REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-LAB-MOT-REV-2021/00180

In the matter between:

STOFFEL JOSEF SWARTZ **APPLICANT**

and

NAMWATER CORPORATION LTD **FIRST RESPONDENT**

EMMA NIKANOR **SECOND RESPONDENT**

THE LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Swartz v Namwater Corporation Ltd* (HC-MD-LAB-MOT-REV-2021/00180) [2023] NALCMD 6 (14 February 2023)

Coram: UEITELE J
Heard: **12 July 2022**
Delivered: **14 February 2023**
Reasons: **15 February 2023**

Flynote: *Labour law* – legal principles governing the remedy of review – principles restated.

Labour Act – Act 11 of 2007 – Section 118 – a party must act frivolously and vexatiously, and a party acts frivolously or vexatiously where he or she 'acts in a manner that is in all the circumstances of the case without pure and honourable foundation and one that is entirely groundless, without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and to disturb and vex the spirit of the other party.

Summary: The applicant was employed by Namwater, the first respondent, on a fixed term contract during the period of 1 August 2017 and 31 December 2018. The applicant alleges that during the currency of his fixed term contract, the executive management of the first respondent promised him that, as from 1 January 2019, they will extend his fixed term contract by two years. When his contract was not extended, he, on 28 June 2019, referred a dispute of unfair labour practice, unilateral change of terms and conditions, unfair discrimination and victimization, and legitimate expectation of future employment to the Labour Commissioner.

The commissioner appointed Ms Emma Nikanor to conciliate and arbitrate the dispute between the applicant and the first respondent. After the conciliation of the dispute was unsuccessful, the arbitration commenced on 21 September 2020, continued on 2 to 3 December 2020, and further continued on 29 March 2021 and ended on 30 March 2021. On 23 April 2021, the arbitrator issued her award dismissing the applicant's claims.

Unhappy with the outcome of the arbitration proceedings, the applicant launched the present review, alleging that the arbitrator amongst other matters committed irregularities and misconduct, and seeks an order to review and set aside the arbitration award of 23 April 2021.

Held that, the Labour Act defines defect to mean misconduct in relation to the duties of an arbitrator, or a gross irregularity in the conduct of the arbitration proceedings, or exceeding of power by the arbitrator, or that the award has been improperly obtained.

Held that, the *onus* rests upon the applicant to demonstrate by admissible evidence that the arbitrator, during the arbitration proceedings misconducted (by acting wrongfully or in another improper manner or dishonestly or mala fides or partial) herself in relation to

her duties as an arbitrator or committed a gross irregularity (that the arbitrator's conduct resulted in him not having his case fully and fairly determined) in the conduct of the arbitration, in order for this court to intervene and set aside the arbitration proceedings. *Held that*, the applicant has failed to discharge the onus resting on him to demonstrate that the arbitrator was not impartial and thus committed an act of misconduct.

Held that, for an order of costs in a labour matter, a party must act frivolously and vexatiously, and a party acts frivolously or vexatiously where he or she 'acts in a manner that is in all the circumstances of the case without pure and honourable foundation and one that is entirely groundless, without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and to disturb and vex the spirit of the other party. The launching of this application, whilst misplaced or ill-advised, was not frivolous or vexatious.

The review application was accordingly dismissed with no order as to costs.

ORDER

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1. The review application is dismissed.

2. There is no order as to costs.

3. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J

Introduction and background

[1] The applicant in this matter is a certain Stoffel Josef Swartz, who was employed by the Namibia Water Corporation (which is the first respondent in this application), and was employed as its Manager: Performance Management, between 1 August 2017 and 31 December 2018.

[2] The second respondent is Ms Emma Nikanor, who was appointed by the third respondent, the Labour Commissioner, to arbitrate a dispute which was referred to his office by Mr Stoffel Josef Swartz. Since the arbitrator and the Labour Commissioner did not participate in these proceedings, I will, in this judgment, refer to the applicant as Mr Swartz, the first respondent as “Namwater”, the second respondent as the “arbitrator” and the third respondent simply as the “commissioner”.

[3] The brief background facts of this matter are as follows. As I have indicated earlier, Mr Swartz was employed by Namwater on a fixed term contract during the period 1 August 2017 and 31 December 2018. Mr Swartz alleged that during the currency of his fixed term contract, the executive management of Namwater promised him that, as from 1 January 2019, they will extend his fixed term contract by two years. When his contract was not extended, he, on 28 June 2019, referred a dispute of unfair labour practice, unilateral change of terms and conditions, unfair discrimination and victimisation, and legitimate expectation of future employment to the commissioner.

[4] Upon receipt of the dispute, the commissioner appointed Ms Emma Nikanor to conciliate and arbitrate the dispute between Mr Swartz and Namwater. After the conciliation of the dispute was unsuccessful, the arbitration commenced on 21 September 2020, continued on 2 to 3 December 2020, and further continued on 29 March 2021 and ended on 30 March 2021. On 23 April 2021, the arbitrator issued her award dismissing the applicant’s claims.

[5] Mr Swartz is unhappy with the outcome of the arbitration proceedings, alleging that the arbitrator amongst other matters committed irregularities and misconduct, and approached this court in terms of s 89(4) of the Labour Act 11 of 2007, hereinafter (“the Act”), for the court to review and set aside the arbitration award of 23 April 2021.

The details of the alleged misconduct by the arbitrator

[6] Mr Swartz tabulated the irregularities and misconduct on which he basis his allegations that the arbitrator committed a gross irregularity and acts of misconduct as follows:

(a) the arbitrator allegedly dismissed his complaint, on the basis of her perception, that he was not treated unfairly, was not discriminated against, was not victimised, there was no unilateral change of his terms and conditions of employment, and there was no legitimate expectation created by Namwater;

(b) the arbitrator allegedly created the overall perception that she is not a neutral and impartial adjudicator because she allegedly fiercely and constantly descended into the arena, and interrupted or stopped Mr Swartz while he was cross-examining witnesses and asking the witnesses relevant questions;

(c) the arbitrator allegedly gave an indication how she feels about the evidence which he led;

(d) he (Mr Swartz) allegedly requested the arbitrator to summon witnesses, whose testimonies were crucial to the dispute and the witnesses were summoned. He further alleges that he applied to the arbitrator for the arbitrator to compel Namwater to disclose documents and e-mail correspondences to him within a certain timeframe, in terms of rule 26(1) of the Rules Relating to the Conduct of Conciliation and Arbitration.[1] He, furthermore, alleges that Dr Vaino Shivute, Mrs K. Hamutumwa, Naftali Iidombo, Pieter Jansen Van Vuuren, Johannes Shigwedha, and Rachel Brandt were summoned, but never attended the arbitration proceedings;

(e) three witnesses, namely Mr Fernando Somaeb, Mrs Ellen Maasdorp, and Mrs Wilma Husselman were summoned to appear and testify on behalf of him (Mr Swartz) during the set down of the matter for the 2nd and 3rd of December 2020, they attended the arbitration proceedings on the 2nd December 2020, but the arbitration proceedings

[1] Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner. Published under Government Notice 262 in Government Gazette No. 4151 of 31 October 2008.

were postponed for the reason that Namwater's representative, a certain Ms Hinasha Mbudje, was late and unprepared. Mr Swartz alleges that he objected to the postponement of the matter, but the arbitrator overruled his objection and postponed the matter contrary to rule 29 of the Rules Relating to the Conduct of Conciliation and Arbitration;

(f)the arbitrator issued the witness summonses as early as the 11th of November 2020, to all parties and afforded the representative of Namwater to be prepared for the proceedings, but nowhere in the arbitration award was the late coming and unpreparedness of the Namwater's representative recorded or addressed;

(g) that two witnesses, namely Mr Fernando Somaeb and Mrs Ellen Maasdorp, were summoned by the arbitrator to testify during the arbitration proceedings which were scheduled for the 29th, 30th, and 31st of March 2021, for him (Mr Swartz), but Mrs Maasdorp appeared as a witness for Namwater and Mr Somaeb ignored the summons, and did not appear as a witness. Mr Somaeb and Mrs Maasdorp were two key witnesses for him, but they just ignored the summons and no action was taken by the arbitrator;

(h) Mrs K. Hamutumwa appeared as a witness for Namwater but he, Mr Swartz, was never informed that she will be a witness and therefore did not prepare himself for this witness. He alleges that he only realised that Mrs K. Hamutumwa was a witness on day of arbitration.

(i) Mrs K. Hamutumwa and the representative of Namwater allegedly left the arbitration hearing at about 11h00 on the 30th of March 2021 to attend a state house meeting, and returned late (at about 15h00) and the proceedings were rushed through due to time limits. He alleges that he could not finish his cross-examination of Namwater's witnesses and the arbitration proceedings were concluded on the 30th of March 2021, although the proceedings were scheduled for three days (29 - 31 March 2021). Why the proceedings could not continue on the next day for further cross-examination was incomprehensible to him.

Namwater's basis of opposing the review application

[7] Namwater opposes Mr Swartz's review application. Namwater anchors its opposition on its contention that Mr Swartz's review application is firstly an attempt to revisit the merits of the dispute, but without following the correct route, which would have been an appeal, and secondly on its allegation that Mr Swartz's factual foundation for the alleged irregularities, as expanded in his founding and supplementary founding affidavit, is materially incomplete and incorrect.

[8] Ms Victoria Letitia Hinasha Mbudje who deposed to the answering affidavit on behalf of Namwater contends that, Mr Swartz did not identify exactly when and where the arbitrator impermissibly descended into the arena, or when she (impermissibly) gave an indication about how she felt about his evidence. He ought to have done so, at the least, with reference to the transcribed arbitration record. Ms Mbudje, accordingly, denies that the arbitrator crossed the line between the active role she was permitted to play, and effectively becoming a litigant herself.

[9] Regarding the arbitrator's alleged failure to consider the evidence and the applicant's closing submissions, Ms Mbudje contends that, the arbitrator's findings are supported by the law and the material that had served before her. With respect to the witnesses who testified, Ms Mbudje contends that during the conciliation stage of the dispute, she gave Mr Swartz an indication as to which witnesses Namwater will call to testify. She deposed that Mr Swartz knew which witnesses were going to testify on behalf of Namwater at the arbitration hearing, and those witnesses testified.

[10] As regards the documents that were allegedly not disclosed or discovered, Ms Mbudje contends that she explained to Mr Swartz that, to her knowledge, all but one of the documents he had requested did not exist. The only document that did exist was the one specifying the performance bonus pool criteria and that document was provided to him.

[11] I find it appropriate to, before I consider whether there were defects in the arbitration proceedings as contemplated in s 89(5) of the Act, briefly set out the legal principles governing the remedy of review.

<u>The legal principles</u>

[12] Section 89(4) and (5) of the Act provides that a litigant may apply for the review of an arbitral award in circumstances where it is alleged that there is a *defect* in any arbitration proceedings.[2] Section 89(5) defines what defect means in terms of the Act, and it provides that:

> '(5) A defect referred to in subsection (4) means –
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> (a) that the arbitrator –
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> (i) committed misconduct in relation to the duties of an arbitrator; or
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> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
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> (iii) exceeded the arbitrator's power; or
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> (b) that the award has been improperly obtained.'

[13] What is clear is that the Act defines defect to mean misconduct in relation to the duties of an arbitrator, or a gross irregularity in the conduct of the arbitration proceedings, or exceeding of power by the arbitrator, or that the award has been improperly obtained. Parker,[3] opines that 'there is no room for additional grounds on which an alleged defect in arbitration proceedings can be based as far as the Act is concerned'. I express no views on this opinion, at this point, since the issue which I am called upon to decide is whether the dismissal by the arbitrator of the applicant's complaint amounts to a defect as contemplated in s 89(4) and (5) of the Act.

[14] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC,*[4] the Supreme Court set out the proper approach to the interpretation of documents generally. The Supreme Court in a nutshell stated that, interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing a legal document. The court engaged upon its construction, and found one must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document itself.

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[2] Section 89(4) of the Act reads as follows:
'(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Part may apply to the Labour Court for an order reviewing and setting aside the award –
(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.'

[3] C Parker. *Labour Law in Namibia*: Unam Press (2012) at 214.

[4] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

[15] The court stated that consideration must be given to the language used in the document in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike, for the words actually used.

[16] Adopting the approach set out by the Supreme Court to the interpretation of a legal document, I am of the view that the provisions of s 89(4) are clear and invite of no ambiguity. In my view, the review process envisaged under s 89(4) is limited to arbitration proceedings conducted in terms of part C (that is ss 84 – 90 of the Act). Any other decision by the commissioner may be reviewed in terms of s 117(1)(*b*) of the Act. I will therefore proceed and consider the aspects (misconduct and gross irregularities) which will amount to a defect in the arbitration proceedings.

Misconduct

[17] The meaning of the term 'misconduct' in relation to arbitration proceedings was considered some more than 100 years ago in the matter of *Dickenson & Brown v Fisher's Executors.*[5] In that case, the Appellate Division of the Supreme Court of South Africa was concerned with the question of, whether it could set aside an award made in terms of the Natal Arbitration Act 24 of 1898. Section 18 of the Natal Arbitration Act 24 of 1898 provided that:

> 'Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set the appointment or award aside.'

Solomon JA who delivered the court's judgment said:

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[5] *Dickenson & Brown v Fisher's Executors* 1915 AD 166.

'Now I do not propose to attempt to give any definition of the word misconduct, for it is a word which explains itself. And, if it is used, in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question … Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law … Cases may no doubt arise where … the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator … But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact.'

[18] In *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another,*[6] Preiss J stated that:

'Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such a case a Court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct.'

[19] In *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another,*[7] the South African Supreme Court of Appeal held that:

'Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The *onus* rests upon the appellants in this regard. As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct … which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the

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[6] *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W) at 100B – D.*

[7] *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) in para 21.

most likely inference) of what has variously been described as wrongful and improper… dishonesty and *mala fides* or partiality … and moral turpitude ... '[8]

[20] Having considered the meaning that the courts have attributed to the word misconduct in the context of arbitration proceedings, I now proceed to consider the meaning that the courts have attributed to the phrase '*gross irregularity'*.

Gross irregularity

[21] The term 'gross irregularity' has been discussed in a number of reported cases (South African), which I find persuasive. It is useful to begin with the oft quoted statement from *Ellis v Morgan,*[9] where Mason J laid down the basic principle in these terms:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods 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.'

[22] In *Goldfields Investment Ltd v City Council of Johannesburg,*[10] Schreiner J said:

'The law, as stated in *Ellis v Morgan* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.'

[23] In *Bester v Easigas (Pty) Ltd and Another,*[11] Brand AJ said:[12]

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[8] I have omitted references to authorities

[9] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581

[10] *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.Also see the case of *Telcordia Technologies Inc v Telkom SA Limited 2007* (3) SA 266 (SCA), para 4, 47-48 and 52 – 79.

[11] *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C).

[12] *Ibid* at 42I/J – 43C: D.

'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*.' [My emphasis.]

[24] Also see Parker,[13] 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.'

[25] From the authorities that I have referred to in this judgment, it is clear that the onus rests upon Mr Swartz to demonstrate by admissible evidence that the arbitrator, during the arbitration proceedings misconducted (by acting wrongfully or in another improper manner or dishonestly or *mala fides* or partial) herself in relation to her duties as an arbitrator or committed a gross irregularity (that the arbitrator's conduct resulted in him not *having his case fully and fairly determined*) in the conduct of the arbitration, in order for this court to intervene and set aside the arbitration proceedings. It is that question that I now turn to.

The contentions by the parties

[26] Mr Bangamwabo, who appeared on behalf of Mr Swartz, argued that the arbitration proceedings which were presided over by the arbitrator were grossly irregular and prejudicial to Mr Swartz's right to a fair trial. He said:

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[13] C Parker *Labour Law in Namibia*. Unam Press (2012) at 214. Also see the unreported judgment of *Mokwena v Shinguadja and Another* (LC 52/2011) [2013] NALCMD 10 (28 March 2013).

'This is so because the 2nd Respondent grossly violated Rule 29 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, when she [2nd Respondent] unilaterally postponed the arbitration proceedings despite Applicant's objections and without any application to that effect by the 1st Respondent or any agreement between the parties to postpone the arbitration proceedings. As a result thereof, Applicant's case was immensely prejudiced because his witnesses were dismissed without testifying, and never showed up in the subsequent hearings. In this respect, the court is referred to page 163-167 of the transcribed record of the arbitration proceedings.'

[27] Mr Bangamwabo, further, with reference to *Roads Contractor Company v Nambahu and Others,*[14] argued that there was gross irregularity on the part of the arbitrator for failing to compel Namwater to disclose/discover documents which were crucial and vital to Mr Swartz's case. Resultantly, argued Mr Bangamwabo, Mr Swartz was denied his right to a fair trial as per art 12 of the Namibian Constitution which provides for fair trial.

[28] Mr Maasdorp, who appeared on behalf of Namwater argued that, there is no irregularity as there was no postponement on 2 December 2022. With respect to disclosure/discovery of documents, Mr Maasdorp argues that there was an email written by Mr Swartz in which he requested for four documents from Namwater. Namwater provided the applicant with one document and informed him that the first respondent did not have the other documents.

Did the arbitrator misconduct herself during the arbitration proceedings?

[29] The first two grounds upon which Mr Swartz rely for the contention that the arbitration proceedings were defective are the allegations that the arbitrator made her award on the basis of her perception and that the arbitrator was not impartial. Has Mr Swartz discharged the onus resting on him to demonstrate that the arbitrator was not impartial?

[30] It is now well established that in application proceedings the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence

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[14] *Roads Contractor Company v Nambahu and Others 2011* (2) NR 707 (LC).

which would be led at a trial. In the South African case of *Hart v Pinetown Drive-In Cinema (Pty) Ltd,*[15] Miller J said:

'It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. For the reasons I have stated herein, I am of the opinion that there is a dearth of such facts as, if true, would support the allegations of unfair and oppressive conduct in the management of the company's affairs and the objection *in limine* must accordingly be upheld.'

[31] In *Patrick Inkono v The Council of the Municipality of Windhoek*,[16] Schimming-Chase AJ (as she then was) said the following:

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.'

[32] It follows that, Mr Swartz, in his affidavit, had to furnish facts in the form of evidence of the arbitrator's perception and partiality. As regards the evidence which Mr Swartz had to put before the court in his affidavit, I echo the words of Kumleben,(then AJA), in *Radebe and Others v Eastern Transvaal Development Board,*[17] that the allegations (i.e. that the arbitrator dismissed his complaint, on the basis of her perception, that the arbitrator allegedly created the overall perception that she is not a neutral and impartial adjudicator and that the arbitrator allegedly gave an indication how she feels about the evidence which he led) in the founding affidavit are legal

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15 *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D).

16 An unreported judgment of this Court, Case No A 55/2013 [2013] NAHCMD 140 (delivered on 28 May 2013).

17 *Radebe and Others v Eastern Transvaal Development* Board 1988 (2) SA 785 (A) at 793C-G.

conclusions, it is at best for Mr Swartz an inference, a "secondary fact", with the primary facts on which it depends omitted.

[33] In *Willcox and Others v Commissioner for Inland Revenue,*[18] Schreiner JA explained the concept of '*primary*' and '*secondary*' facts as follows:

> 'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[34] In the instant case Mr Swartz had to, at the latest with reference to the transcribed arbitration record state the facts on which he based his conclusion that the arbitrator was not impartial. He did not do that, what he did is that he deposed to a legal result. I, therefore, find that Mr Swartz has failed to discharge the onus resting on him to demonstrate that the arbitrator was not impartial and thus committed an act of misconduct.

[35] Mr Bangamwambo (in his written and oral submissions) contends that the arbitrator impermissibly and contrary to rule 29 of the Rules Relating to the Conduct of Conciliation and Arbitration before the commissioner. I agree with Mr Maasdorp who argued that this ground of review is based on wrong facts. The allegations that the arbitrator impermissible postponed the matter despite objections by Mr Swartz is not borne out by the record of the arbitration proceedings and Mr Swartz in his supplementary affidavit conceded that the matter was not postponed. The record in part reads (I quote verbatim) as follows:

> 'ON RESUMPTION (Track DS501308) (0.1.26)

MADAM CHAIRPERSON: Okay since it is 16:20 and the Applicant is the one who is supposed to testify now we know that he will not finish with this time I will get a new date I cannot close that I will, I can get two (2) dates unless there is a conciliation I mean there is a cancellation because some people come to withdraw their cases if they settle so if get a cancellation I can put it for two (2) days but otherwise I will ask her to give a date before end of the year and yes for us to start with the Applicant's evidence and then with the Respondent's witnesses. So thank you for coming and presenting your case we have come to

[18] *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602.

the end of today's proceedings, you must have a good afternoon and a good journey for Mr Stoffel back to Gobabis. Thank you or if you do you have any question or any statement?

RECESS - RECORDING STOPPED (0.01.26)

ON RESUMPTION ON 00.00.0000:(Track DS501354 - 00.12.35)

MADAM CHAIRPERSON: Good morning and welcome back to our office. My name is Emma Nikanor and I am here to continue with the case of Stoffel Josef Swartz against Namwater. It is a case of alleged unfair labour practice unilateral change of terms and conditions, unfair discrimination and legitimate expectations which was lodged by Mr Swartz. We have already started with arbitration proceedings on the 21st of September 2020 and we heard the testimony of the four (4) witnesses for the Applicant. We are now moving to the fifth witness of the Applicant or to himself so that we, we can move on. I have to mention that on the, on the 11th of November 2020 I have received a request for summon for additional witnesses by Mr Swartz. He requested to summon, me to summon Mr Somaeb, Mr or Ms Husselman and Mr Maasdorp or is it a Ms?

THE APPLICANT: Yes Ms Maasdorp.
MADAM CHAIRPERSON: Ms Maasdorp.

THE APPLICANT: Yes.

MADAM CHAIRPERSON: So and we, the Applicant, the Respondent's representative indicated that she have no idea that there are three (3) more witnesses summoned as she did not receive any copy of the summons and she only prepared her witnesses to come and testify. And then she feel that it will be unfair for her to, I mean for the Applicant to call three (3) more witnesses as he indicated last time that he finish with his witnesses and she only prepared her witnesses to come and testify thinking that the Applicant have I mean finished with his case. So the Applicant indicated that he will, I will take that the Applicant to state his position on the three (3) witnesses. Mr Swartz?

THE APPLICANT:...

THE APPLICANT:Yes, on the 11th I have requested to summon three (3) witnesses where the summons was then issued on the 11th as well. This summons was then delivered to the witnesses and an email was sent to the head of legal services Oni Ithete. Where I

indicated that these witnesses was summons and the reason why they were summons, there was a whole communication in the email, one of the witnesses indicated that he was not willing to attend as a witness but Mr Somaeb was here and here and he just left now so at the end of the day he decided to come.

I was surprised that Mr Ithete did not inform Ms Enasha about the decision. I have also consulted with my labour advisor he said the fact that the witnesses was summoned and they are key in my case, they were legally summoned to be here and the one question I would like to ask, if, if they do not witness and I have realised that my case is not going to my favour will I be able to call these witnesses in the Labour Court? That is my question to the Chairlady.

MADAM CHAIRPERSON: I cannot answer for the Court that you can call them at Court because my mandate is only at the level of the Labour Commissioner's Office. I do not know which witnesses will be called at Court and how do they do it. And it is now a bit complicated because before I put on the record you indicated that you want to proceed with them, I mean without them now you are saying you were advised that they are key witnesses. So meaning that you cannot do without them, so that is already an indication that later on something will come up to say that you did not get a chance to proceed with your witnesses and that is why I mean you were not given a fair chance which will be on a procedural issue. So if that is the case then maybe I will just give you, give the parties time.

Maybe Ms Enasha you will get time to consult, if it is possible then we can start at 14:00. Because this is really going to be an issue it is on record, he stated that they are key witnesses and I am not the one who is saying I do not want the witnesses to testify. Is just that, is just because you did not get a chance to prepare or you did not know that there are witnesses who are coming. Is it possible that maybe I can give you to consult up to 14:00 then we start with arbitration at 14:00? This is really a procedural issue which can be I mean taken as a review because if I, if he summoned witnesses and he was not given a chance you can already see that it is going to be an issue.

REPRESENTATIVE FOR THE RESPONDENT: Okay Madam Chair, then I (intervention) …

MADAM CHAIRPERSON: Or if that is the case, if you cannot then we can just proceed tomorrow and then we, we take it up from there. I do not want to be accused later….

REPRESENTATIVE FOR THE RESPONDENT: And seeing that he is saying that there are quite key to this case, I think what would also be fair is for me to be given sufficient time to prepare and I do not think a day or two (2) will be enough for me to prepare for these witnesses. So I would then propose then that we move this matter to a date next year.

THE APPLICANT: I object against that. If I present my case she will better know what to prepare on what I am going to present. I really want to present my case.

MADAM CHAIRPERSON: Sir, what you mentioned it is crucial and I do not want my name to be somewhere else. So you mentioned you were advised that they are key witnesses to your case.

THE APPLICANT: I had only one question, can I use these witnesses in (intervention)...
MADAM CHAIRPERSON: But I told you I do not know, that is not my level. My mandate is up to arbitration proceedings if I am done then I do not know what is happening at the Court.

THE APPLICANT: Then I just want to present my case without my witnesses.

MADAM CHAIRPERSON: No, but you have mentioned that they are key witnesses.
THE APPLICANT: Yes but I can present my case without them, that I put on record.

REPRESENTATIVE FOR THE RESPONDENT: That you can (intervention)…

THE APPLICANT: I have only asked one question and you said it is not (intervention)…

MADAM CHAIRPERSON: Which I do not have an answer.

THE APPLICANT: yes, no you do not have (intervention)….

MADAM CHAIRPERSON: That you have to ask at the courts maybe.

THE APPLICANT: Yes, so (intervention) …

MADAM CHAIRPERSON: Or you can ask your advisor, whoever is advising you. Because I really do not know what is happening at the court. And even if, if there is an appeal or review against our office we do not go there we sent government attorneys so I do not know their procedure there…

THE APPLICANT Yes.

MADAM CHAIRPERSON. Yes

THE APPLICANT I really want to present my case right now..

MADAM CHAIRPERSON Are you sure sir?

APPLICANT Yes …'

[36] From the above reading it is clear that, Mr Swartz elected not to have his witness that he summoned testify, and the hearing continued it was not postponed. As regards the disclosure or discovery of documents to him, Mr Swartz in his supplementary founding affidavit alleges that he delivered an application in terms of rule 28 and refers to '*Annexure — SJS-11',* pertaining to the rules relating to the conduct of Conciliation and Arbitration before the commissioner, in terms of the Act.

[37] I again have to agree with Mr Maasdorp that this ground of review is factually incorrect. First '*Annexure — SJS-11'* is not an application as contemplated in rule 28, but is a request dated 11 August 2020 for the arbitrator to summon witness as contemplated in rule 35(1). Secondly, my perusal of the record indicates that on 4 September 2020, Mr Swartz, by email, send a list of documents that he wanted by 11 September 2020, to Ms Mbudje. In that e-mail Mr Swartz pertinently stated that:

> 'Failure to submit the requested documents to me on the due date will result in a formal application in terms of rule 28, in conjunction with rule 26 (1) of the rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner, Labour Act, (Act No. 11 of 2007), requesting the arbitrator to compel you to disclose the documents.'

[38] On 11 September 2020, Namwater, through Ms Mbudje, supplied Mr Swartz with the document it had (the performance bonus chapter from the HR Policy), and informed him that Namwater did not have the other documents on his list. At the arbitration hearing Mr Swartz complained about the non-disclosure of the documents to the arbitrator. Namwater repeated its assertion that it did not have the requested documents in its possession, and that it disclosed or provided Mr Swartz with the only document

which it had in its possession. Mr Swartz did not follow up on his threats to launch an application for the discovery of the documents. I, therefore, agree with Mr Maasdorp that the arbitrator had no basis to compel Namwater to discover the documents. This can under no stretch of imagination be regarded as gross irregularity on the part of the arbitrator.

[39] In my view Mr Swartz has failed to discharge the onus resting upon him to demonstrate that the arbitrator misconducted herself and committed gross irregularities in the arbitration proceedings. In the circumstances, the court has no legal basis, upon which to review and set aside the arbitrator's decision. The applicant's application accordingly fails.

Costs

[40] The outstanding issue relates to costs. Mr Maasdorp argued that the applicant's case is 'manifestly futile', to his knowledge, at the latest from the delivery of the answering papers. Proceeding with the application in the circumstances was clearly frivolous. He accordingly implored the court to award Namwater costs of one instructing and one instructed counsel.

[41] The concept of '*vexatious or frivolous'* behaviour has been the subject of many decisions of this court. It was stated that a party acts frivolously or vexatiously where he or she 'acts in a manner that is in all the circumstances of the case without pure and honourable foundation and one that is entirely groundless, without proper foundation and singularly designed to trouble, irritate, irk, incense, anger, provoke, pique and to disturb and vex the spirit of the other party.'[19]

[42] The launching of this applications, whilst misplaced or ill-advised, would in my view not constitute frivolous or vexatious conduct. For the reasons set out in this judgment, I make the following order.

1. The review application is dismissed.

2. There is no order as to costs.

[19] *Onesmus v Namibia Farm Workers Union* (LC 3/2013) [2018] NALCMD 17 (16 July 2018) para 28.

3. The matter is regarded as finalised and is removed from the roll.

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S F I UEITELE
Judge

APPEARANCES

APPLICANT:	F Bangamwabo Of FB Law Chambers, Windhoek
FIRST RESPONDENT:	R Maasdorp Instructed by ENS Africa, Windhoek