REPUBLIC OF NAMIBIA **REPORTABLE**

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: LC 94/2013

TEMUS IITENGULA **APPLICANT**

And

ANGELINE HAGEN **FIRST RESPONDENT**
THE LABOUR COMMISSIONER **SECOND RESPONDENT**
NAMDEB DIAMOND CORPORATION **THIRD RESPONDENT**

Neutral citation: *Iitengula v Hagen and others* (LC 94/2013) [2016] NALCMD 10 (19 February 2016)

Coram: GEIER J
Heard: **08 May 2015**
Delivered: **19 February 2016**
Released: **15 March 2016**

Flynote: Labour law — Labour dispute — Conciliation and Arbitration — Referral for — Rules 5, 11(2) and 14(2)(a) of the Rules Relating to the Conduct of Conciliation and Arbitration requiring referral document be signed by referral party — Form LC 21 not signed by referral party as required by these Rules — Court generally approving and following approach set by court in *Purity Manganese (Pty) Ltd v Katjivena and*

Others 2015 (2) NR 418 (LC) - Respondents participation in the arbitration thus held to amount to the ratification of the rule non-compliant referral —

Court however qualifying the general approach set in *Katjivena* in that it questioned whether also the parties' participation, in the preceding conciliation process, set by Section 85(6) of the Labour Act, should cause a party to be estopped from raising this technical objection relating to a party's failure to comply with the Rules Relating to Conduct of Conciliation and Arbitration, rules 5, 11(2) and 14(2)(a), immediately at the commencement of the ensuing arbitration proceedings by virtue of the fact that the preceding conciliation proceedings were 'private and confidential' and were conducted on a 'without prejudice' basis.

Court thus holding that the participation of a party, in the prescribed 'without prejudice' process of conciliation, before arbitration can commence, would not lose the right to raise that point immediately thereafter at the commencement of arbitration. Once such a party has however participated in the ensuing arbitration, without raising the point, such party can no longer, for obvious reasons, and for those stated in the *Katjivena* judgment, belatedly, raise the objection thereafter.

Words and phrases - 'award' - word not defined in the Labour Act 2007 - Meaning of - as contained in Section 89(4) of the Labour Act 2007 - concept broad enough to also include a decision by an arbitrator to dismiss a complaint serving before him or her.

Court accordingly holding that the decision to dismiss a complaint due to the absence of a party at a scheduled arbitration had to be served on the party as required by Section 89(4)(a) before the time period set in the section could commence to run.

Summary: The underlying facts appear from the judgment.

ORDER

The application for review is hereby dismissed.

JUDGMENT

GEIER J:

[1] In this labour review the first, amongst a number of technical issues, raised on an *in limine* basis is, whether or not, the review was instituted within the 30 day period stipulated in Section 89(4) of Labour Act of 2007.

[2] This court has in the *Lungameni and Others v Hagen and Another*[1] and *Puma Chemicals v Labour Commissioner and Another*[2] cases held that the Labour Court has no power to condone the non-compliance of an applicant with Section 89(4)(a) and thus, should it be found, that the applicant in this matter has brought this review outside the time period set in Section 89(4)(a), that would be the end of the matter, as the court would then have no jurisdiction to hear it.

WAS THE REVIEW BROUGHT TIMEOUSLY

[3] In the quest to ward off this point the following submissions were mustered on behalf of the applicant:

'In terms of Section 89(4) of the Labour Act 11 of 2007 Herein referred to as the Labour Act) an application for review should be brought within 30 days after the award was served on the party.

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[1]2014 (2) NR 352 (LC) at [10]
[2]2014 (2) NR 355 (LC) at [40] to [41] and [47]

Section 89(4) provides:

" 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 or;*

(b) *if the alleged defect involves corruption within six weeks after the date that the applicant discovers the corruption."*

Section 129 of the Labour Act regulate the service of documents in terms of the Labour Act, Section 129 of the Act provides as follows:

"129 Service of documents

(1) For the purpose of this Act-

(a) a document includes any notice, referral or application required to be served in terms of this Act, except documents served in relation to a Labour Court case; and

(b) an address includes a person's residential or office address, post office box number, or private box of that employee's employer.

(2) A document is served on a person if it is-

(a) delivered personally;

(b) sent by registered post to the person's last known address;

(c) left with an adult individual apparently residing at or occupying or employed at the person's last known address; or

(d) in the case of a company-

(i) delivered to the public officer of the company;

(ii) left with some adult individual apparently residing at or occupying or employed at its registered address;

(iii) sent by registered post addressed to the company or its public officer at their last known addresses; or

(iv) transmitted by means of a facsimile transmission to the person concerned at the registered office of the company.

Ueitele J*,* in the case of *Strauss v Namibia Institute of Mining & Technology (LC 94/2012)* [2013] NALCMD 38 (06 November 2013) dealt with the form of service as provided for in the Act in terms of section 129, held:

> "In addition to the provisions of section 129 of the Labour Act, 2007, Rule 27(4) of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner provides that *if a matter is dismissed, the conciliator or arbitrator **must** send a copy of the ruling to the parties*."

In the *Strauss* matter supra it was further held that:

> "*The contentions of Mr Mueller that the applicant was telephonically informed of the dismissal of the complaint on 04 May 2011 are of no consequence. I say so for the following reasons the Rules in peremptory terms state that the Arbitrator **must** send a copy of the ruling to the parties, section 86(4) of the Labour Act, 2007 provides that the computation of the days within which the application for review must be instituted starts from the day that the decision/ arbitration award is **served** on a party and section 129 of the Labour Act, 2007 defines what is meant by served. It therefore follows that the computation of the period within which to launch commences from the date on which she was served with written ruling of the Arbitrator and I find that the Arbitrator 's ruling was served or sent to the applicant on 12 June 2012."*

In light of the above submission, we submit that the Applicant was never served with the arbitration award by the Third Respondent in compliance with of the Labour Act. The period of 30 days did not begin to run, until the said written award was received.

The Applicant was informed by her legal representative on the 24th of May 2013 that the matter was really dismissed. A copy of the award was in fact only faxed to the Applicant's

legal representative on the 29th of May 2013. The review application was brought on the 13th of June 2013, well within the 30days period.'

[4] On behalf of the 3rd respondent, who had raised the point, the case was argued as follows:

'In terms of Rule 14(2)(a)(ii) of this court, an application for review must be made within 30 days of the decision which is being challenged.

In paragraph 19 of applicant's founding affidavit he deals with the events surrounding the arbitration hearing of 4 April 2013. The applicant states that he asked the arbitrator to postpone the matter in order to give his legal representatives an opportunity to apply for and to be granted a permit to enter Oranjemund. The applicant further states that the first and third respondents refused his request. He then states the following:

> "I then walked out to consult my legal representatives via the phone. Upon my return I was informed that the matter was dismissed."

The applicant's own unequivocal version under oath is that he already knew on 4 April 2013 that the matter had been dismissed.

Applicant's review application was only filed and served with this Honourable Court on 13 June 2013, some six weeks late.

Section 89 of the Labour Act, 11 of 2007 ("the Act") does not make provision for condonation for the late filing of a review application. In the matter of *Lungameni v Hagen NO and another*, NLLP 2014(8) 40 LCN at paragraphs 6 and 7 Smuts, J stated the following:

> "[6] Mr Philander argued that this Court would not be vested with any power to condone a non-compliance with the Act, in other words with s 89(4), in the absence of a power contained in the Act to do so. He referred to the provisions dealing with appeals and the time period for noting an appeal to this Court from an award of an arbitrator embodied in section 89(1). He referred to s 89(3) which contains a specific power to condone the late noting and of an appeal on good cause shown. There is no similar power with respect to applications for review under s 89(4). He

accordingly submitted that a rule could not vest this court with the power to condone non-compliance with a peremptory statutory provision embodied s 89(4) of the Act in the absence of the power to do so contained in the Act.

[7] This submission is in my view well founded. It is based upon authorities of this court with regard to the time periods provided for in the Act, such as the time period within which disputes are to be referred to the office of the Labour Commissioner. The power to condone a referral out of time has not been provided for in the Act. This Court has made it clear that those provisions are peremptory and that this Court is not vested with the power to condone non-compliance with those time periods. It did so in the Namibia Development Corporation vs Mwandingi and 2 Others which followed two other unreported decisions of this court to similar effect which are referred to in it. Although those decisions referred to the taking of other steps in the Act, that approach would apply with the equal force to s 89(4)."

In order to bring himself within the 30 day period stipulated by Rule 14(2)(a)(ii), the applicant attempts to rely on rule 27(4) of the Rules Relating to the Conduct of Conciliation and Arbitration ("the ConArb Rules") and the judgment in the matter of *Strauss v Namibia Institute of Mining & Technology & Others*.

The applicant argues that, although he was aware of the dismissal of his dispute on 4 April 2013, the time period for filing a review did not commence until he had been served with the award in terms of ConArb rule 27, read with section 129 of the Act.

The applicant's contentions in this regard are, with respect, misplaced. ConArb rule 27 deals with the "**Failure of a party to attend conciliation or arbitration proceedings**". Therefore, if a matter is dismissed in the absence of a party, the conciliator or arbitrator must "send a copy of the ruling to the parties".

It is submitted that if this had to occur also when the party was present at the proceedings and was aware of the dismissal at the time of such proceedings, it would have the absurd result that a party, despite being present and knowing that his or her dispute had been dismissed, can decide a year or two later to review the decision, simply because the arbitrator failed to send the ruling to the parties (which often happens). This is not what the legislature intended with ConArb rule 27(4).

The applicant's reliance on the aforementioned matter of *Strauss v Namibia Institute of Mining* is likewise misplaced because it is distinguishable on the facts. In that matter neither the applicant nor her representative attended the arbitration hearing on 28 April 2011 and the matter was dismissed in their absence. Those facts fall squarely within the confines of ConArb rule 27, the purpose of which is clearly to inform absent parties of the dismissal of their dispute. ConArb rule 27 should not be abused by parties, who obtain knowledge of the dismissal of their disputes or of irregular proceedings during and at the hearing of the arbitration, to file review applications beyond the 30 day period.

In the premises applicant's review application should be struck off the roll, alternatively dismissed, on this basis alone.'

[5] The determination of this first issue is however straight forward.

[6] The main basis on which the applicant contends that this review has not been brought outside the prescribed 30 day window rests on the provisions of Section 89(4) which first require service of the award on an applicant to a review before the 30 day period can commence to run. Reliance was placed in this regard also on what Ueitele J said in *Strauss vs Namibia Institute of Mining Technology* at paragraph [24] of the judgment[3].

[7] The 3rd respondent on the other hand contends that the review is out of time by some six weeks. In this regard it is contended further that the applicant attempts to rely on Rule 14(2)(a)(ii) of the rules relating to 'the Conduct of Conciliation and Arbitration', referred to herein after as the 'ConArb Rules', which reliance, so it is argued, is misplaced as the rule governs the case of the failure of a party to be in attendance at arbitration or conciliation proceedings, which was not the case as here, as the applicant, on his own version stated:

'I then walked out to consult my legal representatives via the phone. Upon my return I was informed that the matter was dismissed',

[3] As quoted above

and that the applicant thus, on his own admission, already knew on 4 April 2013 that the matter had been dismissed.

[8] The 3rd respondent's counsel must be correct in the submissions made in regard ConArb Rule 14(2)(a)(ii) which clearly cannot be of application, and thus cannot be of assistance to the applicant, as the rule was always designed to regulate the giving of notice to absent parties that his or her case has been dismissed.

[9] On the facts this was not the case here and reliance on this rule, by the applicant, is indeed misplaced.

[10] At this stage it is convenient to mention that the court, at the time of reserving its judgment, also invited the parties to file supplementary heads of arguments on the following formulated questions:

'(a) Does the dismissal of the applicant on 04 April 2013 constitute and award as contemplated in the Labour Act 2007, which became reviewable in terms of section 89(4) of the Act and application, accordingly has to be brought in the manner and within the time frame prescribed by the Act.

or

(b) Does the dismissal of the applicant on 04 April 2013 constitute a decision by a body or official provided for in terms of the Labour Act 2007, which became reviewable in terms of Rule 14(2)(a)(ii) of the Rules of the Labour Court in which event the application for review would have had to be brought in the manner and within the timeframes prescribed by the Rules of the Labour Court.'

[11] It was correctly pointed out that these questions were imprecisely formulated by the court and should have read:

"Does the dismissal of the application for postponement on 04 April 2013 constitute …."

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or

"Does the dismissal of case no. SRKE 09/13 on 04 April 2013 constitute …."

[12] The applicant's submissions on this ran as follows:

' It is common cause that the applicant referred a dispute in terms of *Chapter 8, Part C, Section 86 of the Labour Act 11 of 2007*. And the proceedings of 4 April 2013 was held in terms of these provisions. At the conclusion (although halted) of the proceedings referred to above, the arbitrator arrived at a decision to dismiss the applicant's matter, which is referred to as an award, which the applicant now seeks to review. Prior to arriving at the award which has the effect of finality, the arbitrator committed a series of irregularities and misconduct measured at a standard of an arbitrator, one of which is failure to deal with the applicant's application for Legal Representation. It is thus the applicant's case that the road to the ultimate award was tainted with irregularities and misconduct, thus entitling the Labour Court, to set aside the decision/award.

Arbitration proceedings are given trappings of judicial forums. This was confirmed in the judgment of *Purity Manganese Pty Ltd v Katzao & others (LC80/2010) [2001] NALC 19 (11 July 2011) at paragraph 21* were Damaseb JP held that;

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

In terms of *Section 89(4)* of the Labour Act 11 of 2007 an application for review should be brought within 30 days after the award was served on the party. The word

"award" is not defined in the labour Act. However Ueitele J has interpreted same to include a "*decision*" made by an arbitrator.

In *Strauss v Namibia Institute of Mining & Technology (LC 94/2012)* [2013] NALCMD 38 (06 November 2013), Ueitele J held that;

> *"In addition to the provisions of section 129 of the Labour Act, 2007, Rule 27(4) of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner provides that* ***if a matter is dismissed****, the conciliator or arbitrator* ***must*** *send a copy of the ruling to the parites*."
>
> *"The contentions of Mr Mueller that the applicant was telephonically informed of the dismissal of the complaint on 04 May 2011 are of no consequence. I say so for the following reasons the Rules in peremptory terms state that the Arbitrator must send a copy of the ruling to the parties, section 89(4) of the Labour Act, 2007 provides that the computation of the days within which the application for review must be instituted starts from the day that the* ***decision/arbitration*** *award is* ***served*** *on a party and section 129 of the Labour Act, 2007 defines what is meant by served. It therefore follows that the computation of the period within which to launch commences from the date on which she was served* ***with written ruling*** *of the Arbitrator and I find that the* ***Arbitrator's ruling*** *was served or sent to the applicant on 12 June 2012."*

It therefore follows that, the dismissal of the applicant's case on 04 April 2013 constitutes a reviewable award, as envisaged in *section 89(4)*, and thus reviewable within 30 days from the date that the award/decision was served.

The facts of the case is somehow distinguishable from any other case, as it does not place the arbitrator in a position to act squarely in terms rule *27(2)* and *(4)*, of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner, as the applicant was present, and the arbitration proceedings commenced, and it is within the commencement of the proceedings that the arbitrator committed the irregularities and the misconducts necessitating the review herein, and of which the outcome was the dismissal of the applicant's matter.

We therefore submit that, the clothing of arbitration tribunals as a judicial forum brings its decision within *section 89(4)*, which is a remedy available to a party to such proceedings. Limiting the applications of the provisions of *section 89(4)* to only awards which do not result in the dismissal of any applicant's matter cannot be said that it is what the Legislature intended for, more so when the word "award" is not defined. Further the Act or rules does not prohibit the brining of review application in a matter like that of the applicant.

In any event, even if the review proceedings herein are to be said that they fall within the ambit of rule 14(2)(ii), as opposed to Section 89(4), in pre-emptory terms as Ueitele J found in the *Strauss* matter *supra*, the arbitrator **MUST** still send the decision, as per rule 27(4) of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner, before the computation of the 30 days commences.

In light of the above submission, we submit that the Applicant was never served with the arbitration award or decision by the First Respondent in compliance with provisions of the Labour Act or the rules. The period of 30 days did not begin to run, until the said written award or decision was received.

The Applicant was informed by his legal representative on the 24th of May 2013 that the matter was really dismissed. A copy of the award was in fact only faxed to the Applicant's legal representative on the 29th of May 2013. The review application was brought on the 13th of June 2013, well within the 30 days period.'

[13] In this regard the following can immediately be said that:

a) The concept 'award' is not defined in the Labour Act 2007.

and that

b) in relation to a dispute, referred in terms of Part C of Chapter 8 of the Labour Act 2007, Section 86(15) lists the possible awards an arbitrator can make[4].

[4]86 (15) The arbitrator may make any appropriate arbitration award including- (a) an interdict; (b) an order directing the performance of any act that will remedy a wrong; (c)a declaratory order; (d) an order of reinstatement of an employee; (e) an award of compensation; and (f) subject to subsection (16), an order for costs.

[14] On behalf of the 3rd respondent it was submitted that by making an award an arbitrator gives, or orders the giving of something, as relief or compensation to a party to the proceedings. A distinction was so to be made between "the giving of something" i.e the awarding of some relief and a 'dismissal'. "A dismissal of a complaint", so it was argued, is a mere decision, in terms of which nothing is awarded and that in any event a dismissal only amounts to a mere refusal on the part of an arbitrator to make an award or to grant an order for any relief sought by the applicant. Accordingly, as no award was made, so the argument run further, Section 89(4) was not of application, and, service of the 1st respondent's decision, upon the applicant, in terms of Section 89(4), or ConArb Rule 14(1)(a)(ii), was not required.

[15] As attractive as this argument might be it cannot be upheld as:

a) firstly, Section 86(15) of the Labour Act does not limit an arbitrator to the awards listed in that section as the statute expressly allows an arbitrator to make *'any appropriate award including …'* those that that are listed in sub-section (15);

b) secondly, and as a matter of logic, it cannot be that a decision to dismiss a complaint does not award anything to the party that benefits from the dismissal;

c) thirdly, this conclusion is underscored by the dictionary meanings which can be assigned to the word 'award' and to which, for instance, according to the *Thesaurus* function available on the 'Microsoft Word' computer programme, the concept includes: *'a verdict, a decision or a determination'*.[5]

d) A 'dismissal' in my view also grants relief to a party in whose favour such a 'decision' or 'determination' is made.

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[5]See also in this regard further: the *'Chambers English Dictionary'* reprint 1990, at page 96 which defines 'award' as *' to adjudge, to determine, to grant, judgment, final decision, esp of arbitrators, that which is awarded: a prize …'*; and 'Collins English Dictionary – Complete and Unabridged' 6th Ed 2003 at page 113': *' … to declare to be entitled, as by decision, … the decision of an arbitrator …'*.

[16] I therefore find that the word 'award' as contained in Section 89(4) is broad enough to also include a decision by an arbitrator to dismiss a complaint serving before him or her.

[17] This finding then means that the decision made by the 1st respondent at the time had to be served on the applicant as required by Section 89(4)(a).

[18] Accordingly I also find on the facts, which are common cause in this respect, that the decision, in this instance, was served on the applicant on the 29th of May 2013 and that the review was brought thereafter on the 13th of June 2013 and that this review was therefore brought timeously, within the time period prescribed by the Act.

THE ISSUE RELATING TO THE APPLICANT'S FAILURE TO PERSONALLY SIGN FORM LC 21

[19] The next technical hurdle which was placed in the applicant's way was his failure to personally sign the referral form LC 21 which was signed by Mr Ntinda the applicant's legal representative in breach of ConArb Rules 5, 11(2) and 14(2)(a), in circumstances where Mr Ntinda was not entitled to sign such form.

[20] Although there are conflicting judgments on the point I am inclined to follow the less harsh and more qualified reasoning of the court in *Purity Manganese (Pty) Ltd v Katjivena and Others*[6], which thoroughly analysed the conflicting judgments made in this regard in the *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others*[7] and *Waterberg Wilderness Lodge v Uses and 27 Others* [8] cases and which now recognised and applied a more flexible approach to the rule although it can, generally still be said that, an act, which is performed contrary to a statutory provision, is to be regarded as a nullity.

[6]2015 (2) NR 418 (LC)
[7] LCA 70/2012, [2013] NALCMD 17, 31 May 2013
[8]LC case No LCA 16/2011, Van Niekerk J, 20 October 2011

[21] It makes eminent sense that such general rule should not be considered fixed or inflexible and that regard should be had to the objects of the rule and the intention of the legislature. I believe therefore that it would be appropriate to conclude also on the strength of the South African authorities referred to and relied upon by the learned Judge in *Purity Manganese (Pty) Ltd v Katjivena and Others* that any objection based on a referring party's failure to sign form LC21 in accordance with the rules should be raised *in limine* which right can subsequently be lost, once that party participates in the arbitration process without raising that objection at the outset.

[22] I beg to differ however in one important respect with the *Katjivena* judgment, as I question, whether also a parties' participation, in the required preceding conciliation process[9], should cause a party to be estopped from raising this technical objection immediately at the commencement of arbitration proceedings by virtue of the fact that the preceding conciliation proceedings are 'private and confidential' and are conducted on a 'without prejudice' basis.[10]

[23] I cannot see how in such circumstances the participation of a party in the prescribed 'without prejudice' process of conciliation, before arbitration can commence, should lose the right to raise that point immediately thereafter at the commencement of the arbitration. Once such a party has however participated in the ensuing arbitration without raising the point, such party can no longer, for obvious reasons, and for those stated in the *Katjivena* judgment, belatedly, raise the objection.

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[9]Section 86(5) 'Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.'

[10]Compare ConArb Rule 13 Confidentiality of conciliation proceedings - (1) Conciliation proceedings are private and confidential and are conducted on a "without prejudice" basis. (2) No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing. (3) No person, including a conciliator, may be called as a witness during any subsequent proceedings or in any court to give evidence about what transpired during conciliation proceedings, except that disclosure may be ordered by a court- (a) in the course of adducing evidence in any criminal proceedings; or (b) when it is in the interests of justice that disclosure be made.

[24] This is precisely what also occurred in this instance. We do not know what was said or what transpired during conciliation. We do however know, from the record, that the point was not raised on behalf of the 3rd respondent at the commencement of arbitration on the 4th of March 2013.

[25] The 3rd respondent representative Ms Borman did, on resumption of the proceedings, and once the applicant had walked out, firstly express her concern that she was still waiting for one of the 3rd respondent's witnesses and then, after pointing out that the applicant was not there, i.e. had not returned, to ask for the dismissal of the applicant's case, which request was granted in terms of Con Arb Rule 27(2)(c).

[26] On the application of the principles formulated in *Katjivena* - as qualified in this judgment - which principles, as I have said, I endorse, save for the qualification mentioned above - the participation by the 3rd respondent, in the arbitration process, subsequent to the conciliation attempt, without first raising the objection, relating to the applicants failure to sign Form LC 21, precludes the 3rd respondent, in my view, from raising this point belatedly.

[27] Accordingly the second point *in limine,* raised by the 3rd respondent, cannot be upheld.

THE MERITS

[28] This leaves the determination of the merits of the review in respect of which the applicant's legal practitioners formulated their client's case as follows:

' In terms of section 117(1) (b) of the Labour Act, the Labour Court has exclusive jurisdiction to review the arbitration award made in terms of the Act. The decisions which the applicants seek to have reviewed are as follows:

The first respondent's decision that the matter should be dismissed due to the fact that the applicant requested for postponement but the third respondent did not agree with the postponement and the applicant walked out of the meeting.

The first respondent's decision that the applicant walking out of the meeting is a ground for dismissal of the entire case.

Review of arbitral awards is governed by subsection (4), read with subsections (5) and (10), of s 89 of the Labour Act 11 of 2007. there are only four grounds under the Labour Act for reviewing and setting aside an:

(5) A defect referred to in subsection (4) means –

(a) that the arbitrator -

(i) ***committed misconduct in relation to the duties of an arbitrator;***

(ii) ***committed a gross irregularity in the conduct of the arbitration proceedings; or***

(iii) ***exceeded the arbitrator's power; or***

(b) that the award has been improperly obtained.

The grounds for reviewing and setting aside the arbitration of the First Respondent are as follows:

a) the refusal by the first respondent to grant the postponement request on the 2nd of April 2013, despite compelling reasons why applicant's legal representatives could not be present;

b) the first respondent's decision that legal representatives are not automatically allowed in the hearing, while proper application was made and no objection was received, and no opportunity for representation was allowed for legal representative to advance its arguments and reasons to arbitrator why representation was necessary;

c) the first respondent's refusal to understand and take into consideration the

unforeseen circumstances faced by applicant's legal representation.

In the present case the need for the postponement was not foreseen until a day before the legal representative of the Applicant were scheduled to travel.

a) The Applicant was present at the hearing and he opted to make the application in person. The first respondent's refusal to understand and take into consideration the unforeseen circumstances faced by applicant's legal representation is a gross irregularity.

b) Irregularity as held in the case of *Strauss v Namibia Institute of Mining & Technology* (LC 94/2012) [2013] NALCMD 38 (06 November 2013) where the case of *Bester v Easigas (Pty) Ltd and Another* Brand, AJ said:

"From these authorities it appears, firstly, that the ground of review envisaged by the use of this 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-handed 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 on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.

Also see Parker who argues that:

'Gross irregularity will be found to exist where there has been a breach of the rules of natural justice resulting in the aggrieved party not having had his case heard and fairly determined.'

a. It's common cause that on the 16th January 2013, the legal representatives of the Applicant in terms of section 82(7) and 86(1) of the Labour Act of 2007 an rule 11 and 14 referred a dispute of unfair dismissal on behalf of the Applicant. The LC 21

was accompanied by a LC 29 supported by an affidavit to support the application for legal representation.

b. On the 08th of March 2013 conciliation was held at the offices of the Labour Commissioner in Windhoek. The Applicant was represented by his legal representatives and the third respondent by two of its representatives, one of which is the Third Respondent's legal advisor, it was agreed that he matter shall be transferred to Orandjemund as Windhoek arbitrators had no jurisdiction to hear the matter.

c. Both First and Third Respondent were well aware that the Applicant shall be represented by their legal representative at the Arbitration hearing to be held in Orandjemund.

d. Applicant's legal representative was of the bona fide belief that as a result of the public notice that Orandjemund was an open town there was no permit required to enter same. Since the notice of the arbitration hearing to be held in Orandjemund was served on the Applicant's legal representative travelling arrangements were only made on the 28th of March 2013.

e. Applicant's legal representative in attempt to book the flight ticket was informed that she needed a permit. She was further informed that the said permit took 7 days to be granted. When the said information was communicated, Applicant's legal representative made attempt to obtain a permit sooner, to no avail.

f. On the 2nd of April 2014 Applicant's legal representative addressed a letter to the First Respondent in attempt to seek a postponement as a result of the unforeseen circumstances they found themselves in. The said request was refused by the First Respondent.

g. Applicant travelled on the 2nd of April 2013 and was only informed that his legal representative will not be permitted to enter into Oranjemund. Applicant was not prepared to represent himself in the said arbitration he had to attend.

h. In light of the letter written to the First Respondent and the further application

made by the Applicant a reasonable arbitrator would have applied her mind and granted the postponement. Her failure to grant the said postponement under such circumstances goes to the very root of a fair hearing and thus grossly irregular.

i. Applicant in attempt to consult his legal representative went outside, on his return he was informed by the Third Respondent that the said referral was dismissed. A reasonable arbitrator would have not dismissed Applicant's referral merely on the basis of the Applicant walking out of the arbitration. She could then hear the merits and have the matter in the absence of the Applicant.

j. First Respondent, after hearing the submissions of the Applicant, opted to dismiss the referral. First Respondent could at the very least have attempted to conciliate the matter, she failed to, another violation of her statutory duties. The conduct of the First Respondent is a gross-irregularity and as result Applicant's case was not fully and fairly determined as contemplated in section 89(5)(a)(ii) of the Labour Act, 2007.

LEGAL REPRESENTION IN ARBITRATION

Section 86(13) regulates the allowing of legal representatives in arbitration hearing;

(13) An arbitrator may permit –

(a) *a legal practitioner to represent a party to a dispute in arbitration proceedings if -*

(i) *the parties to the dispute agree; or*

(ii) at the request of a party to a 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 to the dispute will not be prejudiced; or

(b) *other individual to represent a party to a dispute in arbitration proceedings.*

In terms of this provision the Arbitrator should consider the above factors before she

refuses legal representation. Third Respondent failed to apply her mind to the supporting affidavit of the application for legal representation.

Applicant's referral application was accompanied by the LC 29 was accompanied by an affidavit that explained to the Third Respondent, the complexity of the dispute and the manner in which the legal representative shall assist expedite the proceedings.

In the present case at the conciliation hearing the issue of legal representation of the applicant was not put in dispute, and in fact the legal representative participate in those proceedings.

Further the applicant's legal representatives were in communication with the first respondent, at no point were they informed that they were not allowed to represent the applicant in the arbitration hearing to be held in Oranjemund.

In light of the above, the conduct of the first respondent to decide in her arbitration award that the applicant's legal representatives were not permitted in the arbitration hearing goes to the roots of gross irregularity. The first respondent made her decision prematurely as she did not hear any submissions from the legal representatives of the applicant. The provisions of section 86(3) should be utilised with guidance.

The first respondent failed to exercise her discretion in a just manner. First Respondent exercised her discretion wrongly. Applicant had not consulted his legal representatives; he was not in a position to adequately defend himself. First Respondent failed to consider the prejudice that Applicant stood to suffer.

The Applicant's right to fair trial was infringed by the decision of the Third Respondent to dismiss his referral in his absence: Article12 (1)(a) of the Namibian Constitution provides as follows:

'Article 12 Fair Trial

(1) *(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by*

law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

In Namibia Bureau De Change (Pty) Ltd v Mwandingi NO (LCA 65/2013) [2014] NALCMD 31 (25 July 2014) court held:

"In my opinion the arbitrator when acting as such under the Labour Act, 2007 is a tribunal as envisaged by Article 12(1) (a) of the Constitution. There is thus no doubt that an arbitration under the Labour Act, 2007 is a tribunal. The hallmark of arbitration is that it is an adjudicative process. As arbitration is a form of adjudication the function of an arbitrator and the Labour Commissioner is not administrative but judicial in nature. The Labour Commissioner or an arbitrator must therefore, before arriving at any conclusion, consider any complaint or application brought to his attention judiciously.

(2) *The requirement to act judiciously imposes a duty on the arbitrator to treat a party before him fairly and in accordance with a fair procedure. The requirement to act fairly finds its expression in the celebrated principles of natural justice which dictates that a person who is affected by any decision or action must be afforded a fair and unbiased hearing before the decision or action is taken. The principles of natural justice are expressed in the Latin maxims of audi alteram partem (hear the other side) and nemo iudex in propia causa (no one may judge in his own cause).*

Baxter explains the operation of the principle as follows:

(3) *'The principles of natural justice are flexible. The range and variety of situations to which they apply are extensive. If the principles are to serve efficiently the purposes for which they exist it would be counterproductive to attempt to prescribe rigidly the form which the principles should take in all cases.'*

Smuts J in the case of *Nedbank Namibia Limited v Arendorf (LC 208/2013) [2014] NAHCMD 29 (25 June 2014)* court held what the Arbitrator should consider when an application for representation is sought;

"An arbitrator is clearly required to consider a 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 questions of law as well."*

In all these circumstances, it is clear to me that the arbitrator had **failed to properly apply her mind to the request for legal representation and her decision to refuse that application is hereby set aside**. It would seem to me that this would be one of those cases in which it would be justified to permit legal representation.

In light of the above submissions we pray for an order in terms of our notice of motion.'

[29] The 3rd respondent's counter was motivated as follows:

'The applicant contends that the first respondent's decision not to postpone the matter pursuant to the letter of 2 April 2013 constitutes a gross irregularity.

With respect, there is no substance in this ground of review. ConArb rule 29, dealing with postponements of arbitration hearings, reads as follows:

"(1) An arbitration hearing may be postponed –

(a) by agreement between the parties in terms of subrule (2); or

(b) by application and on notice to the other parties in terms of subrule (3).

(2) The arbitrator must postpone an arbitration without the parties appearing if -

(a) all the parties to the dispute agree in writing to the postponement; and

(a) the written agreement for the postponement is received by the arbitrator more than seven days prior to the scheduled date of the arbitration.

(3) If the conditions of subrule (2) are not met, any party may apply, in terms of rule 28, to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the arbitrator before the scheduled date of the arbitration.

(4) After considering the written application, the arbitrator may -

(a) without convening a hearing, postpone the matter;

(b) convene a hearing to determine whether ot postpone the matter; or

(c) deny the application."

The third respondent opposed any postponement of the arbitration proceedings. ConArb rule 29(3) therefore applied. The applicant and his legal representatives failed to apply for a postponement of the arbitration in terms of Rule 28 of the ConArb rules. It is submitted that the first respondent, particularly in the absence of a substantive application for a postponement setting out all the facts under oath, exercised her discretion correctly by refusing a postponement of the matter.

The applicant and his representative are also being needlessly vague about how and when exactly they discovered that a permit was required to enter Oranjemund. In paragraph 16 of the founding affidavit he states that it was "during or about 28th March 2013", which in any event was six days prior to the arbitration hearing and more than sufficient time to apply for a postponement in terms of ConArb rule 29. Such an application could even have been drafted on 2 April 2013 when the first respondent indicated[11] that she would not grant a postponement.

More importantly though, Alethea Borman and Eddy Christian state under oath that already at the hearing in Windhoek on 8 March 2013 they advised the applicant and his

[11]Record p 10 par 18

representative that a permit would be required from the Ministry of Mines and Energy and that same should be applied for at least two weeks prior to any hearing in Oranjemund. The applicant and his representative did not heed this advice, thereby themselves causing the dilemma in which they found themselves on 2 and 4 April 2013.

The third respondent therefore takes issue with the applicant's contention that "the need for a postponement was not foreseen until a day before the legal representative of the applicant was scheduled to travel".

Refusing a postponement under these circumstances does not amount to any irregularity at all, let alone a gross irregularity. The first respondent's decision in this regard does not amount to conduct which is "high-handed or mistaken" which "has prevented the aggrieved party from having his case fully and fairly determined". Likewise, there had been no breach of the rules of natural justice since the applicant could have proceeded with the matter on his own, but instead elected to absent himself from the hearing. The fact that the applicant's matter was not heard on 4 April 2013 was of his own and his representative's making.

The issue of legal representation

The second alleged gross irregularity, namely that the first respondent stated in her award that legal representation is not automatically allowed at the hearing, is equally without substance. In fact, what first respondent stated is the law.

It is not in dispute that the applicant's legal representative filed an application for legal representation in terms of section 86(13).

The applicant attempts to make an issue of the fact that the third respondent's representatives did not complain of the applicant's legal representation at the hearing in Windhoek on 8 March 2013. It is submitted that the applicant misses the point. The issue of legal representation and the application in terms of section 86(13) did not arise during the meeting of 8 March 2013. Such application was in any event not moved at such meeting on 8 March 2013. The sole issue during such meeting was to determine the proper forum / venue for the dispute. This issue was determined and the matter was referred to

Oranjemund. It was therefore not necessary for the third respondent to raise any objection in this regard. In any event, neither the Act nor the rules require such an objection.

The application for representation was never moved because applicant's legal representatives were not present on 4 April 2013, applicant stated that he would not be present at the hearing and he left the proceedings.

Had the first respondent decided to consider the applicant's application for representation in terms of section 86(13) and had the first respondent decided in his favour, his legal representative was in any event not present in Oranjemund to represent him. There was no application for the postponement of the matter. The fact that an application of this nature was filed is therefore academic.

The permit issue

The third gross irregularity alleged by the applicant is that the first respondent refused to "understand and take into consideration the unforeseen circumstances my legal representatives found themselves in."

The fact that applicant's representative only applied for a permit at the eleventh hour, despite being advised on 8 March 2013 to do so timeously, has been dealt with above. Such facts should, in any event, have been placed before the first respondent by way of affidavit as part of the ConArb rule 28 postponement application. In that event the third respondent would have placed the true facts before here, also by way of affidavit. The first respondent committed no irregularity in this regard.

The disputes of fact

It is submitted that the material disputes of fact are:

a) when were the applicant and his legal representatives informed that they required a permit to enter Oranjemund?

b) after the first respondent refused a postponement and ruled that the matter would proceed, whether the applicant indicated that he would not be present at the

hearing and walked out, or whether he walked out of the hearing in order to consult his legal representatives.

It is trite law that any dispute of fact "Should be adjudicated on the basis of the facts averred in the applicant's founding affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or *bona fide* dispute of fact or a statement in the respondent's affidavits is so far fetched or clearly untenable that the court is justified in rejecting it merely on the papers … This approach remains the same irrespective of the question of which party bears the onus of proof in any particular case."

It is submitted that third respondent's version on the first issue should be accepted. The record speaks for itself on the second issue.

Applicant's prospects of success

It is submitted that applicant's prospects of success are negligible. It should be noted that the applicant was not charged with illicit diamond dealing or diamond theft. These offences are usually difficult to prove. Due to the nature of the third respondent's operations, namely diamond mining, it expects (and is entitled to expect) a high level of trust and honesty from its employees. For this purpose it entered into an agreement with the Mineworkers Union of Namibia in terms whereof an offence of breach of trust was established, which reads as follows:

"Breach of trust

Actions or conduct of an employee that cause a reasonable suspicion of dishonesty or mistrust and for which there exists extraneous evidence to prove a breakdown in the relationship of trust between the concerned employee and the Company. This will include a situation where the conduct of the employee has created mistrust, which is counter-productive to the Company's commercial activities or to the public interest, thereby making the continued employment relationship an intolerable one. (Cases in this category will be handled by officials at HOD level and above, including the Managing Director)."

The applicant was not only implicated in transporting a diamond thief from Oranjemund to Port Nolloth, but also of co-ordinating the deal and introducing the thief to the buyer. To compound matters, the applicant failed to co-operate in the investigation.

Conclusion

In the premises the application for review falls to be dismissed, alternatively struck from the roll.'

[30] If one considers these arguments and the record it would appear that the submissions on behalf of the 3rd respondent have merit and thus have to be upheld.

[31] I do so also for the following further main reasons:

1. The rules relating to postponements of arbitration hearings are clear. They were not complied with by the applicant. No proper basis for a postponement was placed before the arbitrator on which such application could thus have been granted.

2. It is common knowledge that Oranjemund is not an open town and that a permit to attend the proceedings in that town would have been required.

3. It is also clear that the allegation that this was not foreseen by the applicant's legal practitioners until the day before the applicant's legal practitioners were scheduled to travel to Oranjemund must be rejected, and, at least, cannot prevail on the application of the applicable principles, to disputed facts, in motion proceedings.

4. There is no reason why the allegations[12], made under oath, by Ms Alethea Borman and Mr Eddy Christian in this regard, should not be accepted.

5. At the same time it becomes clear that the remissness of the applicant's legal practitioners to arrange their affairs timeously and properly cannot be visited on the arbitrator.

[12]That already at the hearing in Windhoek on 8 March 2013 they advised the applicant and his representative that a permit would be required from the Ministry of Mines and Energy and that same should be applied for at least two weeks prior to any hearing in Oranjemund.

6. The first respondent's resultant decision to refuse a postponement in view of these circumstances, particularly in the absence of a full and proper explanation to the arbitrator, at the same time, vindicates the 1st respondent's decision to refuse a postponement for which no case had been made out before her.

[32] The issue regarding legal representation becomes moot at the same time in such circumstances as such application would have had to be moved during the proceedings before the 1st respondent. Unfortunately however, and due to the applicant absenting himself during the proceedings, which led to the dismissal of his case, such application was never formally moved and therefore did not fall to be decided by the 1st respondent.

[33] Ultimately, it must thus be concluded, against this background, and for the reasons stated above, that the grounds, relied upon in this review, were not established.

[34] It follows that the application therefore cannot succeed which accordingly, and in the result, is thus dismissed.

H GEIER

Judge

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APPEARANCES

APPLICANT:	Mr M Ntinda Sisa Namandje & Co. Inc., Windhoek
3rd RESPONDENT:	Mr G Dicks Instructed by Köpplinger Boltman Legal Practitioners, Windhoek

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