring the instant matter within the realms of the presumption and for that reason, I am of the considered opinion that the presumption in this case cannot properly be applied. The above section does not assist the arbitrator nor indeed the respondents in this matter.

[22] In their heads of argument in support of the award[7], the respondents claim that the arbitrator informed the parties from the onset that only one employee would be called to adduce evidence in support of the claim and that 'at no stage did the respondent object to the proceeding'. This may well be the case. What cannot be denied though is that the procedure followed was irregular as shown in the cases cited above and that the applicant participated in the irregular process without demur does not then infuse the proceedings with even a modicum of regularity. This may well serve to show that the applicant was correct in seeking the services of a legal representative who could have assisted the arbitrator in following the correct procedure.

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[6] Section 133 (4) (a) and (b) of the Act.
[7] Page 57 of the record paragraph 11.

[23] That the applicant did not object to the wrong procedure being adopted cannot avail the respondents, nor can it assist the arbitrator. The principle *volenti non fit injuria* i.e. to one consenting, no harm is done, that the respondents appear determined to invoke does not apply in such circumstances. For the maxim to apply, the person who suffers harm must know of the harm and be fully appreciative of the harm and consequences heralded by the consent, which is not the case in the instant matter.

[24] Equally unmeritorious, in the face of the authority referred to above, is the respondents' submission that, 'The testimony induced (*sic*) during the arbitration included all the employees'. This was simply not the case as is evident from what I have said above. The only way in which oral evidence would have been dispensed with is if an agreed statement of facts was produced and signed by the parties as a basis for the factual position. Any other route, however convenient, time and cost-saving as it may well be, is neither regular, good, reliable nor acceptable.

[25] Another disconcerting feature of the case relates to the fact that the arbitrator inexplicably made an award in favour of only 90 of the employees. No reasons are given as to why the others were apparently non-suited. This is not to suggest that they were entitled to a favourable order, regard had to the criticisms levelled at the procedure followed and not followed as discussed above. The unexplained disparity in treatment of complainants who were for all intents and purposes seeking more or less the same relief and based on largely similar circumstances even drew the criticism of the respondents' representatives in the present proceedings.[8]

[26] The other disturbing feature is the presence in the proceedings of Mr. Ndeitwa who was eventually called as a witness for the applicants. It appears that he was present throughout the proceedings when the respondents were conducting their case and only came out when it was notified that he would be called as a witness. The arbitrator does not say in his award what level of caution, if any, he employed in the receipt of Mr. Ndeitwa's evidence and whether what Mr. Ndeitwa said in his evidence

[8] Page 58 of the record at para 14 and 15.

had a bearing on the evidence led whilst he was sitting, presumably in the gallery. The court is simply left in the dark as to what weight, if any, was attached to Mr. Ndeitwa's evidence in the light of his presence earlier in the proceedings.

[27] In view of the foregoing irregularities in the procedure followed, I am of the view that the proceedings, even on this ground alone, cannot be allowed to stand.

Non-compliance with Rules relating to class disputes in arbitration

[28] The other salvo unleashed by the applicant is that the arbitrator failed to comply with the rules applicable to class disputes in arbitration.[9] These are contained in rule 17 and they provide as follows:

> (1) 'One or more of a class of employees or employers (hereinafter referred to as a "representative party") may refer a dispute to arbitration (hereinafter referred to as a "class dispute") on behalf of all members of such a class, and must, in addition to complying with rule 14, file with the Labour Commissioner and serve the respondent with an application for class certification on Form LC 38.
> (2) The application for class certification referred to in subrule (1) must describe the class and contain sufficient particulars to establish that –
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> (a) The members of the class in question are such a number that joinder of all such members is impracticable;
> (b) There is a question of law or fact common to the class;
> (c) The dispute referred by the representative party or parties is of a similar nature as the disputes to which the other members of the class are parties;
> (d) The representative party or parties will fairly and adequately protect the interests of the other members of the class;
> (e) The hearing of separate disputes and before different arbitrators will likely create a risk of inconsistent or varying decisions of the arbitrator;
> (f) The respondent or respondents against whom a class dispute has been referred has acted or refused to act on grounds generally applicable to the class; and

[9] Rules applicable to class action in arbitration.

(g) The question of law or fact common to the members of the class predominate over any questions affecting only some members, and a class arbitration is superior to other available methods for the air and efficient resolution of the issues.

(3) On service of the application, the respondent or respondents has 14 days to file opposing affidavits or statements, if any, and the representative party has five days to reply.'

[29] The applicant contends that the provisions of the above rule were not complied with by the respondents in the proceedings *a quo.* For that reason, the applicant alleges that the proceedings conducted by the arbitrator are therefore defective and ought for that reason to be set aside. In the award, the arbitrator stated that this issue was never raised in the proceedings but was included in the submissions at the end of the case.[10] In dealing directly with the issue in the award, the arbitrator relied on *Purity Mangenese (Pty) Ltd v Katjivena,*[11] where he states, the court held that where there has been participation in conciliation, would not result in an award being declared a nullity. He also relied on the provisions of section 59 (1) of the Act, which allow a trade union to represent its members.

[30] I will start with the latter argument. It is true that section 59 (1) (a) grants a trade union the right to 'bring a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act.' The difference is that in the instant case, it is not the trade union which brought the case on behalf of its members but it was the members themselves and in their personal capacities. Had it been the former, the case would have been brought in the name of the union, which is certainly not the case when one has regard to the parties to the dispute. The trade union does not feature at all and did not, from the information available, "bring" any proceedings on behalf of the respondents in this matter. The provisions referred to have no application in the current case.

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[10] Page 25 of the record.
[11] (LC 86/2012 [2014] NALCMD 10.

[31] It may well be on reading the award[12] that Mr. Victor Hamunyela of the Namibia Building Workers Union represented the respondents during the application but it is clear as noonday that it is not the said union which brought the application because had it done so, as indicated above, the dispute would have been in its name. Bringing an application on behalf of members and representing those members are not necessarily synonymous. It may be possible to do both but the situation in the instant case suggests inexorably that the trade union only represented the respondents but did not 'bring' the dispute on behalf of the respondents as appears to be conclusion of the arbitrator. In this, the arbitrator erred.

[32] In relation to the *Hamunyela* case, it must be pointed out that the said case dealt with a different section and aspect of referring a dispute and has no direct relevance to the issue at hand. I say so because the provisions in question relate to class actions. A case in point that deals with the very procedure to be followed when class disputes are referred and on which the applicant laid a lot of store, is *Springbok Patrols (Pty) Ltd v Jacobs And Others.*[13] There the learned Judge said the following:

> 'Not one of the applicants signed a joint referral. No accompanying statement was attached authorizing the union signatory. This non-compliance vitiated the proceedings.'

[33] In my considered view, the certification of the class referral is not just an idle or inconsequential formality. It serves a very useful purpose namely, to make sure that the parties sought to be represented know about the class action and that they have personally made common cause with the referral and that no impostor or busybody masquerading as their representative has pulled the carpet under their feet and purports to represent them in a class dispute they may have no knowledge of. As a result, they should agree to be bound by the findings and not later make a *volte face* and claim they did not know about the fact that they were represented in the proceedings. For this reason, the non-compliance with this provision, in my considered opinion, constituted a defect that entitles this court to set aside the proceedings as irregular as I hereby do.

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[12] Page 2 of the award; page 18 of the record at paragraph 1 on representation.
[13] (LCA702/2012) [2013] NALCMD 17 (2013).

There was not proper evidence before court that the applicants had agreed to launch a class action as no application for such was made as mandatorily required by the rules.

Denial of legal representation

[34] Another issue, which caused spasms of disquiet within me and which was not raised by the applicant but to which I attach some importance, relates to the application by the applicant to have legal representation during the arbitration and how flippantly it was thrown out with both hands by the arbitrator, and as it appears, without any reference to or consideration of the relevant provisions of the Act. It would appear that the applicant applied for legal representation during the arbitration proceedings and this application was denied. In the award[14], the arbitrator states the following regarding that issue, 'The respondent earlier on applied for the legal representation which was declined by the arbitrator as the applicant's representative <u>also</u> objected to such representation.' (Emphasis added). What this appears to suggest is that the arbitrator was also opposed to the application for legal representation and did not only rely for his decision to decline the application on the opposition of the claimants' representative to the application.

[35] The relevant provision of the Act dealing with this issue is section 86 (13), which provides the following:

> 'An arbitrator may permit –
> (a) A legal practitioner to represent a party to a dispute in arbitration proceedings if –
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> (i) the parties to the dispute agree; or
> (ii) at the request of a party to the dispute, the arbitrator is satisfied that –
>
> (aa) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and
> (bb) the other party will not be prejudiced;'

[14] Page 18 of the record.

[36] The section allows a party to a dispute to apply for legal representation and it would appear that if the other party has no objection thereto, the application should be granted. This would be by agreement of the parties. If there is an objection by the other party to the dispute, however, it would seem to me that the arbitrator must consider the dispute as a whole, its merits and demerits, its nuances and twists and turns, if any, and make a value judgment as it were, as to whether or not the dispute is not one that is complex in nature such that it might require or benefit from the engagement of a legal representative. Cases differ in nature, content and ramifications. There are those run of the mill cases which may be straightforward. The arbitrator may be well within his or her rights on application, to refuse legal representation in those circumstances. On the other hand, there may be those matters that involve intractable disputes or raise novel questions and it is in these matters that legal representation may be necessary and should be allowed, even if the other party will have objected.

[37] I should mention that *en passant* that legal representation does not only benefit the party which seeks to be represented, but may also assist the arbitrator in properly identifying and delineating the issues and may also assist in presenting different and beneficial perspectives to the entire dispute. Furthermore, it may even serve to curtail the dispute if the legal practitioner takes the view, as sometimes happens, that his or her client does not have a good case.

[38] The second leg of the enquiry, is whether or not the other party will be prejudiced by granting the application for legal representation. Prejudice, in this case appears to refer to a disadvantage which may detrimentally affect that party's rights and interests during the conduct of the arbitration proceedings. In this regard, Black's Law Dictionary[15] defines prejudice as 'Damage or detriment to one's legal rights or claims'. It therefore means that the arbitrator must bring his or mind to bear and carefully consider whether the other party's rights or interests may be dealt a blow by allowing legal representation for the opposite party. This decision must be undertaken in a completely

[15] Third Pocket Edition, 2006.

dispassionate spirit and setting, eschewing any predilections and personal idiosyncrasies that the arbitrator may harbour regarding the issue of legal representation. The main focus must be on the two-pronged questions mentioned above and no more.

[39] In this matter, it would appear that the arbitrator was himself averse to the application from the onset and found solace in the other party also objecting to the application. The provisions of the section as stipulated above, were not considered at all. It is important to recall that legal representation is otherwise a constitutional right and where it is refused, there must be a proper basis for doing so and one which is fully steeped in the provisions of the Act and not one that is arbitrary, irrational or unreasonable. The decision in this case was made on the basis of irrelevant considerations and should, all things being equal be open to fresh determination in line with the guidelines discussed above. I raise the issue, not because it is a reason for the review application succeeding but as a means of giving guidance to arbitrators as to how to approach the issue of legal representation, particularly in cases where it is ultimately denied.

[40] In *Nedbank Namibia Limited v Duncan Arendorf and Another*[16] Smuts J (as he then was), had occasion to deal with the issue of legal representation and the proper approach to that question by an arbitrator in the following terms, which as will be seen, coincide with my own views expressed above on this very point. At page 8 [para 22-23], the learned judge said:

> '[22] It is clear to me from the reasons provided by the arbitrator show that he had not properly applied his mind to the requirements of the section. He had plainly not considered the complexity of the matter and the role of the legal representative which could significantly assist the tribunal in dealing with complex evidential issues. It would also appear to me that the arbitrator rigidly adhered to a predetermined approach to

[16] (LC 208/2013) [2014] NAHCMD 29 (25 June 2014).

> requests for legal representation where one of the parties would not have been represented without considering the factual matter raised in the request made to him.
> [23] An arbitrator is clearly required to consider the request of this nature upon the facts and circumstances of each individual case placed before him. In this matter, it is clear from the uncontested facts put before me that the dispute raises highly complex factual questions and no doubt reasonably complex question of law as well. This was correctly conceded by the first respondent. It is also clear to me that this aspect was not properly considered by the arbitrator in making his decision. Furthermore, it would appear that the question of prejudice was also not properly entertained at the time. It was not properly specified in his reasons and would appear to be an afterthought raised in opposition to this application after legal advice had sought.'

[41] It would appear that the learned judge again had the present matter in mind. I unfortunately have not been placed in possession of the relevant documents relating to the motivation for the application for legal representation as was the learned judge, but from his reasons advanced, it is very clear that the arbitrator in this case committed a misdirection in the application of the law which from the paucity of information at my disposal, does not place me in a position to state authoritatively whether this was a proper case in which legal representation was necessary.

[42] What cannot be denied though is that some of the mistakes of colossal proportions committed by the arbitrator pointed out above, would have been avoided had the application been allowed. I may add that although this is not included in the considerations, where the dispute is likely to involve large sums of money in the case of an award being successful, an arbitrator should not lightly deny representation to a party that makes application, especially where the issue of prejudice to the other party points in the direction of allowing legal representation.

[43] In closing, I cite the judgment in *Bester v Easigas (Pty) Ltd*[17]where Brandt A.J. (as he then was) stated the standard fitting to result in proceedings being set aside on the basis that they are irregular. The learned judge said:

[17] 1993 (1) SA 30 (C).

> ‘From these authorities it appears, firstly that the ground of review envisaged by the use of the phrase [i.e. gross irregularity] relates to the conduct of the proceedings and not the result thereof . . . But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handedness or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined. Secondly, it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having had his case fully and fairly determined.’

The issues raised above, individually and more so, when considered cumulatively, meet the standard set by the learned judge.

[44] In view of the positive findings I have made regarding the above points, which as I have said, amount to defects as envisaged in the Act, I am of the view that it is unnecessary to flog what is evidently a dead horse by considering the other grounds of review raised by the applicant herein. This would include the attack on the Labour Commissioner himself having become *functus officio* and him personally dealing with the matter and not the conciliator.

[45] For the foregoing reasons, I granted the order in the following terms:

(1) The entire arbitration proceedings presided over by the 182nd respondent as well as the award issued subsequent thereto dated 24 December 2014 under Case No: 108-14 are hereby reviewed, corrected and set aside.
(2) There shall be no order as to costs.

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TS Masuku, AJ

APPEARANCES

APPLICANT:	S. Rukoro
	Instructed by Dr Weder, Kauta & Hoveka Inc.
RESPONDENTS:	Non appearance