



REPORTABLE

CASE NO: SA 16 / 2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**WILLIAM S. TORBITT
TUULIKKI MWAFUFYA-SHIKONGO
PENDA YA OTTO N.O
THE REGISTRAR OF THE LABOUR
COURT**

**First Appellant
Second Appellant
Third Appellant
Fourth Appellant**

and

**THE INTERNATIONAL UNIVERSITY OF
MANAGEMENT**

Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF AJA

Heard: 02 March 2016

Delivered: 28 March 2017

Summary: Interpretation of Statutes – the phrase ‘within 30 days of the conclusion of arbitration proceedings the arbitrator *must* issue an award . . .’ as it appears in

s 86(18) of the Labour Act 11 of 2007 found by the court *a quo* to be peremptory, requiring strict compliance, and award issued outside time period declared null and void *ab initio*.

The cardinal rule of construction is that words of a statute must be given their ordinary, literal or grammatical meaning if the words are clear and unambiguous, unless it is apparent that such literal construction would lead to manifest absurdity, inconsistency, injustice or would be contrary to the intention of the legislature.

Impossible to lay down any conclusive test as to when legislative provision is directory and when it is peremptory.

It is the duty of a court to arrive at the real intention of the legislature by considering the object and scope of the relevant statute.

Peremptory provisions merely because they are peremptory will not by implication, be held to require exact compliance where substantial compliance with them will achieve the object of the legislature. The modern approach manifests a tendency to incline towards flexibility.

Where a statutory duty is imposed on a public body or public officers and the statute requires that such duty shall be performed in a certain manner or a certain time or under specified conditions, such prescription may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control

over those exercising the duty would result if such requirement were essential or imperative.

On appeal found that the word 'must', should in view of semantic and jurisprudential guidelines developed by the courts, be interpreted as permissive, requiring only substantial compliance in order to be legally effective.

APPEAL JUDGMENT

HOFF AJA (DAMASEB DCJ, and MAINGA JA concurring):

[1] This is an appeal against the order of the Labour Court in which an award issued in favour of the first appellant by the second appellant was declared a nullity and *void ab initio*.

[2] A claim of unfair dismissal was heard by the second appellant and the arbitration proceedings concluded on 11 March 2013 after evidence by both sides had been led. The respondent, in its founding affidavit in the court *a quo*, stated that the second appellant directed that submissions by the parties be made in writing and be filed on or before 20 March 2013. It was contended that the conclusion of the arbitration was on 11 March 2013, or alternatively on 20 March 2013, the day on which heads of argument were to be filed. The award by the second appellant was issued on 8 May 2013 and served on the respondent on 10 May 2013.

[3] The respondent approached the court *a quo* for a declaratory order in terms of the provisions of s 117(1)(d) of the Labour Act 11 of 2007 (the Act). It was contended by the respondent that the arbitrator was peremptorily bound to have issued an award within a period of 30 days from the date of the conclusion of the hearing as contemplated in terms of s 86(18) of the Act. Since the award was not issued within 30 days from the conclusion of the arbitration hearing the purported award by the second appellant 'is a complete nullity with no effect in law and which cannot be enforced'.¹

[4] Section 86(18) of the Act reads as follows:

'Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award giving concise reasons and signed by the arbitrator.'

[5] Before considering the submissions made on behalf of the respective parties it must be mentioned that the first appellant passed away on 23 March 2015 pending appeal proceedings. At the hearing of this appeal an application was brought by Balfrieda Coetzee (acting in her capacity as the executrix of the estate of the late William Stansfield Torbitt) to be substituted in place of the first appellant. There was no opposition to this application and the substitution prayed for was granted.² I shall continue to refer to the late Mr Torbitt as the first appellant.

¹ At p 8 of the record, para 14 (last line).

² Section 19(b) of the Supreme Court Act 15 of 1990 provides *inter alia* that this court on hearing appeals has the power to make any order which the circumstances may require.

The proceedings in the labour court

[6] The relief claimed in the notice of motion was the following:

‘Declaring the award on 8 May 2013 by the second respondent under case number CRWK 877-12 as a nullity and void ab initio.’

[7] The approach by the Labour Court in the interpretation of s 86(18) was to have recourse to the golden rule of construction, namely, that words of a statute must be given their ordinary, literal or grammatical meaning if the words are clear and unambiguous. This may be departed from if it is apparent that such literal construction falls within one of the exceptional cases in which it will be permissible for a court of law to depart from such literal construction, for example, where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to legislative intent.

[8] The court below found that ‘all the words including ‘must’ in s 86(18) are clear, plain and unambiguous and should be given their literal and grammatical meaning . . .’

[9] In this regard the Labour Court remarked as follows in para 9 of its judgment:

‘The legislative purpose behind the section is as clear as day: it seeks to ensure that arbitration awards are issued expeditiously. And by its choice of the auxiliary verb “must”; the Legislature intended “to oblige” (see *Concise Oxford Dictionary* 11th ed) and arbitrator to obey the statutory command without fail; and the arbitrator is not given any leeway in the matter. Thus, the word “must” used as an auxiliary verb, is a modal denoting obligation: it casts an absolute duty on the arbitrator without any shadow of allowance which would permit the arbitrator to issue the award any time he

or she likes after the statutory time limit has expired. It follows inevitably and reasonably that s 86(18) of the Labour Act intends that 'must' should have mandatory and peremptory meaning and effect, not permissive or directory meaning and effect.'³

The Labour Court continued as follows at para 10:

'Thus, the intention of the Legislature in s 86(18) of the Labour Act is clearly to command in peremptory terms the duty of an arbitrator to issue his or her arbitration award within the prescribed statutory time limit; and the purpose is to ensure that arbitration awards are issued expeditiously and within a fixed and identifiable time limit. The absurdity that would indubitably be begotten by the interpretation put forth by Mr Vlieghe and Mr Ncube is this. Arbitrators would, under the Labour Act, have a field day, uncontrolled, to issue arbitration awards any time they want at their whims and caprices. Parliament could not have intended such absurd result.'

[10] The issue to be decided in the court *a quo* was not whether having regard to the time period prescribed in s 86(18) within which an award must be issued by an arbitrator, a court *always* has a *general power* to condone non-compliance. Rather, the issue was whether or not by *interpreting the language used*,⁴ the time period is not prescriptive and that the section ought to be read as allowing a court a power to condone non-compliance.

Issue on appeal

[11] The issue on appeal remained the same as in the court *a quo*, namely the interpretation of the provisions of s 86(18) of the Act.

³ Para 9 quoted in part only.

⁴ See paras 1, 2, 6, 7 and 8 of the judgment of the court *a quo*.

[12] Mr Namandje, on behalf of the respondent, submitted that the court *a quo*⁵ correctly found that an arbitration award issued beyond the 'mandatory period' is a nullity.

[13] Mr Namandje submitted that it is significant that in para 14⁶ of the judgment the court *a quo* emphasised the word 'must' as opposed to the word 'shall' used in s 86(18) of the Act, and where it was stated as follows:

'Furthermore, it is not insignificant, neither is it aleatory that 'must' and not 'shall' is used in s 86(18) of the Labour Act. It is to take out of the hands of the over activist judge who may be minded to put forth the theory that depending upon the context, "shall" may mean "may", thus creating a directory or permissive status for "shall" in addition to its natural, peremptory and mandatory status.'

[14] It was submitted that this reasoning is in accord with this court's approach in *Minister of Justice v Magistrates Commission* 2012 (2) NR 743 (SC), as well as with the approach of the South African Supreme Court of Appeal in *Minister of Environment Affairs and Tourism & others v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA).

[15] Mr Namandje referred to another case dealt with in the Labour Court subsequent to the judgment of the Labour Court in the present matter, where the failure to comply with the 30 days limit in s 86(18) of the Act was considered in *Life Office of Namibia Ltd (Namlife) v Amakali & another* 2014 (4) NR 1119 (LC).

⁵ As per Parker AJ.

⁶ Erroneously referred to in the heads of argument as para 16.

[16] It was pointed out that in the *Life Office* matter Smuts J agreed with Parker AJ, on the meaning of 'must' in s 86(18), and Smuts J stated that: '... the use of the term 'must' casts an obligation upon an arbitrator to deliver an award in that 30 day-period. He⁷ concludes that the use of the term 'must' is mandatory and peremptory and not permissive or directory. I respectfully agree with all of those sentiments'.⁸

[17] In *Life Office* the court however disagreed that the consequence following upon non-compliance is the invalidity of an award delivered beyond the expiration of that period.

[18] Mr Namandje submitted that once it is found that the period prescribed in terms of s 86(18) is peremptory it would follow (in the absence of power given to the Labour Court to extend the period or to condone non-compliance), that in the proceedings where a declarator is being sought, following admitted facts that the award was issued beyond the mandatory period, the court has no option but to grant the declarator, confirming invalidity.

[19] Mr Namandje contended that the respondent cannot as a remedy, appeal against an award it is convinced is a nullity, and that a declarator was the most appropriate and available remedy to it.

[20] Mr Vlieghe on behalf of the first appellant with reference to relevant authority submitted, in a nutshell, that although s 86(18) is worded in peremptory terms this

⁷ A reference to Parker AJ.

⁸ At para 15 quoted in part only.

does not necessarily mean that the consequences of non-compliance therewith render the award a nullity, but that the enquiry goes further since legislative intent and purpose must be considered. He submitted that the interpretation which should be given to s 86(18) of the Act should be a modern and flexible one, aimed at achieving a systematic, speedy, and inexpensive means of resolving labour disputes. He further submitted that s 86(18) is a legislative guideline and that an award is not invalid or a nullity as a consequence of it being late. This interpretation, it was submitted, is one which will not cause absurdities, hardships and unjust consequences. It was submitted that the interpretation by the court *a quo* in fact caused an injustice.

[21] Mr Ncube on behalf of second, third and fourth appellants identified the issue on appeal as follows:

- (a) Whether the provisions of s 86(18) are peremptory;
- (b) If the court finds that they are peremptory, whether non-compliance results in an award given outside that period is a nullity.

[22] Mr Ncube submitted that the cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment; that in a constitutional state a purposive construction should be adopted in ascertaining the meaning of a statute or a provision in a statute; that the interpretation of a statute should be seen as an enforcement of constitutional values; that the tenor and spirit adopted by the Labour Act is that of fairness and justice to the

parties in its interpretation; and that s 86(18) of the Act should be read *pari passu* the broad purposive intention of the Act and the preamble.

[23] Mr Ncube in his heads of argument embarked upon a comparative analysis of a number of authorities from various jurisdictions primarily to underscore the point that non-compliance with a mandatory statutory provision does not inevitably result in invalidity.

Common cause facts

[24] The following facts are common cause:

- (a) The first appellant had a master's degree in computer science with 35 years' experience as a lecturer at various universities around the world. The respondent head-hunted the first appellant for a position as senior lecturer in its Information Technology Department.
- (b) The first appellant and the respondent concluded a 2 year fixed contract of employment, set to run from 5 August 2011 until 4 August 2013. A probationary period of 12 months was set to end on 5 August 2012.
- (c) On 19 October 2012, more than 2 months after the probationary period ended the first appellant received a letter from the respondent in which the first appellant was informed that his probationary period had been extended for a further four months retrospectively from 5 August 2012 to 5 December 2012.

- (d) On 26 October 2012 the first appellant replied by addressing a letter to the respondent firstly dismissing the 'aspersions' against his performance, secondly incorrectly denying that the contract contained a probation period, and thirdly ridiculing the phrase 'retrospective probation period'.
- (e) The respondent thereafter in a letter dated 21 November 2012 informed the first appellant that since he was undergoing an assessment during the probation period it was found that his 'performance was not satisfactory'. The first appellant was further informed that 'in view of your inappropriate letter dated 26 October 2012 kindly now take notice that your employment, as per the probation period of twelve (12) months, terminates with immediate effect'.
- (f) The first appellant subsequently referred a complaint of unfair dismissal to the labour commissioner in terms of s 86 of the Labour Act. A conciliation attempt was unsuccessful and arbitration proceedings commenced and were finalised on 11 March 2013. Written submissions were filed by the parties on 20 March 2013 and in terms of s 86(18), the arbitrator was required to issue her award by 19 April 2013. The award was delivered on 10 May 2013, 21 calendar days later.
- (g) The arbitrator found that the dismissal was both procedurally and substantively unfair and ordered the respondent to compensate the first appellant in the amount of N\$170 169.63.

(h) The first appellant was 70 years old at the time the arbitration award was issued.

The consideration of respective submissions

[25] As a point of departure it must be emphasised that what was stated by this court in *Minister of Justice v Magistrates Commission* correctly reflects the approach in the interpretation of statutes where this court expressed itself as follows at para 27:

'The respective roles of the minister and the commission can be determined on a proper interpretation of the words "may" and "must" as used in ss 13 and 21(3)(a). In terms of what is commonly referred to as the cardinal rule of interpretation, where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning *unless it is apparent that such an interpretation would lead to manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature.*'

(Emphasis provided).

[26] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), the Supreme Court of Appeal in South Africa expressed itself as follows regarding the current legal position in respect of the interpretation of statutes, at para 18a-c:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole

and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used 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.'

and continues at para 26f-g:

'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[27] The significance of the terms peremptory/mandatory/obligatory and directory/permissive was explained in *Nkisimane & others v Santam Insurance Co Ltd* 1978 (2) SA 430 (AD) at 433H-434A by Trollip JA as follows:

'Preliminary I should say that statutory requirements are often categorised as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular.'

and continues at 434C:

'In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle & another* 1961 (2) SA 320 (N) at 327 *in fin* 328B and *Shalala's case supra* at 587F-588, and cf *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 646C-E).'

[28] This court in *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) at 515F-G referred to a full bench decision of the High Court of Namibia in *DTA of Namibia & another v SWAPO Party of Namibia & others* 2005 NR 1 (HC) where the High Court referred to some guidelines, stating the following at p 9H-10C:

'In *Pio v Franklin, NO & another* 1949 (3) SA 442 (C) Herbstein J summarised certain useful, though not exhaustive, guidelines when he said, at 451:

"In *Leibbrandt v SA Railways* (1941 AD 9 at 12) De Wet CJ said that "it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory."

He quoted with approval the statement of *Lord Campbell in Liverpool Bank v Turner* (1861) 30 LJ CH 379 which was recently again quoted with approval in *Vita Food Products v Unus Shipping Co* (1939 AC 277 PC):

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered."

In *Sutter v Scheepers* (1932 AD 165 at 173-4), Wessels JA suggested 'certain tests, not as comprehensive but as useful guides' to enable a Court to arrive at that 'real intention'. I would summarise them as follows:

- “1. The word ‘shall’ when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
2. If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
3. If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
4. If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
5. The history of the legislation also will afford a clue in some cases.”’

[29] This court in *Rally for Democracy* at 515E-F with reference to the reasoning that the distinction between a peremptory provision and a directory ‘is reflected in the use of “shall” to signify an absolute provision and “may” a directory provision’, stated that this ‘as a general proposition of law . . . presents an oversimplification of the semantic and jurisprudential guidelines pragmatically developed by the courts and distilled in a long line of judgments to differentiate between – what they conveniently labelled as – peremptory and directory provisions’.

[30] The approach that a peremptory enactment must be obeyed exactly and that it is sufficient if a directory enactment is obeyed or fulfilled substantially has been

described as rigid and inflexible⁹ and 'that the modern approach manifests a tendency to incline towards flexibility'.¹⁰

[31] This court in *Rally for Democracy* referred to *Volschenk v Volschenk* 1946 TPD 486 and *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour & another* 1987 (1) SA 1027 (SWA) as examples of cases manifesting this modern approach.

[32] In *Volschenk v Volschenk* Malan J expressed this approach at 490:

'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity.'

[33] In *Suidwes Afrikaanse Munisipale Personeel Vereniging* Hart AJP stated the following at 1038B-C:

'... but the principle in my opinion has now been firmly established that, in all cases of time limitations, whether statutory or in terms of the Rules of Court, the Supreme Court has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the Court.'

⁹ *George Simataa v The Public Service Commission & another* (2013) NAHCMD 306 High Court judgment delivered on 30 October 2013; *Rally for Democracy* (*supra*).

¹⁰ *DTA of Namibia* (*supra*); *Rally for Democracy* (*supra*).

[34] In *JEM Motors Ltd v Boutle & another* 1961 (2) SA 320 (NPD) at 328A-B Milne J stated:

‘. . . what must first be ascertained are the objects of the relevant provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at.’¹¹

[35] *Vlok NO & others v Sun International South Africa Ltd & others* 2014 (1) SA 487 (GSJ) (a case referred to by Mr Namandje in his heads of argument) also emphasises the trend of statutory interpretation, in context.

[36] Where a statutory duty is imposed on a public body or public officers ‘and the statute requires that it shall be performed in a certain manner or within a certain time or under specified conditions, such prescription may well be regarded as intended to be directory only in cases when injustice or inconvenience to others, who have no control over those exercising the duty would result if such requirement were essential or imperative’.¹²

[37] In *Maxwell: The Interpretation of Statutes*, regarding the performance of a public duty the following was said:¹³

¹¹ See also *Maharaj & others v Rampersad* 1964 (4) SA 638 (A.D.) 646C-E.

¹² *R v Noorbhai* 1945 AD 58 at 64 quoted with approval a passage in Maxwell on *The Interpretation of Statutes* 8th ed p 321 *et seq.* See also *K & P Contractors v Standerton Town Council* 1963 (1) TPD 405 at 406H-407C.

¹³ Eleventh ed (1962) p 369.

'On the other hand, where the prescriptions of a statute relate to the performance of a public duty, and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only and might be complied with after the prescribed time.'

[38] The provisions of s 86(18) should be determined by having regard to the scope and object of the Act as well as the semantic and jurisprudential guidelines referred to hereinbefore. The scope and object of the Act amongst others, can be summarised as follows:

to provide for a systematic prevention and resolution of labour disputes;¹⁴ to protect employees from unfair labour practices;¹⁵ to ensure that disputes are filed timeously;¹⁶ to determine disputes fairly and quickly;¹⁷ the arbitrator is enjoined to deal with the substantial merits of the dispute with the minimum of formalities;¹⁸ where a defect in proceedings is alleged a party may apply within 30 days for an order reviewing and setting aside the award;¹⁹ appeals to an arbitration award are to be finalised in a speedy manner;²⁰ an appeal against

¹⁴ As reflected in the pre-amble of the Act.

¹⁵ As reflected in the pre-amble of the Act.

¹⁶ Section 86(2) deals with the prescription of disputes.

¹⁷ Section 86(7)(a) of the Act.

¹⁸ Section 86(7)(b) of the Act.

¹⁹ Section 89(4)(a) of the Act.

²⁰ Rule 17(25) of the rules of the labour court.

an award lies in respect of a question of law alone;²¹ and legal representation in arbitration proceedings is circumscribed.²²

[39] These provisions aim to ensure a systematic, inexpensive, relatively informal²³ and expeditious resolution of labour disputes.

[40] If the guidelines referred to are to be applied the word 'must' is peremptory only insofar as it relates to the issuing of an award by the arbitrator. However, where an award is not issued within the prescribed period of 30 days such non-compliance cannot in my view have the effect of invalidity in circumstances where the award was in fact issued subsequently. I say this for the following reasons:

If the respondent's interpretation of s 86(18) were correct it would result in the following absurd, oppressive and unjust circumstances:

(a) awards delivered outside the 30 day period would have to be reheard which in turn would cause delays, further costs and a waste of the State's resources.

(b) it may prejudice the rights of both the applicant and respondent to a fair trial as evidence would already have been tendered, disclosing the strengths and weaknesses of their respective cases.

²¹ Section 89(1)(a) of the Act.

²² Section 86(13).

²³ An arbitrator may permit a legal practitioner to represent a party in certain prescribed circumstances.

(c) it would leave a litigant in a labour dispute in an untenable position in so far as his or her right to a speedy resolution of the dispute is concerned. The litigant cannot bring a mandamus application prior to the expiration of the 30 day period because such application would be premature. A mandamus application brought only after the 30 day period had expired would serve no purpose since by then the award would be a nullity (on the approach of the respondent). In these circumstances a litigant would be without any rights to ensure that an award is delivered in time.

(d) circumstances beyond the control of the arbitrator and the litigants (eg where an arbitrator is incapacitated) may prevent an arbitrator from strictly complying with the section. In each such case where an award is issued outside the 30 day period, even in cases where the award was issued only one day late, such an award would be a nullity through no fault of the litigants. This would be unfair to the successful litigant.

[41] A comparison with similar legislation in South Africa reveals that in terms of s 138(7) of the Labour Relations Act 66 of 1995 (LRA), a commissioner (arbitrator) must issue an arbitration award with brief reasons within 14 days of the conclusion of arbitration proceedings.

[42] Section 138(8) provides that the 'director' may on good cause shown extend the period within which an arbitration award is to be served and filed. There is no similar provision in the Namibian Labour Act as s 138(8), however non-compliance with the provisions of s 138(7) of the LRA has been interpreted by the Labour Court²⁴ as not intended to be peremptory but a guideline, since to visit non-compliance with invalidity would not be in accordance with the aims of that Act. The LRA has similar aims as our Labour Act namely the expeditious and effective resolutions of labour disputes.

[43] The second appellant (the arbitrator) explained the delay in issuing the award as follows:

'during the period 24 to 28 March 2016 she attended an arbitration award writing workshop in Otjiwarongo; as deputy labour commissioner she had administrative duties in addition to presiding over conciliations and arbitrations; during the period after the written submissions were received she presided over other arbitrations which placed additional pressure on her; and the offices of the labour commissioner were grossly understaffed as a result of which she was required to do extra duties.'

[44] The respondent did not refute this explanation but is of the view that the explanation is irrelevant, does not amount to good cause, and does not justify a relaxation of the 30 day period.²⁵

²⁴ See *Free State Buying Association Ltd t/a Alpha Farm v SACCAWU & another* [1999] 3 BLLR 223 LC; *Standard Bank of SA Ltd v Fobb and others* 2003 (2) SA 692 (LC).

²⁵ Page 103 of record; para 11.

[45] The respondent stated²⁶ that the purpose of bringing the application in the court *a quo* was ‘to set aside an invalid and unlawful administrative action by the Arbitrator as an administrative official’. This is a fundamental flaw in respondent’s approach.

[46] The nature of the function of an arbitrator is not administrative but quasi-judicial. In *Kasuto v Joubert & another*,²⁷ 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.’²⁸

[47] In *Lufuno Mphaphuli & Associates*²⁹ Kroon AJ referred to *Shippel v Morkel & another* where Van Winsen J expressed himself in connection with the nature of arbitration proceedings as follows at 434A-D:

‘Voet, 4.8.1., states that “there is a great correspondence between arbitrations and judicial proceedings” and that “there is the same sequence of proceeding and proof” as in judicial proceedings (*Gane’s trans*, vol 1 p 737); *Van Leeuwen*, bk 5 ch 94 (*Kotzé trans*), says that arbitrators are required to “pronounce an award according to the requirements of law and custom”. Our Courts have accepted that in deciding upon

²⁶ Pages 104 (last line) and 105 (first line) of the record.

²⁷ 2011 (2) NR 399 at 401A-B.

²⁸ 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.

²⁹ See footnote 30.

matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings. See such cases as *Croll q.q. Kerr v Brehm, supra; Lazarus v. Goldberg and Another, supra*. This would also appear to be the position in England. See *Haigh v. Haigh*, (1861) 5 L.T. 507 at p. 508; *Re Gregson and Armstrong*, (1894) 70 L.T. 106. The similarity between proceedings in Court and before an arbitrator are also apparent from the terms of the Arbitration Act, 42 of 1965.

It can thus be said with confidence that it is well established by the cases in our Courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties.'

Some apparent disputes between the parties

[48] The first appellant, in his answering affidavit³⁰ in the court *a quo*, asserted that the respondent flagrantly disregarded a most fundamental principle in law namely the *audi alteram partem* principle since he was 'dismissed from employment with immediate effect without ever being afforded the right to be heard, without ever being disciplined for misconduct or incapacity . . . and was never given the opportunity to answer to the allegations about his conduct or his ability.

[49] This is disputed by the respondent which in its replying affidavit³¹ stated that the first appellant was afforded an opportunity to be heard by virtue of the letter dated 19 October 2012.³²

[50] The first appellant also took issue with the validity of the assessments by his immediate supervisor and accused the respondent of not following its own policy in the assessments.

³⁰ Page 53-55 of the record.

³¹ Page 100.

³² *Supra* at p 100 para 6.2.7

[51] The first appellant also avers that the reason for his dismissal was simply that the respondent did not approve of the manner in which he took issue with the probationary period in the letter dated 26 October 2012 – implying an absence of a valid reason for his dismissal.

[52] The first appellant stated in his answering affidavit³³ that he is 70 years old and his prospects of finding another employment is slim. He further stated that the salary he earned at the respondent was intended to assist him in his retirement.

[53] The respondent in, its replying affidavit,³⁴ denied *inter alia* that respondent's prospects of finding other employment is slim and stated that the respondent has no knowledge of what the first appellant intended to do with the 'good salary' afforded to him by the respondent.

[54] I highlight these disagreements on the merits between the first appellant and the respondent in order to demonstrate the futility of ordering that the complaint by the first appellant, be heard *de novo*. The first appellant had passed away. The parties (assuming the estate of the first appellant a party) would simply be afforded no proper hearing in the absence of the first appellant. It is trite law that an arbitrator in such a situation would commit an irregularity by conducting a hearing in the absence of one of the parties.

Conclusion

³³ Record p 57 para 12.16.

³⁴ Record p 102.

[55] The injunction in s 86(18) to deliver an award within 30 days is aimed at addressing the delays in issuing awards. This is in line with the intention of the Legislature to ensure the efficient and speedy resolution of labour disputes. There is no provision in the Labour Act that non-compliance with s 86(18) is a nullity and void *ab initio*. Similarly, there is no explicit provision in the Labour Act which provides that non-compliance may be condoned by a commissioner or a court of law by extending the period within which the award is to be delivered.

[56] However as indicated supra in para 42, to interpret the word 'must' as peremptory in the sense that non-compliance with the 30 days period would render such award a nullity and void *ab initio*, would in my view, having regard to the circumstances of this case result in a gross injustice.

[57] The first appellant had no control over the arbitrator in order to ensure strict compliance with s 86(18). The arbitrator issued her award 21 days late through no fault of either first appellant or the respondent. It would be oppressive and extremely unjust in these circumstances to interpret the word 'must' literally, as submitted by the respondent, confirming the suggested invalidity of the award.

[58] This court would in view of the authorities referred to be justified to deviate from the cardinal rule of interpretation and to interpret the word 'must' not as peremptory but as permissive, requiring substantial compliance with the time period prescribed in s 86(18) of the Act, in order to be legally effective.

[59] This approach, in my view, would not only achieve the object of effective and efficient resolution of disputes, but would at the same time avoid a gross injustice to the first appellant.

[60] The reasoning by the court *a quo* that arbitrators would 'have a field day, uncontrolled, to issue arbitration awards at any time at their whims and caprices' is in my view no justification for a strict and inflexible interpretation of the provisions of s 86(18). Except to state³⁵ that it was of the *opinion* that its preferred interpretation (of the word 'must') would not lead to any manifest absurdity, inconsistency, hardship or a result that is contrary to legislative intent and purpose, the court *a quo* did not consider what effect such a declaration would have had on the position of the first appellant, the successful party in the arbitration proceedings. The first appellant was 70 years old and it is highly unlikely in the normal course of employment policies of institutions that he would have found at his age similar employment. The denial by the respondent that first appellant's prospects of finding another employment in those circumstances is slim, is in my view deliberately closing its eyes (figuratively speaking) to the advanced age of the first appellant. The prejudice the first appellant stood to suffer would have been loss of remuneration suffered a result of his dismissal. The respondent did not and could not deny that first appellant intended his salary to assist him in his retirement. The respondent on the other hand has a right to appeal the findings of the arbitrator or to take the arbitration proceedings on review.

³⁵ At para 8 of its judgment.

[61] In order to determine whether or not there was substantial compliance a court may consider the following factors:

the reason for the delay; the period of the delay; the prejudice to the respective litigants if the award were to be allowed to stand or were to be dismissed; and the availability of evidence if the matter were to be reheard. The list is not exhaustive. Each case must be considered on its own circumstances and merits.

[62] In the present matter there has, in my view, been substantial compliance with the provisions of s 86(18) and the arbitrator has given a satisfactory explanation for non-compliance with the time limit set out in s 86(18).

[63] I am drawn to conclude that the legislature had no intention to visit strict non-compliance with s 86(18) with a nullity *ab initio* and I am of the view for the reasons provided that substantial compliance therewith will not stultify the broader operation of the Act.

[64] This however does not mean that arbitrators may now disregard the time limit prescribed in s 86(18) of the Act. That time limit must still be regarded as the guiding objective when awards are to be issued by arbitrators.

[65] In the result the following orders are made:

1. The appeal is upheld.

2. The order of the court *a quo* is substituted with the following order:
 - (a) The application is dismissed.
 - (b) The validity of the arbitration award is confirmed, the respondent is to pay the first appellant, for the credit of the estate, the amount of N\$170 169.63 with interest at the rate of 20% per annum from 10 June 2013 (being 30 days after the award was issued) to the date of final payment.

3. The respondent is ordered to pay the appellants' costs in this appeal.

HOFF AJA

DAMASEB DCJ

MAINGA JA

APPEARANCES

FIRST APPELLANT:

S Vlieghe

of Koep & Partners, Windhoek

SECOND to FOURTH

J Ncube (with him E Nekwaya)

APPELLANTS:

of Government Attorney, Windhoek

RESPONDENT:

S Namandje

of Sisa Namandje & Co. Inc., Windhoek