



Case no: LCA 24/2016

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

In the matter between:

**ERONGO MARINE ENTERPRISES (PTY) LTD**

**APPELLANT**

and

**IPINGE PETRUS AND 47 OTHERS**

**RESPONDENTS**

**Neutral citation:** *Erongo Marine Enterprises (Pty) Ltd v Ipinge Petrus & 47 Others* (LCA 24/2016) [2016] NALCMD 40 (7 October 2016)

**Coram:** ANGULA, AJ

**Heard:** 23 September 2016

**Delivered:** 7 October 2016

**Flynote:** *Labour Law* – Conciliation and Arbitration- Referral for- Compliance with rules 5 (11) 2 and 14 (2) (a) of Rules relating to Conduct of Conciliation and Arbitration before Labour Commissioner requiring referral documents to be signed by referring party- Form LC21 signed by the union representative- Rule 5 (2) and (3) applicable to joint referral- mandate by employees to co-employees to sign Form LC21- statement to be signed by all

employees and attaching thereto a list providing names and addresses of all employees.

*Labour Law*- Rule requires an Arbitrator to give 14 days' notice of the arbitration hearing – Non-compliance of Rule 15 after initial arbitration hearing-Consent by parties to shorter notice.

*Labour Law* – Application for rescission – Refusal by Arbitrator to hear and consider an application for rescission-Application for rescission was not placed before arbitrator - Applicability of *audi alteram partem* principle and article 12 (1) (a) of the Namibian Constitution.

**Summary:** This is an appeal in terms of section 89 of the Labour Act, 11 of 2007 ('the Act') against the award of the arbitrator of 24 March 2016. The appeal includes review grounds. In this matter, the appellant raised three points *in limine*.

The first point *in limine* deals essentially with the non-compliance of rule 14 (2), 5 and 11 of the rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ("the Rules"). Rule 14 (2) (a) requires that the referral document referring a dispute must be signed by the referral party as provided for in rule 5. Rule 5(1) permits a party and a *person 'entitled'* in terms of the Act or rules to represent a party to the proceedings to sign form LC21. Appellant took the point that the joint referral document referring the dispute did not comply with Rule 5(2) and (3), and as a result the joint dispute was not properly referred, resulting in the proceeding being irregular and thus a nullity.

Rule 5(2) and (3) require a joint referral by employees to be accompanied by a statement signed by all employees, authorizing one of them to sign the referral document on their behalf. The sub-rules further require a list of all employees' names and addresses to be attached to the statement. No such Statement accompanied the referral document and the list attached was a crew list of some 54 odd employees, more than the 47 employees alleged to have referred the dispute. Although the referral documents state that there are

47 other respondents, only 19 of them attended the arbitration hearing. The referral document was signed by the union representative on behalf of the employees.

The second point *in limine* raises the short notice of the arbitration hearing in contravention of rule 15. Rule 15 require the arbitrator to give the parties at least 14 days' notice of the arbitration hearing, unless the parties have agreed to a shorter period. On 8 March 2016 the appellant received a notice of set down informing the parties that the arbitration hearing will take place on 15 March 2016.

On 10 March 2016, appellant communicated to the arbitrator that its representative has to attend a meeting in Cape Town scheduled on the same day as the arbitration hearing. The parties were advised to agree to a postponement or apply for a postponement. Although the party initially agreed to a postponement, the respondents' representative rescinded from the agreement at such an advanced stage. The appellant, as a result did not attend the arbitration hearing. It was contended that the appellant did not agree to a short notice period resulting in the proceeding being irregular.

The third point *in limine* is a climax of the appellant's argument based on the fact that its application for rescission of the award granted in its absence was never heard and its rights to a fair trial as set out in article 12 (1) (a) of the Namibian Constitution was violated. Although the application for rescission of judgment was properly delivered and served on all the parties, for some confusing reasons, it never reached the arbitrator. The arbitrator nevertheless decided that it was not necessary to hear the application because appellant failed to apply for a postponement of the arbitration hearing held on 15 March 2016.

*Held that* Rule 5(2) and (3) are intended to regulate a situation where a group of individual employees refer a dispute to the Labour Commissioner. Where a Union representative act on behalf of its members, as in this case, rule 5(1) applies.

*Held* further that a union representative is a '*person entitled*' in terms of rule 5(1) to sign a referral document on behalf of all its members and whom it may represent at an arbitration hearing, and such a mandate is derived from the provisions of section 59 and 86 of the Act and not from rule 5(2) and (3). Therefore, Rule 5(2) and (3) does not apply when the joint referral is signed by the union representative on behalf of the employees.

*Held* further that there had been ratification on the part of the employees, if at all, of the failure to comply with the rules through participation of the employees at conciliation and arbitration proceedings.

*Held* that there was compliance with rule 15 when the arbitration hearing was set down as the parties have agreed to a shorter period.

*Held* further that the Arbitration tribunal which is empowered to hear and resolve disputes abdicated its responsibilities when it took a decision to not hear and consider the application for rescission of the default award and as such violated the appellant's right to a fair trial as set out in article 12(1)(a) of the Constitution.

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## ORDER

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1. The decision by the arbitrator Ms. Gertrude Usiku not to hear and consider appellant's application for rescission of the default award lodged by the appellant on 25 April 2016 under case number CRWB 01/16 is set aside.
2. The matter is remitted to the Labour Commissioner and the Labour Commissioner is directed to refer the appellant's application to rescind the default award made on 25 April 2016, for hearing and consideration by an arbitrator other than Ms. Gertrude Usiku.

3. There is no order as to costs.

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## JUDGMENT

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**ANGULA, AJ**

### Introduction

[1] This is an appeal in terms of section 89 of the Labour Act, 11 of 2007 (‘the Act’) against the award of the arbitrator of 24 March 2016. The appeal includes grounds of review.

[2] Ms. Gertrude Usiku, (‘the arbitrator’) issued a default arbitration award (‘the award’) in favour of the respondents ordering Erongo Marine Enterprises (Pty) Ltd (‘appellant’) to, *inter alia* reinstate the respondents to the positions they previously held in the company and to compensate each of the respondents for losses incurred from the date of termination of their services by the appellant.

[3] Appellant, pursuant to section 89 of the Act, approached this Court seeking an order for the setting aside of the award. Appellant’s appeal includes review grounds constituted by alleged defects in the arbitration proceedings apparent from the record. The appellant is therefore entitled to bring the matter before this Court by way of appeal.<sup>1</sup>

[4] In the appellant’s heads of argument, *Mr. Dicks* casts the crisp issues for preliminary determination in the following terms:

1. whether the respondents acted in compliance with the requirements of Rules 5, 11, and 14 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour

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<sup>1</sup> *Shaama v Roux* 2015 (1) NR 24 (LC) at 21.

- Commissioner (“the rules”) when the joint referral was lodged; and;
2. whether the arbitrator acted in compliance with rule 15 of the rules when she, on 8 March 2016, set down the arbitration hearing for 15 March 2016; and
  3. whether the arbitrator’s refusal to hear appellant’s rescission application subsequent to the issuing of the award by her, infringed upon Appellant’s rights in terms of section 12 of the Namibian Constitution.

### **Background**

[5] On 6 October 2015, Ipinge Petrus and 47 Others (respondents in this appeal but complainants in the arbitration case) referred a dispute of unfair dismissal to the Labour Commissioner by delivering Forms LC 21, LG 36, a summary of dispute, a crew list and a request for a meeting with the Appellant.

[6] Form LC 21 was not signed by any of the respondents but was instead signed by the Branch Organizer of the Namibian Food and Allied Workers Union (NAFAU), the respondents’ Trade Union and such respondents’ representative.

[7] On 18 January 2016, the arbitrator informed the parties that an arbitration hearing was set down for 12 February 2016, but was subsequently postponed to 15 February 2016.

[8] On 15 February 2016, the parties unsuccessfully attempted to reach a settlement. It is common cause that Ms Arendse (who represented appellant at conciliation) required more time to obtain a firm mandate from the Director or Management of appellant. As a result thereof, appellant was afforded more time to revert with its settlement proposals, which proposals never materialized.

[9] On 8 March 2016, the Arbitrator, frustrated by the delay on the part of appellant, decided to set down the arbitration hearing for 15 March 2016. It appears that this date of 15 March 2016 initially suited the parties. However Ms Arendse subsequently learnt of an important meeting taking place in Cape Town on the same day for which the hearing was scheduled.

[10] The arbitrator advised Ms Arendse that the matter may be postponed if the parties agree thereto or if an application for postponement is brought by either party. Ms Arendse did not consider that a formal application for postponement was necessary (presumably because she was of the view that the initial postponement (from 12 February to 15 February 2016) was made without a formal application for a postponement).

[11] Ms Arendse instead sought the hearing to be postponed by seeking the respondents' representative's consent thereto. The parties agreed amongst themselves to postpone the hearing to 22 March 2016. This date appears not to have suited the arbitrator and the subsequent date appears not to have suited the respondents. In the face of this dilemma, the respondents' representative reneged on the initial agreement with appellant to have the matter postponed to 22 March 2016.

[12] Despite a written communication by Ms Arendse to the arbitrator confirming the agreement reached between the parties, the respondents' representative maintained that there was no agreement to postpone the hearing by transmitting a letter to the arbitrator to that effect.

[13] On 15 March 2016, the matter proceeded in the absence of the appellant. The record shows that of the 47 other respondents who were initially party to the dispute, only 19 attended the arbitration hearing.

#### *Appellant's Appeal*

[14] The preliminary points raised by the appellant are essentially issues of law and are based on alleged non-compliance with the rules. These are dealt herein as submitted in argument by the appellant.

First point in limine – the joint referral in compliance with Rule 5

[15] Appellant submitted that the respondent's referral documents did not comply with Rules 5, 11 and 14 and as a result of the respondents' non-compliance with the aforementioned rules, there had been no proper referral of the dispute to the Labour Commissioner. The latter was therefore precluded to act in terms of the enabling rules rendering the ensuing proceedings and the award a nullity.

[16] In support of this proposition, appellant placed extensive reliance on *Waterberg Wilderness Lodge v Menesia Uses and 27 others*<sup>2</sup> wherein it is stated that:

"[10] Rule 14(1)(b) of the RCCA states that a party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed Form LC 21, which is called "the referral document". Rule 14(2)(a) states that the referring party must sign the referral document in accordance with rule 5. Rule 5, in turn, provides as follows:

**"5. Signing of documents**

(1) A document that a party must sign in terms of the Act or these rules may be signed by the party or by a person entitled in terms of this Act or these rules to represent that party in the proceedings.

(2) If proceedings are jointly instituted ... by more than one employee, the employees may mandate one of their number to sign documents on their behalf.

(3) A statement authorising the employee referred to in sub-rule (2) to sign documents must be signed by each employee and attached to the referral document ..., together with a legible list of their full names and addresses."

[11] In this case the referral document states that the applicant is "Menesia Uses plus 27 others". The other particulars like the physical and postal address, telephone [en] fax numbers appear to be that of

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<sup>2</sup> (LCA N16/2011) [2011] NAHC 322 (20 October 2011).



one person, presumably Ms Menesia Uses. It further states that the nature of the dispute is one of unfair dismissal and unfair labour practice and specifies that a joint complaint is being referred. The form, which is prescribed by Regulation 20(1) of the Labour General Regulations (Government Notice No. 261 of 31 October 2008), makes provision for signature by the "Representative of the Applicant" (but not for signature by the applicant) and requires that the name of the signatory be printed and signed. At this place on the form the following is inscribed "Menesia Uses Plus Others" and further on the same line there appears to be a signature, namely "M. Uses".

[11] Attached to Form 21 is a summary of the dispute under the heading "MENESIA USES PLUS 27 OTHERS". The summary clearly indicates that the intention is to institute joint proceedings. Attached to the summary is a handwritten list with the heading "COMPLAINANTS NAMES AND NUMBERS". The 27 names on the list are written out in full, except for some second names which are only indicated by an initial, but they do not appear to be signatures. In fact, it is clear from the handwriting that the same person wrote several of the names. The numbers listed are telephone numbers.

[12] Mr Barnard submitted that none of the respondents signed the referral document. It is however clear that Ms Uses did sign it. Her dispute was therefore properly referred. However, as far as the other respondents are concerned, their dispute was not properly referred, because (i) they did not comply with the provisions of rule 5(1) by signing Form 21 themselves; or (ii) they did not comply with rule 5(3), in that they did not sign a statement authorising Ms Uses to sign documents on their behalf. In this case the latter is a crucial requirement, as this statement would, in terms of the sub-rule, complete the mandate given to the first respondent to refer the dispute on their behalf. Furthermore (and perhaps less importantly), the list attached to the referral document does not specify their addresses, as required by rule 5(3). In my view these omissions must be rectified first should the 27 other respondents wish to have their dispute referred to arbitration. Obviously the necessary application for condonation in terms of rule 14(2)(c) for referral out of time would have to accompany the referral document."

[17] In the *Waterberg Wilderness Lodge* case (supra) Van Niekerk J, found that only the dispute of Ms. Uses, who also signed the referral form, had been properly referred. In upholding the appeal, Justice Van Niekerk, stated as follows:

‘Her [Ms. Uses’s] dispute was therefore properly referred. However, as far as the other respondents are concerned, their dispute was not properly referred, because (i) they did not comply with the provisions of rule 5(1) by signing Form 21 themselves; or (ii) they did not comply with rule 5(3), in that they did not sign a statement authorising Ms Uses to sign documents on their behalf. In this case the latter is a crucial requirement, as this statement would, in terms of the sub-rule, complete the mandate given to the first respondent to refer the dispute on their behalf. Furthermore (and perhaps less importantly), the list attached to the referral document does not specify their addresses, as required by rule 5(3). In my view these omissions must be rectified first should the 27 other respondents wish to have their dispute referred to arbitration. Obviously the necessary application for condonation in terms of rule 14(2)(c) for referral out of time would have to accompany the referral document.’

[18] In terms on rule 5(1) the referral document, which is Form LC 21 (‘the referral document’), “*may be signed by the party or by a person entitled in terms of this Act or these rules to represent that party in the proceedings.*” Ms. Uses clearly falls within the first categories of persons contemplated by this sub-rule.

[19] In my view, the reason why Van Niekerk J, in the *Waterberg Wilderness Lodge* case found that the other respondents did not comply with Rule 5(1) is because the other respondents were parties just like Ms Uses and in the absence of a statement as provided for in sub-rule 3, there was no mandate for Ms Uses to sign form LC21 on their behalf. In other words, if the respondents were in compliance with Rule 5(3), they would, by virtue of that fact also have been in compliance with requirements of Rule 5(1) since the issue involved a joint referral.

[20] In the instant matter, the respondents were represented by a union representative of the respondents' trade union. A union representative falls within the second category of person entitled to sign form LC21. A union representative is entitled to represent the respondents at arbitration proceedings by virtue of the provisions of sections 59 and 86 of the Act. This is the distinguishable feature of the matter under consideration from the *Waterberg Wilderness Lodge* case.

[21] Appreciating that Rule 5(1) permits a person 'entitled' in terms of the Act or rules to represent a party to the proceeding to sign Form LC21, is it correct to maintain, as *Mr Dicks* does, that sub-rules (2) and (3) are applicable to persons other than co-employees? Put differently, are these sub-rules applicable when the person representing the employees is not a co-employee?

[22] If I understand *Mr Dicks's* argument correctly, he submitted that, sub-rules (2) and (3) were not complied with. I disagree. In my view, a proper construction of rule 5, leads to the conclusion that sub-rule 2 and 3 are intended to cover for situations where the joint referral is being referred by a co-employee. A co-employee is entitled to only represent other employees if there is a written statement signed by all the employees mandating the co-employee to represent them at the arbitration proceedings.

[23] In contrast, and if a party or parties to the proceedings are represented by a union representative, as in the present case in this matter, sub rules 5 (2) and (3) are *not* applicable since the mandate to represent a party is imparted to a union representative by sections 59, 86(12) of the Act and rule 5 (1).

[24] Thus, the union representative is vested with the right to represent its members and to refer disputes on their behalf as a '*party entitled*' to sign form LC21 on their behalf as is required by the rules. Mr. Ipinge on the other hand would require the mandate from his co-employees to sign Form LC 21 on their behalf and would require a signed statement from the co-employees as provided for in rule 5 (2) and (3) of the rules.

[25] Rule 5 (2) and (3) does not apply, if the party referring the dispute is a union representative purporting to act on behalf of a party to a dispute.

[26] In the South African case of *Hans Merensky Holdings (Pty) Ltd t/a Northern Timbers v Commission for Conciliation, Mediation and Arbitration and 2 Others*<sup>3</sup>, Nel AJ stated the following:-

‘The first complaint the applicant levels at this referral is that it does not comply with Rule 4(2) of the CCMA rules, in that it was not signed by all the individual employees. I believe this contention is misconceived. I am of the view that Rule 4(2) regulates a situation where a group of individual employees refer a dispute to the CCMA. In short, where a union purports to act on behalf of its members, as is the case herein, Rule 4(1) of the CCMA, in my view, applies. The union is entitled in terms Section 200 of the Labour Relations Act to act on behalf of its members. It follows that a union is a “party ..... entitled in terms of the Act or these rules to represent that party in the proceedings” and it is therefore in terms of Rule 4(1) entitled to sign the referral on behalf of all its members who it may represent. This is what happened herein. This complaint of the applicant is accordingly misdirected.’<sup>4</sup>

[27] Form LC 21 does not make provision for signature by employees in cases of joint referrals and does not provide for space to be signed by all employees next to their respective names. In the *Hans Merensky Holdings* supra, Nel AJ, further stated that:

‘On LRA Form 7.11, in the column next to where the details, and more particularly the name of the referring party, is to be filled in, one sees that it says “If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply their personal details and signature on a separate page which must be attached to this form.” That complaint of the applicant is accordingly without substance. Nowhere does one see from the LRA Form 7.11 that the number of employees on whose behalf the union was acting had to be stated. Whilst it may be prudent, even necessary, to provide these details at some stage of the dispute, I do not believe there is any statutory requirement to be gleaned

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<sup>3</sup> JR963/2005.

<sup>4</sup> Op cit, paragraph 4.

from the form itself, or from any other statutory source, to my knowledge, that compels a union, when referring a dispute to the CCMA, to provide such numbers and names of the employees it purports to represent. Lastly, with reference to the complaint that the employment and other particulars required in Part B of LRA forms 7.11 were not properly provided, this is the high watermark of the applicant's case. Whilst these details are clearly required to be filled in, if they are not, or are filled in inadequately, I do not believe that in and by itself renders the whole referral a nullity. I am of the view that as long as a dispute referral complies reasonably with the requirements as they appear on the LRA Form 7.11 itself, the CCMA is entitled to accept that there has been a proper referral. The CCMA is also in my view entitled to allow the correction and amplification or the curing of defects which it may believe exist in a particular dispute referral. All these complaints of the applicant in my view falls to be rejected as there was in my opinion substantial compliance by the third respondent on the one hand in referring the dispute and the first and second respondent did not in my view perpetrate any reviewable irregularity in accepting the dispute referral as having been properly made.<sup>15</sup>

[28] While Form LC 21 is not similarly worded as its South African counterpart (LRA form 7.11), it equally makes no provision for signatures of the employees next to their names. As stated above, rule 5 (2) and (3) is couched in clear and in unambiguous language. These sub-rules do not need to be complied with if the referring party is a *'person entitled'* (for example, a union representative). It is specifically designed to target a co-employee referring a dispute on behalf of other employees. It borrows, with minor alterations, the same legal construct as it's South African counterpart (CCMA-LRA form 7.11).

[29] In light of the authorities cited above, I am of the view that there was a proper referral of the dispute to the Labour Commissioner. In my understanding, rule 5(1) was complied with when the referral was signed by the trade union representative who derived his mandate to represent the respondents from the provision of the Act without the need to submit a list and signed statement as proof of such a mandate as required by rule 5(2) and (3). Therefore, the fulfillment of rule 5(1) by the union representative extinguishes

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<sup>5</sup> *Hans Merensky Holdings (Pty) Ltd t/a Northern Timbers v Commission for Conciliation, Mediation and Arbitration and 2 Others* JR963/2005, paragraph 7.

this ground of appeal as argued and consequently the appellant's point *in limine* fails.

[30] Even if I am wrong in finding that rule 5 (2) and (3) above do not apply to this instant case, I find that there was ratification by conduct of any defect in this referral of the dispute by the respondents.

[31] In *Purity Manganese (Pty) Ltd v Katjivena and Others*,<sup>6</sup> Smuts J in determining whether the failure on a part of the referring party to sign the referral notice renders the ensuing arbitration proceedings and the award invalid and a nullity and liable to be set aside, stated as follows:

“It would seem to me that once parties have participated in proceedings which are the consequence of the submission and delivery of a referral form, then it would not be open to the other protagonist to take the point of the failure to have signed form because the question of authority would then not arise. The position may be different in cases of joint referrals where parties have not signed or identified as was found in *Springbok Patrols* which is to be confined to the facts of that case and is also to be qualified by the views expressed in this judgment. It would in my view be a point for the office of the Labour Commissioner to take up before participation commences and for that office to require compliance with the provisions of rules 5 and 14 for the matter to proceed in conciliation and arbitration. If that office does not invoke these provisions, and reject a referral it may then be for the protagonist to raise non-compliance with that rule prior to participation in conciliation and arbitration as the case may be, so that non-compliance can be rectified then. But once the Labour Commissioner has appointed a conciliator and arbitrator to conciliate and thereafter determine the dispute and who has assumed jurisdiction to do so, and once the parties have participated in those proceedings, then it would not in my view be open to the other protagonist in the proceedings to take this point.”<sup>7</sup>

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<sup>6</sup> 2015 (2) NR 418 (LC).

<sup>7</sup> Op cit note 3 para 35.

[32] It is common cause that 19 of the 47 other respondents participated in the arbitration proceedings and that their names were read into the record. I find the said respondents who participated in the arbitration proceedings had ratified the referral of the dispute if there was non-compliance.

[33] In *Springbok Patrols (Pty) Ltd v Jacobs and others*<sup>8</sup> the referral form did not contain any attachment on which the names of other respondents were set out or the nature of their claim or even the amounts claimed by the different respondents. This case contained a number of distinguishing features, and I am in full agreement with Smuts J when he stated that each case must be confined to its facts. What distinguishes the matter currently under consideration is that a crew list was attached to the referral form.

[34] In *Methealth Namibia Administrators (Pty) Ltd v Matuzee and others*<sup>9</sup>, a union representative signed on behalf of the complainants in a joint referral and the process had reached an advanced stage when objections for non-compliance were raised. The court found that there was ratification by conduct on the part of the employees which ratification was effectual when objections were raised. The court did not consider whether rule 5 (2) and (3) are applicable as it found that the arbitrator's reasoning in refusing the point *in limine* at such an advanced stage of the arbitration proceedings was correct.

[35] On the basis of the aforesaid, I find that the 19 respondents who attended the arbitration hearing ratified whatever non-compliance there may have been in the referral of the dispute. On this basis, the appellant's point *in limine* equally fails.

*Second point in limine- short notice of the hearing.*

[36] Appellant contends that the arbitrator erred in law when she set down the dispute for the arbitration hearing in contravention of the rules. Rule 15 requires the arbitrator to give the parties 14 days' notice of the arbitration hearing.

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<sup>8</sup> (LCA 702/2012) [2013] NALCMD 17 (2013).

<sup>9</sup> 2015 (3) NR 870 (LC).

[37] Mr *Dicks* submitted that the notice issued by the arbitrator on 8<sup>th</sup> March 2016 setting down the arbitration hearing for the 15<sup>th</sup> of March 2016 constitutes a short notice in violation of rule 15. He argued that any failure to comply with the time limits prescribed by the rules would make the arbitration hearing invalid and the award granted in terms thereof should be set aside.

[38] The essential facts relating to this legal challenge are to be found in the affidavit of Ms Arendse. These facts are stated in paragraphs 7 to 12 above. Of particular importance is the following extract from her affidavit:-

'On Tuesday, 8 March 2016, I received a notice of set down (FormLC4) advising that the arbitration hearing is set down for 15 March 2016. A Copy thereof is attached hereto and marked "AA10". On 9 March 2016, I was instructed to attend management meetings of applicant in Cape Town. On 10 March at about 12h42, I telephonically spoke to the arbitrator and informed her that the date on which she has set the arbitration down is not suitable, as I had to attend management meetings in Cape Town.... She informed me that the matter can only be postponed if the two parties agree and that if we can agree to a date still in March 2016, she can assist before she goes on leave during April 2016.'

[39] On the 15 of March 2016, the matter proceeded without appellant who did not attend the hearing. It is common cause that Ms Arendse raised the issue of non-compliance with rule 15 for the first time in the rescission application. She did not raise this issue with the arbitrator and the union representative when she sought a postponement. Her reason for seeking a postponement was premised on her unavailability due to a meeting scheduled on the same day in Cape Town. This much is obvious from her affidavit as aforestated.

[40] Form LC 28 filed on 12 February 2016 clearly indicates that the parties were invited to an arbitration hearing. Mr *Dicks* argued that despite the wording on form LC28, there was no arbitration hearing held on the day but a conciliation hearing. I disagree with such a proposition if regard is had to Section 86 (5) and (6) of the Labour Act: it states as follows:-



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

(6) If conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.'

[41] Ms Shilongo, who appeared on behalf of the respondents, correctly argued that the form LC28 was clearly intended to notify the parties of the arbitration hearing and because the arbitrator was obliged to conciliate the dispute before arbitrating it, it cannot be said that there was no notice of the arbitration hearing. The matter can be arbitrated immediately after conciliation failed. She maintained that the initial set down of the matter was in compliance with rule 15.

[42] Ms Shilongo submitted that the hearing date of 15 March 2016 was equally not contested by the parties until Ms Arendse encountered a double booking. She maintained that the parties were afforded reasonable time from 15 February 2016 to 15 March 2016 to settle the dispute.

[43] From the reading of section 86 of the Act, it is clear that the intention of the legislature is to ensure that conciliation of disputes precedes arbitration. This position is confirmed if one has regard to the time period prescribed in the rules relating to the setting down of conciliation and arbitration hearings.

[44] Rule 12 stipulates that:-

'The Labour Commissioner must give the parties at least seven days' written notice on Form LC 23, of a conciliation meeting, unless the parties agree to a shorter period.'

[45] Rule 15 reads as follows:

'The Labour Commissioner must give the parties at least 14 days' notice of an arbitration hearing on Form LC 28, unless the parties agree to a shorter period.'

[46] Rule 12 provides for a different form and the periods prescribed are much shorter than those prescribed by rule 15. An arbitrator who is keen to fairly and quickly determine the dispute between the parties may very well dispense with the issuance of form LC23 and issue form LC28 instead. The critical compliance requirement is that the dispute referred is conciliated before it is arbitrated. In that regard, conciliation can be dealt with on the same day as arbitration. This was clearly the intention of the arbitrator in this case.

[47] Form LC28 is attached to the rules. It is titled "*Arbitration Hearing*". It reads as follows:-

‘that postponements may be granted without the need for the parties to appear if:

all parties agree in writing and notify the arbitrator.

a written request for a postponement has been received by the designated arbitrator at least ten days before the commencement of the hearing and the arbitrator has granted the request hearing.

A formal request for a postponement may be made at the commencement of the meeting/hearing.’

[48] In light of the approach I take to this point, it is not necessary for me to decide whether the notice issued on 8 March 2016 was for the first or second arbitration hearing.

[49] The date 15 of March 2016, was suitable to the parties until appellant instructed its representative to attend to another more pressing and important meeting. It is for this reason that Ms Arandse sought a postponement, which was initially agreed to by the parties to 22 March 2016. If that date suited the arbitrator, the matter would have been heard on 22 March 2016. That date was also short of the required 14 days’ notice. Therefore, it is not correct that there was non-compliance with the rules, because Ms Arendse had agreed to a shorter period. When the Union Representative communicated in writing that there is no agreement between the parties to the requested postponement, it was up to Ms Arendse to request a postponement. It is common cause that Ms Arendse did not attend the hearing nor did she

designate someone to attend the hearing with the view to request a postponement as provided for in part three of form LC 28 above.

[50] Mr *Dicks* referred to the judgment of this court in *Joubert v Swakop Uranium (Pty) Ltd*<sup>10</sup> in finding with reference to the requirement of setting down of an arbitration hearing. Unfortunately, this judgment was delivered *ex tempore* and the facts are vastly distinguishable. In the *Joubert* matter *supra*, the parties had agreed to the postponement and the applicant had lodged a formal application for a postponement.

[51] As pointed out above, this court is inclined to accept that the parties had agreed to a shorter period for holding of the arbitration hearing, initially on the 15 March 2016 and subsequently, on 22 March 2016. This court is satisfied that the reason why the date of 15 March 2016 was unsuitable for the appellant was because appellant was unable to attend the hearing due to a subsequent commitment in Cape Town. The remedy for the appellant was to apply for a postponement. In view of the conduct of the respondent's representative by reneging from the agreement to postpone the matter at such late stage, I am of the view that appellant might have been granted a postponement.

[52] This court was requested to determine whether the arbitrator erred in law when she set down the arbitration hearing on a date shorter than 14 days as provided for in the rules. I am satisfied that the shorter notice period was agreed to between the parties and as such there was no violation of rule 15 when the matter was set down for the arbitration hearing.

[53] Upon consideration of the rule 15 and form LC28, it is doubtful that rule 15 should be strictly applied to subsequent setting down of arbitration hearings. For these reasons, this point *in limine* also fails.

Third point *in limine* – refusing to hear Appellant's rescission application

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<sup>10</sup> (LC 108-2014A) [2015] NALCMD 24 (04 September 2015).

[54] On 15 March 2016, appellant was not present at the arbitration proceeding and the arbitration hearing proceeded in its absence. On 24 March 2016, the arbitrator handed down her award.

[55] On 25 April 2016, appellant lodged and served an application for rescission of the default award dated 24 March 2016. On 23 May 2016 appellant's representative addressed a letter to the office of Labour Commissioner which reads as follows in part:

'A Notice of Application for Rescission of an Arbitration Award (Form LC38) accompanied by the affidavits of Azalia Arendse and Elia Hipundjua was delivered to the respondents' representative trade union [Namibian Food and Allied Workers Union (Nafau)] and your offices by the messenger of court on 25 April 2016. Kindly find attached copies of the messenger's return of service and proof of service (form LG36) for your records.

As no notice of opposition to the application has been delivered, kindly advise if you intend to schedule a hearing for the application and if so, the date when the application will be heard.'

[56] There was no response to this letter, and a follow up letter dated 31 May 2016 was addressed to the arbitrator. On 8 June 2016 the arbitrator responded to the representative of appellant as follows:

1. 'I acknowledged receipt of your letter dated 31<sup>st</sup> May 2016 on the above case number CRWB 01-16 and my response as follows...
2. The letter written to me indicates that an application was lodged with my office to have the award made in the absence of the respondent be rescinded in terms of ConArb Rules 28(10) and that an appeal has been noted.
3. I was on leave during April 2016 and had not received any document requesting for the rescission of the arbitration award. I however asked around and were informed that Lucia Hamukena received the document. She is however unable to locate the document for me to properly respond to your request, therefore from what I can tell is that I cannot rescind the arbitration award for the following reasons:

3.1 I am satisfied that the respondent was properly informed of the set-down date and was prepared to attend to the proceedings.

3.2 A day before the proceedings the respondent requested for a postponement of which it was informed of the right procedure to postpone a matter in line with the instructions on form LC 28 in accordance with Rule 29 (1) of the Labour General Regulations.

3.3 The respondent wrote a letter dated 14<sup>th</sup> March 2016 and in that letter indicated that the parties have agreed to a postponement which was denied by the union as per their letter dated 14<sup>th</sup> March 2016. Rule 27 is clear on what should happen in what circumstances hence with I chose to proceed and determine the matter.

4. I normally sent the record whenever a case is appealed hence with the transcript you received. Kindly take notice that based on the above reasons the matter will not be rescinded because the respondent was properly notified and waived its right to be heard.'

[57] It is against the above decision by the arbitrator that the appellant raises its third point *in limine* in this appeal. We know that the rescission application was not opposed. Ms Shilongo for the respondents argued that the arbitrator acted correctly because appellant failed to bring its postponement application as instructed by the arbitrator. On the other hand, Mr Dicks for appellant submitted that the failure by the arbitrator to hear the rescission application violated the appellant's right to a fair trial as enshrined in article 12 of the Namibian Constitution.

[58] Article 12 (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.' (emphasize added)

[59] According to section 85(1) and (2) of the Act, an arbitration hearing is a tribunal as envisaged by Article 12(1) (e) of the Constitution. The function of an arbitrator is judicial because arbitration is a form of adjudication. In this regard, an arbitrator must, before arriving at any conclusion, judiciously consider any complaint or application brought to his or her attention.

[60] Mr. Justice Ueitele in *Namibia Bureau de Change (Pty) Ltd NO*<sup>11</sup> considered the requirements of the principles of natural justice as follows:

‘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<sup>12</sup> explains the operation of the principle as follows:

‘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 would be counterproductive to attempt to prescribe rigidly the form which the principles should take in all cases.’

The flexibility of the principles of natural justice was articulated as follows by our Supreme Court in the matter of *Chairperson of the Immigration Selection Board v Frank and Another*<sup>13</sup> where Strydom, CJ said:

‘This rule (i.e. *audi alteram partem* rule) embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion... In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. Consequently the Board need not in each

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<sup>11</sup> (LCA 65/2013) [2014] NALCMD 31 (25 July 2014).

<sup>12</sup> Baxter Lawrence, *Administrative Law* (1984) at 541.

<sup>13</sup> 2001 NR 107 (SC) at 174.

instance gives an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.'

[61] Section 88 of the Act, in material terms reads as follows:

**'88 Variation and rescission of awards**

An arbitrator who has made an award in terms of section 86(15) may vary or rescind the award, at the arbitrator's instance, within 30 days after service of the award, or on the application of any party made within 30 days after service of the award, if-

- (a) it was erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) it was made as a result of a mistake common to the parties to the proceedings.'

[62] The rules do not prescribe the form that an arbitrator must follow where a party applies for rescission of an arbitration award. In the present matter, the application for rescission of the award was set in motion by a written application to the arbitrator, and the application was supported by an affidavit. The arbitrator did not receive nor consider the application. The application found legs and disappeared from the office of the Labour Commissioner. The arbitrator did not consider it necessary to hear the application as she held a view that appellant was at fault for not attending the arbitration hearing of 15 March 2015. She pre-judged the outcome of the application which was running around somewhere in the streets of Khomasdal. In other words, the application for rescission was lost. I find thereby that the arbitrator robbed Appellant of a fair hearing of its application for rescission of the award.

[63] No effort was made to trace the application and Appellant was not given a chance to provide a copy of its missing application. There was no hearing at all. The Arbitration tribunal empowered to hear and resolve disputes, shrugged its shoulders and abdicated its responsibilities when it took a decision to not hear and consider the application for rescission of the

default award. The outcome is a denial of fairness and justice to appellant in a judicious process.

[64] *Mr. Justice Ueitele* in the *Namibia Bureau de Change (Pty) Ltd* case *supra* said it better when he said:

‘The approach taken by the arbitrator is inconsistent with an adjudicative process and a clear negation of the applicant’s right to a fair hearing enshrined in Article 12(1) (a) of the Namibian Constitution’.

[65] The decision by the arbitrator not to hear and consider the appellant’s application for rescission of the default award lodged on 25 April 2016, should for these reasons, be set aside and as a result, I make the following orders.

1. The decision by arbitrator Ms. Gertrude Usiku not to hear and consider appellant’s application for rescission of the default award lodged by the appellant on 25 April 2016 under case number CRWB 01/16 is set aside.
2. The matter is remitted to the Labour Commissioner and the Labour Commissioner is directed to refer the appellant’s application to rescind the default award made on 25 April 2016, for hearing and consideration by an arbitrator other than Ms. Gertrude Usiku.
3. There is no order as to costs.

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EM Angula  
Acting Judge



**APPEARANCES**

**APPELLANT**

ADV.G DICKS

Instructed by Engling Stritter &  
Company

**RESPONDENTS**

MS. NN SHILONGO

Sisa Namandje & Co