HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

IN THE HIGH COURT OF NAMIBIA

Case Title: TELECOM NAMIBIA LIMITED VS NAMIBIA PUBLIC WORKERS UNION AND 2 OTHERS	**Case No:** Case no: HC-MD-LAB-MOT-REV-2021/00150
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	**Date of hearing:** 31 January 2022
	Date of order: 16 March 2022
Neutral citation: *Telecom Namibia Limited v Namibia Public Workers Union (HC-MD-LAB-MOT-REV-2021/00150) [2021] NALCMD 13 (16 March 2022)*	
Results on merits: Merits not considered.	

The order:

Having heard **Mr Avila** for the Applicant and **Mr Nangolo**, for the First Respondent, and having read the documents filed of record:

IT IS HEREBY ORDERED:

1. The application for review succeeds;
2. The award in arbitration No CRWK 1099- 20 dated 28 June 2021 is set aside;
3. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to

conduct the arbitration de novo and to deal with the points *in limine* and further deal with the dispute

4. No order as to costs.

Reasons for orders:

Introduction and brief background

[1] Serving before the court for determination is a review application brought in terms of section 89 (4) read with section 89 (5) (a) (ii) of the Labour Act, 11 of 2007 (hereinafter "the Act"), in which the applicant, Telecom, seeks to review, correct and set aside the second respondent's ruling as delivered on 28 June 2021, in which he dismissed the applicant's *points in limine* raised at the commencement of the hearing.

[2] On 03 November 2020, the first respondent, NAPWU, lodged a dispute with the office of the Labour Commissioner in respect of the unilateral change in terms and conditions of employment, i.e. Leave Policy to limit the number of leave days, which may be paid out to its members, who are in the employ of Telecom.

[3] The third respondent designated the second respondent in terms of section 86(4) of the Act to preside over the dispute. The referral was scheduled for hearing for 01 December 2020 before the second respondent.

[4] During the proceedings, the applicant, represented by Ms Cecilie Karokohe, raised three preliminary issues in respect of the referral, i.e.

i) the first respondent had not exhausted all internal remedies prior to approaching the offices of the third respondent;

ii) that the dispute had prescribed; and

iii) that the second respondent had no jurisdiction to hear and entertain the matter.

[5] The second respondent directed the parties to file written heads of argument on the *points in lime* raised, and having considered both arguments, the second respondent ruled as follows on 28 June 2021:

"1. Therefore based on my above findings, the arbitrator has jurisdiction to hear and determine this dispute.

2. The respondent's application is therefore dismissed.

3. This dispute must be set down for conciliation meeting and arbitration hearing to be resolved."

[6] The applicant, aggrieved with the arbitration award, filed a notice of review against the findings of the second respondent.

[7] In its notice of motion the applicant sought the following order:

"1. Reviewing, correcting and setting aside the Second Respondent's ruling to dismiss the Applicant's points *in limine* under case no CRWK 1099-20 on 28 June 2021.

2. Referring the dispute back to the Third Respondent to appoint another arbitrator to hear the preliminary issues by holding a preliminary issue hearing and to further deal with the dispute. Alternatively, referring the matter back to the Second Respondent to hear the preliminary issues by conducting a preliminary issue hearing and to further deal with the dispute.

3. Further and/or alternative relief."

[8] The review application is opposed by the first respondent.

Issue for determination

[9] In my view the issues for determination are limited to the following:

Whether the second respondent committed a gross irregularity when he directed the parties to file written submissions on the applicant's *points of limine* on prescription, jurisdiction and failure to exhaust internal remedies in writing without conducting a preliminary hearing.

Arguments advanced on behalf of the parties

[10] When I use the words 'submit' and 'argue' and their derivatives in the course of this judgment, they must be understood to encompass both the heads of argument and the oral

submissions made in court.

On behalf of the applicant

[11] Mr Beukes, on behalf of the applicant, argues that the second respondent's conduct was grossly irregular when he directed the applicant to reduce its *points in limine* in writing and file heads of argument to that effect. The second respondent was to afford the parties an opportunity to provide oral testimony, cross-examine such testimonies, and submit and/or object to exhibits.

[12] Mr Beukes argues further that an inquiry as to when a dispute has arisen, or issues relating to prescription and jurisdiction, is a factual enquiry. Mr Beukes submitted that determining these questions requires the parties should be allowed to call on the testimony of witnesses to determine the actual date on which dispute has arisen. Counsel took the view that this cannot be done on papers alone.

[13] Mr Beukes argues that the exercise of reducing the *points in limine* to writing created a scenario where there existed two conflicting versions, which should have been referred to oral testimony to allow the parties to test the veracity of these versions.

[14] Mr Beukes contended that the second respondent in his ruling goes as far as to acknowledge that the issues of prescription and jurisdiction required a factual enquiry that will require the parties to present evidence before the arbitrator. Yet, despite this contention by the second respondent, proceeded to dismiss the applicant's *points in limine* on the papers alone, without putting into practice what he acknowledged to be the correct approach. This conduct alone, in counsel's view, constitutes a gross irregularity, which conduct stands to be set aside.

[15] Mr Beukes referred the court to the matter of *Cloete v Bank of Namibia*[1] albeit dealing with a labour appeal, Geier J held that holding a preliminary issue hearing to deal with issues of prescription and jurisdiction is a regular and common practice followed by our Courts. As such, this approach could be followed. Mr Beukes pointed out that the court further held in the *Cloete* matter that a determination of the *in limine* points was apposite in the circumstances of the said case and that no prejudice was occasioned by any of the parties by the procedure followed by the arbitrator in the determination of the issues of prescription and jurisdiction through a preliminary issue hearing.

[1] (HC-MD-LAB-APP-AAA-2019/00071) [2020] NALCMD 34 (23 October 2020).

[16] Mr Beukes argues that the second respondent became *functus officio* when he ruled that he has jurisdiction to hear the dispute. The second respondent conceded that the issue regarding the date upon which the dispute arose would require a hearing to determine the factual position thereof. The determination of the actual date of the dispute goes to the heart of prescription, and that clothes the arbitrator with jurisdiction. As such, the second respondent committed gross irregularity.

[17] Mr Beukes submits that the failure to hold a hearing on the preliminary issues constitutes a gross irregularity with the meaning of s 89 (5) and Rule 28 of the Con/Arb Rules resulting in the appellant not having its case fully and fairly determined as contemplated in s 89 (5) (a) (ii) of the Act.

[18] Mr Beukes submits that the applicant was severely prejudiced by how the second respondent conducted the proceedings and that its right to a fair trial was violated in line with the views held by the Supreme Court in the *Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another*[2].

[19] In conclusion, Mr Beukes submits that the second respondent's conduct is a breach of the rules of natural justice, which resulted in the applicant not having had its case fully and fairly determined, which falls neatly within what Parker AJA classifies as gross irregularity.

Argument on behalf of the first respondent

[20] Mr Nekwaya, on behalf of the first respondent, argues that the parties to the dispute and the second respondent, after consultation, agreed to file written submissions whereafter the second respondent would make a ruling on the preliminary points raised.

[21] Mr Nekwaya argues that the applicant at no stage raised the issue of oral evidence or suggested to the second respondent that the issues of law must be disposed of with reference to oral evidence.

[22] Mr Nekwaya argues that the applicant's review application lacks merits in that the arbitration proceedings were conducted in accordance with the agreement reached between the parties at the inception of the proceedings. Neither the second respondent nor the first respondent requested the *points in limine* to be disposed of by way of oral evidence, and the applicant now raises this point as an afterthought. Therefore the applicant impermissibly seeks to argue an irregularity.

[2] *Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another* 2014 (4) NR 915 (SC).

[23] Mr Nekwaya argues the applicant acquiesced to how the arbitration was conducted and fully participated in the arbitration proceedings. The applicant accordingly waived the right to lead oral evidence.

[24] Mr Nekwaya argues that the default legal position is that the points of law are ordinarily determined without regard to oral evidence unless the parties expressly request that oral evidence be led. Failure to request a direction to hear oral evidence for purposes of disposing of points of law by the applicant is fatal. The second respondent bears no obligation to direct the parties to lead oral evidence on points of law unless expressly requested by the parties to the proceedings. Mr Nekwaya argues that the applicant makes out no case of gross irregularity.

[25] Mr Nekwaya submits that the review record shows no evidence to support the applicant's contention that it was denied an opportunity to call its witnesses. Mr Nekwaya argues that if a party fails to request that oral evidence be led to support its *points in limine*, the default position sets in, i.e. that heads of argument shall suffice.

[26] Mr Nekwaya also refers the court to the *Cloete* judgment[3] and submits that when a *point of limine* is raised, the parties commence presenting arguments in the point or file heads of argument to support the point. The leading of oral evidence is the exception, not the rule.

[27] Mr Nekwaya also refers the court to s 86 (7) of the Act, which empowers the second respondent to conduct the proceedings in the manner he considers appropriate to determine the dispute fairly and quickly with minimal legal formalities. As such, the second respondent did not commit any defect in how he conducted the proceedings, as he allowed the parties an opportunity to file heads of argument to deal with the *points of limine* raised by the applicant.

[28] In conclusion, Mr Nekwaya submits that the applicant expressly waived its right to have the *points in limine* determined by way of oral evidence. Alternatively, waiver can be inferred from the consistent conduct on a reasonable view thereof.

Legal Principles applicable

[29] In *the Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another*[4] and where Namibia's Apex Court stated:

[3] Supra at footnote 1.
[4] Supra at footnote 3.

'[38] It is, I accept, not every irregularity committed by an arbitrator that meets the standard of a gross irregularity, but it is essential that the irregularity causes prejudice. It must be an irregularity that constitutes a negation of a fair trial. That approach accords with dicta from South Africa and Namibia as regards what constitutes a gross irregularity in the conduct of arbitration. An arbitrator commits a gross irregularity within the meaning of s 89(5) if his or her conduct denies a party a fair hearing. Such conduct may consist in the breach of the well-trodden tenets of natural justice (*audi alterem partem* or being judge in one's own cause) or, as stated in Halsbury's — 'such a mishandling of the arbitration as is likely to amount to some substantial injustice . . . or appear to be unfair'.

[39] The fact that the arbitrator has discretion to determine the procedure of an arbitration in terms of s 86(7) of the Act does not justify an arbitrator completely disregarding the legitimate expectation of parties to be allowed procedural rights which are commonly associated with a hearing before a 'tribunal' as envisaged in art 12 of the Constitution. It is trite that arbitration is a tribunal contemplated in art 12. To call witnesses, to present evidence and to challenge the evidence of the opposing party — all within reason (ie without the hearing being converted into a full-blown prolonged adversarial contest) — are procedural rights which should be accorded to the parties, unless there is a cogent reason, which must be apparent from the record, to depart therefrom or the parties either waive their rights or agree otherwise. The discretion to determine procedure is certainly not a warrant for an arbitrator to act arbitrarily or oppressively towards the parties.'

[30] In the *Cloete* matter, Geier J held:

' [18] Also the discretion, that was exercised, to first conduct 'a preliminary issue hearing', cannot be faulted in my view. This is a procedure that is also followed regularly in our courts. Why should it not be followed, where apposite, during arbitration proceedings as well. Such *in limine* determination was most certainly apposite in the circumstances.' (Own emphasis).

Application

[31] From the onset, I wish to state that I agree with my brother Geier J. When it comes to a preliminary issue hearing, the procedure that is followed regularly in our courts is that a preliminary issue hearing is held first and that evidence be led where applicable, especially in circumstances where the preliminary issues raised can be dispositive of the matter, i.e. prescription. In the ordinary course of proceedings prescription will be raised as a special plea, which will be dealt with separately from the merits and not all special pleas can be adjudicated on the papers alone, and

when there are real and genuine disputes of fact on crucial and material issues necessary for the resolution of the dispute in a matter, such material disputes are often incapable of being resolved without resorting to oral evidence.

[32] In respect of the processes that could be followed by the arbitrator it is necessary to note that the nature of the functions of an arbitrator is not administrative but quasi-judicial. In *Kasuto v Joubert & another*[5], Muller J referred with approval to *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) where the learned judge of appeal, Heher JA stated the following:

'An arbitration is of course, a quasi-judicial proceedings: *Estate Milne v Donohoe Investments (Pty) Ltd & others* 1967 (2) SA 359 (A) at 373H. The precepts which govern the procedure in judicial proceedings apply to arbitration. *Shippel v Morkel & another* 1977 (1) SA 429 (C) at 434A-E.'[6]

[33] The second respondent clearly acknowledged in his analyses of the application before him what process had to follow in adjudicating the preliminary issues, and that is clear from the reasoning of the second respondent where he states as follows:

'd. The day on which the dispute arose and the respondent (sic) right to amend their leave policy, allege contraventions of agreements, policies and statutory provisions can only the (sic) definitely determined through a hearing where both parties present evidence before the arbitrator.' [7]

[34] Yet, contrary to this reasoning, he proceeds to dismiss the points raised *in limine*. This is a complete contradiction in terms. On the one hand, the second respondent finds that to make a definitive determination on the issue of prescription, which turns on the date on which the dispute arose, he needs to hear evidence and then immediately after that makes the following contradictory finding 'Therefore based on my above findings, the arbitrator has jurisdiction to hear and determine this dispute.' The logic in this argument escapes me.

[35] I agree with Mr Nekwaya that from the review record, it is not evident that the applicant was opposed to the manner in which the second respondent wanted to conduct the proceedings. In the same vein, however, it is also not apparent from the record before this court that the parties reached an agreement that the parties will file heads of argument and have the *points in limine* decided on the heads of argument. As a matter of fact, I failed to find anything in the review record

[5] *Kasuto v Joubert & another* 2011 (2) NR 399 at 401A-B.
[6] See also *Roads Contractor Company v Nambahu & others* 2011 (2) NR 707 LC para 30; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) at paras 84, 85, 86 and 87.
[7] Record page 76.

related to the purported consultation between the parties and the arbitrator regarding the conduct of the matter. In the second respondent's summary of the proceedings before him, he noted as follows: ' The arbitrator directed the parties to submit their points *in limine*/preliminary issues in writing.' In light thereof I am of the considered view that the issue raised regarding waiver on the part of the applicant is without merit. The submissions by Mr Nekwaya regarding a consultation between the parties and the arbitrator and the agreement reached regarding the conduct of the matter clearly falls outside the review record and will therefore not be considered.

[36] In as much as the second respondent has the discretion in terms of s 86 (7) of the Act, it does not justify an arbitrator completely disregarding the legitimate expectation of parties to be allowed procedural rights which are commonly associated with a hearing before a 'tribunal' as envisaged in art 12 of the Constitution, as correctly stated above by Geier J. One should also bear in mind that the applicant at that stage of the arbitration proceedings was not legally represented and therefore would not have known what procedure needed to be followed. From the record, it is not also not evident whether the second respondent explained the different avenues available to the parties in conducting the proceedings.

[37] Having considered the argument on behalf the applicant, I agree with Mr Beukes that the applicant suffered prejudice by not having a fair hearing regarding the preliminary issues raised. It is common cause that once evidence has been led on the issue of prescription, the outcome will determine the issue of jurisdiction and is therefore dispositive in nature.

[38] As a result of the manner in which the second respondent decided to deal with the preliminary issue, without according the parties an opportunity to adduce oral evidence on issues that could have potentially ended the matter there, results in the conduct of the second respondent to be categorised as a gross irregularity.

Conclusion

[39] In conclusion I am of the considered view that on the facts of the matter, the applicant has made out a case that the second respondent conduct results in gross irregularity.

[40] My order is as above.

Judge's signature	**Note to the parties:**

Prinsloo J	Not applicable.
Counsel:	
Plaintiff /Applicant	**Defendants/Respondents**
Mr Beukes Of Metcalfe Beukes Attorneys	Mr Nekwaya Instructed by Sisa Namandje & Co