CASE NO.: LCA 97/2009

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ROADS CONTRACTOR COMPANY **APPELLANT**

and

VICTORIA NAMBAHU **1ST RESPONDENT**
LETISIA SHIWEDA **2ND RESPONDENT**
THE LABOUR COMMISSIONER **3RD RESPONDENT**

CORAM: **MULLER J**

Heard on: 8 July 2011
Delivered on: 12 August 2011

APPEAL JUDGMENT

MULLER, J.: [1] This is an appeal by the employer of the first and second respondents against an award made by an arbitrator on 17 September 2007 after an arbitration hearing which originated from a complaint launched by the two respondents on 22 April 2009. There were various applications for condonation by the parties for not complying with the applicable provisions in the Labour Court Rules. However, after both

parties indicated that there would not be any objection to the condonations being granted, the court condoned non-compliance with the rules and the appeal was heard.

[2] Both Counsel submitted written heads of arguments in advance and amplified their submissions orally when the appeal was heard. Mr Philander represented the appellant and Adv Barnard the first and second respondents.

[3] The (unedited) award made by the arbitrator is the following:

> *"1. The respondent must rectify the salaries and benefits of the applicants with effect from 1 September 2009, to be equivalent of a C2 with two notches, and thus translating to: N$85, 650.00 per annum.*
>
> *2. The respondent to compensate the applicants with an amount of N$100, 000.00 each, being an estimate of the underpayment from July 2002 when they were appointed as Assistant Accountants, up to when their salaries were adjusted during June this year, 2009.*
>
> *The respondent must request for a tax directive from the Receiver of Revenue regarding taxation on the compensation amount.*
>
> *3. Payment of the compensation to be made directly to the applicants and proof of such payment to be provided to the arbitrator, by no later than the 18th October 2009.*
>
> *4. This award is final and binding on both parties."*

[4] The appellant's amended grounds of appeal are as follows:

"1.1 *The grounds of appeal are as follows:*

In limine: *The arbitrator failed to conduct the proceedings in a fair and just manner.*

(i) *That the Arbitrator erred in law in failing to find that the entire dispute or part thereof had become prescribed pursuant to the provisions of the Labour Act of 2007.*

(ii) *That the Arbitrator erred in law in proceeding with the arbitration in the absence of an application condoning the non-compliance with the provisions of the Labour Act of 2007.*

(iii) *That the Arbitrator erred in law in finding that the Respondents should be graded as Assistant Accountants on the level C2 with two salary notches.*

(iv) *That the Arbitrator erred in law in finding that the respondents' salaries should be rectified to be equivalent to that of the Grade C2 with two notches.*

(v) *That the arbitrator erred in law in finding that the respondents were entitled to losses/compensation in the amount of N$100,000.00 each.*

1.2 The grounds on which the Appellant relies are the following:

(i) *Evident from the record the arbitrator failed to comply with the rules of natural justice, in particular by ensuring that proceedings are conducted fairly to both parties.*

(ii) *The Respondents' cause of action (if any) arose either in 2002 (February & July respectively) when they were placed on the level B3 (Assistant Accountant) with retention of their existing salaries at the time, alternatively in 2005/2006 when, according to their own testimony during the arbitration they instituted the proceedings on 22 April 2009, without making an application for condonation for the late referral of the matter. The arbitrator acted ultra vires his authority when considering the dispute.*

(iii) *Further, the Appellant has in place a standard procedure to be followed and which it followed in respect of the grading and placement of positions. All assistant accountant positions within the Appellant are graded B3 (and not C2 as ordered by the arbitrator) since October 2005 till present.*

(iv) *The arbitrator notes in his judgment that the calculations made by the Respondents were erroneous yet he does not clarify how he computed the amounts payable to the Respondents."*

[5] As mentioned before, the court condoned the respondents' failure to file a statement containing the grounds of the opposition to the appeal. These grounds are

contained in the heads of arguments submitted by Mr Barnard and will be referred to when the particular grounds of appeal are dealt with, wherever necessary.

Background

[6] The background to the complaint by the respondents are briefly the following:

- The respondents referred disputes to the Labour Commissioner in terms of Form LC 21 of the Labour Act, no. 11 of 2007 (the Labour Act) on 22 April 2009, in which form their complaints were described as “under-payment”.
- Both respondents were employed as administrative assistants and were transferred with retention of their public service salaries during April 2000 to the appellant;
- Both respondents were employed with the appellant as administrative assistants;
- Both respondents were upgraded during 2001 to accounting assistants;
- In June 2001 the position of accounting assistant was upgraded to assistant accountant;
- In 2002 the respondents were informed that their positions with the appellant would be assistant accountants graded at Level B3 and not C2, as it was in the past;
- The respondents raised their concerns with regard to the salary differences between them and other colleagues, also employed as

assistant accountants, which objections were not approved by the appellant;

- In June 2009 the appellant adjusted the salaries of the respondents.

[7] The cases of both respondents as claimants were that they were entitled to be remunerated on the same level as their colleagues, which was not done.

Points in *limine*

[8] The appellant raised two points in *limine,* namely that the Labour Court proceedings before the arbitrator were conducted in an unfair manner and secondly, that the claims of the respondents had become prescribed in terms of section 86(2) of the Labour Act. The second point in *limine* might have been decisive, if their claims were not launched within 12 months from the time when it arose and the arbitrator could consequently not consider and deal with the claims. However, I regard it necessary to commence by dealing with the first point in *limine* and shall refer to the second point in *limine* thereafter. The reasons why this procedure is followed will become apparent in this judgment. If still necessary, the merits of the appeal will thereafter be considered.

First point in *limine* – unfair conduct of the arbitration proceedings

[9] Article 12 of the Namibian Constitution guarantees that any person is entitled to a fair trial. Article 12 (1)(a) reads as follows:

"(1) (a) In the determination of the civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law; provided that such Court or Tribunal may exclude the press and/or the public from all or any parts of the trial for reasons or of morals, the public order or national security, as is necessary in a democratic society."

[10] The applicable law in this matter is the Labour Court Act, which provides as follows in Section 85 (6):

"(6) Despite any provision to the contrary in the Public Service Act, 1995 (Act No. 13 of 1995) or in ay other law, an arbitrator must be independent and impartial in the performance of duties in terms of this Act."

(My emphasis)

[11] At the commencement of the arbitration the arbitrator indicated his awareness of this requirement of independence and neutrality. At page 61 of the record he said the following:

"*I consider myself as an outsider in this case and subsequently neutral*."

[12] Mr Philander submitted that throughout the arbitration before him the conduct of the arbitrator can be regarded as a misconduct in respect of his duties and that he consequently committed a gross irregularity. In this regard he referred to the case of *Klaasen v CCMA and Others* (2005) 10 PLLR 964 at [27] and *Naraindath v CCMA and*

Others (2000) 21 ILJ 1151 (LC) at [27]. In respect of what has to be understood from the expression of misconduct, Mr Philander referred to the 4th edition of re-issue of Halsbury, vol 2, paragraph 694, where the following is stated:

> *"Misconduct has been described as "such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice..... An arbitrator will misconduct himself if he acts in a way that is contrary to public policy. In particular, it will be misconduct to act in a way which is, or appears to be, unfair."*

At the hand of the decision in *Mutual and Federal Insurance Company Limited v Commission for CCMA and Others* (1997) 12 PLLR 1610 (LC) it is submitted that when an arbitrator adopts a more inquisitorial participative role in proceedings before him than is customarily the case in an adversarial hearing, he must be vigilant to ensure not only that the proceedings are fair to both parties, but that the appearance of fairness is always maintained. Furthermore, an arbitrator should not rely on his personal experience and knowledge to such an extent that he might be considered as partial or that he was overstepping the boundaries that he is dutybound to perform as an independent arbitrator.

[13] Mr Philander referred the court to several extracts from the record in respect of remarks by the arbitrator, which he submitted is indicative of the arbitrator not being impartial or that he overstepped the boundaries of his office, or of pre-judging the issue and acting with a clouded mind. I shall refer to these extracts (and more) later herein. Mr Barnard's attitude in this regard was that, when he originally drafted his heads of argument, this issue did not form part of the grounds of appeal, but was only included

later. As mentioned, that amendment was condoned by the court. In his heads of argument Mr Barnard steered clear from dealing with this aspect and only submitted that it was not part of the grounds of appeal. It is now part of the grounds of appeal. In this court Mr Barnard had only two submissions to make in this regard, namely that this is a procedural issue and not a substantive one and that the particular ground of appeal in the amended notice of appeal is not stated clear enough. There is no substance in both these submissions.

[14] From the extracts referred to by Mr Philander of comments made by the arbitrator during the hearing, I have no doubt that the arbitrator did not act as an independent and neutral trier of facts. The arbitrator clearly revealed his attitude and anybody reading the record would have the perception that the arbitrator had pre-conceived ideas and pre-judged the issue. It is also evident that the arbitrator misjudged the onus issue and that played a role in his evaluation of the evidence. Furthermore, the whole procedure and the way that the hearing was conducted, made it impossible for any witness to testify, because the arbitrator constantly and nearly after each and every sentence in the evidence a witness, intervened and asked questions which were not only based on assistance or clarification. The arbitrator not only interfered in the evidence and cross-examination of witnesses, but he seemed the most active questioner. In this regard certain guidelines in respect of the manner in which an arbitration ought to be conducted to ensure a fair hearing will be provided for the edification of arbitrators at the end of this judgment.

[15] The first indication in the record that the arbitrator was at a loss of how the arbitration should be conducted regards the manner how he dealt with the two claimants. Each claimant launched a claim against the appellant in respect of "*unfair payments*" in one document, form LC21. The arbitration should therefore have been conducted with regard to two claimants. However, from the procedure adopted by the arbitrator, it seems that although it was one hearing, the second claimant (second Respondent) testified, whereafter Mr Shipapo on behalf of the appellant (respondent in the arbitration) cross-examined her. So far the procedure had been in order. However, thereafter the arbitrator got confused. Evidence was then presented by Mr Shipapo on behalf of the appellant (respondent in the arbitration). From the record it appears as if Mr Shipapo was "*cross-examined"* solely by the arbitrator and not by any respondent (claimant). Thereafter first respondent (co-complaint) testified and was cross-examined by Mr Shipapo, whereafter he was again allowed to testify on behalf of the current appellant. The second misconduct of the procedure happened at the end of the hearing. Mr Shipapo on behalf of the respondent in the arbitration, objected that the arbitrator did not allow closing statements. He said the following at page 249 of record:

> *"FOR RESPONDENT: Mr Chair, I didn't come to the closing statement. The hearing is not procedurally correct"*

The arbitrator evidently recognised his failure to conduct the proceedings correctly in this regard and admitted it. He then said the following:

"CHAIRPERSON: You can then decide who will start, very briefly, to wrap up your case, why you feel I should make the certain ruling. The applicant can start."

From the record it appears as if the arbitrator was so rattled that he did not know how to handle this situation. He even let a clamant prescribe the proceedings to be followed. He said:

"CHAIRPERSON: Or you can start. How do you want to do it? Who wants to start?"

MS NAMBAHU: He can start.

CHAIRPERSON: You can start.

FOR RESPONDENT: I can start?

CHAIRPERSON: Ya."

There is also a third indication that the arbitrator did not know how the proceedings should be conducted. As indicated before, he conducted one case as two, but when it came to submissions at the end of the case, he regarded it as one. On page 250 of the record the following appears:

"CHAIRPERSON: No the case is one

FOR RESPONDENT: One, okay.

CHAIRPERSON: Ya, you don't do it one by one.

FOR RESPONDENT: Okay.

CHAIRPERSON: Even them they will decide one person only will speak not all of them. That's how its done here. The case is one. Its only that they were (interrupted)."

Mr Shipapo, on behalf of the appellant (respondent in the arbitration), then made closing submissions. Thereafter the arbitrator said the following on page 252:

"CHAIRPERSON: Fine. Madam, you decide one of you can quickly just summarise what you want (interrupted)."

The respondents were obviously also prejudiced by the arbitrator's above mentioned procedural ruling. The second respondent then made a submission, but the first respondent didn't as the arbitrator ruled.

[16] It is recognised that the manner in which proceedings should be conducted may rest in the hands of the presiding officer, the arbitrator, and that the proceedings should be more flexible than that in a court of law, also in regard to the Rules of evidence. However, the manner in which the proceedings in this matter was conducted indicates that on the one hand the arbitrator did not exactly understand what should be done and on the other, it must have led to confusion, in particular in respect of lay persons like the respondents (claimants). It should have been obvious to the arbitrator that where he has to deal with claims of two co-claimants and when he decided that they should commence with their evidence, both of them should have testified, with proper cross-examination allowed, and after they have closed their case, the appellant should have been allowed to give evidence with proper opportunity by the respondents to cross-

examine the appellant's witnesses. It is certainly not conducive of a perception of impartiality that the arbitrator should enter the arena and be the only cross-examiner of the respondent's (appellant's) witness. This did not happen. Furthermore, is it obvious that at the end of the hearing, both claimants and the appellant should have been allowed to make submissions and closing statements. At first the arbitrator did not allow it. He only did so after he was made aware of this procedural unfairness by Mr Shipapo. The arbitrator then clearly did not know how to deal with closing statements. He should have allowed both claimants to make submissions and thereafter Mr Shipapo. He allowed them to choose who will go first, which Mr Shipapo accepted. Then the arbitrator decided to allow only one of the co-claimants to put arguments in respect of her particular case before him, while each of them should have been allowed to do so.

[17] The following are extracts from the record which in my opinion clearly indicate that the arbitrator did not conduct fair proceedings in the arbitration and that neither the appellant, nor the respondents received a fair hearing in contravention with the provisions of both the Labour Act and the Namibian Constitution. It is not possible to quote each and every remark by the arbitrator, but from the following extracts it is evident that the arbitrator did not act independently and impartially.

[18] The second respondent testified about the salary difference between her salary and that of her colleagues. She was asked where she got the information from. Her response was that she could not reveal the source of her information. The arbitrator formulated her evidence which is clearly based on hearsay in his own words and

indicated that the onus in this regard rested on the respondent in the arbitration (the appellant):

"CHAIRPERSON: Okay, so what you are saying is: The information you use here to illustrate a difference in the discrepancies in the salary, you got it from a confidential source.

MS SHIWEDA: Yes.

CHAIRPERSON: Which you are uncomfortable to disclose.

MS SHIWEDA: Mm-hm.

CHAIRPERSON: But you are convinced your source is reliable and that's why you are presenting it.

MS SHIWEDA: Mm-hm.

CHAIRPERSON: It is then for them to prove you wrong.

MS SHIWEDA: Yes.

(Record: 93.)

When the second respondent complained about the fact that she and first respondent are on a B3 grading, while her colleagues are on C2 although they are doing the same job, the arbitrator said the following:

"*CHAIRPERSON: She is not at liberty to disclose her sources. That is our predicament. But I would believe that it should not be a problem because you sat on top of the hill. You are able to access all the information. If she is may be misinformed you should be able to give us the correct information."*

(Record: 110.)

When the second respondent was further cross-examined in respect of her allegation that she should be paid the same salary as her colleagues who might have earned a higher salary even before her transfer, the arbitrator intervened and effectively stopped Mr Shipapo's cross-examination:

"*CHAIRPERSON:* *I think that question that you are putting, you are putting her in a very difficult situation because she is not an HR. You are privy to that information and if that is a reason for the discrepancy, when you get the floor you can then put that information on the table.*

FOR RESPONDENT: *Okay, thank you very much.*

CHAIRPERSON: *There is no need for you to dwell on that."*

(Record: 112.)

On the next page of the record the chairperson continues along this line and then stated in so many words that the onus in this regard rests on the respondent (appellant):

"*CHAIRPERSON:* *Ya, ya, because she only does her work but she managed on her own to find out. She suspects that she is underpaid, you understand?*

FOR RESPONDENT: *Mm-hm*

CHAIRPERSON: *But the onus, I think she presented her case and <u>the onus is on you</u> to give us the modality of why there is, what is the justification for this discrepancy, if any.*

FOR RESPONDENT: *Ya*

CHAIRPERSON: *If there is no discrepancy, it is for you to prove."*

(My emphasis)

(Record: 113.)

When the representative of the appellant wanted to enquire on what does second respondent base her calculation that she earn less than the other assistant accountants, namely on only one person, or more than one, the arbitrator also stopped this line of questioning:

"*CHAIRPERSON:* *I think she has answered. She said it is impossible for her to get information on all of them. That question again is a same as the previous one, because you know what the actual situation is. I think she has put her case. She has indicated that she managed to get information. I do not think it's possible for her to get information on all the employees, because she is not in HR. This is confidential information. But what makes her unhappy is that she managed, whether it is from one or two she's got a case. Why should these two be treated differently than her, you understand? But you from the HR should then be able to put the broader picture on the table and say "look, you were misinformed" or "your information was*

correct, but these exceptional cases, that is the justification". I think that is the issue here.

FOR RESPONDENT: *Okay, I think I will rest my things on closing statement. Thank you very much.*

(Record: 114.)

That was the end of the cross-examination of second respondent. As mentioned earlier, Mr Shipapo was then called to testify by the arbitrator in the following words:

"*CHAIRPERSON:* *Not really. In that case I would ask the respondent's representative to give me their side of the story. Your name Sir?"*

(Record: 115)

[19] The perusal of the record also reveals that after nearly every sentence of the testimony by Mr Shipapo, the arbitrator, who was the sole cross-examiner, had some comment to make. A few examples of the many such interruptions by the arbitrator will suffice:

"*CHAIRPERSON:* *As an HR Manager do you think this was right?*

FOR RESPONDENT: *Ya, from me as HR Manager as you are aware that when you were transferred you were still an admin assistant. Then the (interrupted)*

CHAIRPERSON: *The question I'm asking; You know what happened now.*

FOR RESPONDENT: *Ya*

CHAIRPERSON: *As an HR practitioner, do you think this was right? That's the question. Are you convinced it was done right?*

FOR RESPONDENT: *It is done right. Based on her upgrading she needs to be paid, because she in no more an admin assistant; she is now an accounting assistant. Based on that one she's got the salary adjustment.*

CHAIRPERSON: *Because I don't get you. Because if I get (interrupted)*

FOR RESPONDENT: *Maybe the question (interrupted)*

CHAIRPERSON: *Let me just get you right, because I think that is where you have this problem.*

FOR RESPONDENT: *Mm*

CHAIRPERSON: *If I understand what you are saying you are saying that she was transferred from government to RCC, from day one she was technically she was transferred as assistant accountant or whatever, right.*

FOR RESPONDENT: *Ya*

CHAIRPERSON: *But for one reason or another she remained an administrative assistant.*

FOR RESPONDENT: *Assistant, it is correct.*

CHAIRPERSON: *Which I would believe was an omission on somebody's part.*

FOR RESPONDENT: *Mm*

CHAIRPERSON: *From day one she was supposed to be an assistant account, or whatever you call it.*

FOR RESPONDENT: *Accounting assistant.*

CHAIRPERSON: *Accounting assistant.*

FOR RESPONDENT: *Mm*

CHAIRPERSON: *By default this did not happen. And as things went some time later her boss picked it up.*

FOR RESPONDENT: *Wrote a letter.*

CHAIRPERSON: *And she could only pick it up in June, or wherever. Although he might have picked it up earlier he could only write a letter in June.*

FOR RESPONDENT: *Mm*

CHAIRPERSON: *Now when he wrote this letter the problem came I, approval had to be granted that she did not get compensation for the mistake that was done.*

FOR RESPONDENT: *Mr Chair, there was not a mistake.*

CHAIRPERSON: *No, no, my own understanding.*

(Record: 120-123.)

[20] During the evidence of Mr Shipapo on behalf of the appellant (respondent in the arbitration) the arbitrator did on numerous occasions refer to his own experience, or to his own understanding based on that experience, with relation to the issue that he had to decide. Some of these remarks are high-lighted to illustrate the arbitrator's reliance

on his own experience. Just after the previous remarks by the arbitrator quoted above, he said the following as recorded on page 123 of the record:

"*CHAIRPERSON: I was also an HR Manager myself for a big company. My own understanding, I might be wrong, but my own understanding is that to rectify this anomaly a back-pay should have been worked out of the difference between the salary of an administration assistant and an accounting assistant. If there is a difference in salary, that should have been worked out from the day she started and should have been paid to her. And her salary should have been adjusted immediately. From there on it should have been brought on par.*

Now, if you discover the mistake in June and she had already started in April of the previous year, and you only rectified the mistake for one month backwards, you did not solve the problem, you understand. If she accepted it its fine, but if she makes a legal issue out of it, which is the case now, I would believe you find yourself outside the parameters of the law. And that's why the allegation of underpayment or unfair labour practice or whatever you may call it, is justified, in my opinion."

On page 131 of the record the arbitrator again referred to his own experience. He referred to "*probation*", which was never a basis of any of the respondents' claims.

> "*CHAIRPERSON: Yes, you see, I have a serious problem. Let me just give you an example. Myself, when I started here, I worked in the same Ministry for 10 years and I left in 2000. I came back in 2007, first April. I applied for a position. It was a promotion post, which I'm still occupying now. But the procedure in government, I'm subject to a one year probation, and that is exactly what happened. I was appointed on probation. All the probation means that I have to prove that I can do the job, you understand."*

On the next page the arbitrator stated:

> "*CHAIRPERSON: I was appointed as a control labour relations officer, and as I sit here I am a control labour relations officer. I was confirmed. I ran my probation. One year have prescribed, and I was confirmed. But whatever change took place with my salary was either in terms of notches, which I get one notch every year or in government I get my increase on, I think on the day that I started. There is a bonus that I get, seniority date, whatever. The letter told me what is my seniority date and whatever. My salary increased accordingly.*

But the increase in salary had nothing, the probational nature of my appointment and salary are two separate things, you understand.

FOR RESPONDENT: *Ya.*

CHAIRPERSON: *And I would believe that should have been her case... That's what I know. I don't know, I might be wrong, but from the experience of many cases that I handled, there is no link between the salary scale and confirmation of probation. You understand?*

FOR RESPONDENT: *Mr Chair, I understand.*

CHAIRPERSON: *That's how I see it.*

FOR RESPONDENT: *May be you can give me to finish my (unclear)?*

CHAIRPERSON: *Okay, alright."*

Finally, on the issue of the arbitrator's reliance on his own experience, he said the following at page 138 of the record:

"*CHAIRPERSON:* *But with due respect, if I'm working here we are about five, six control labour relations officers here.*

FOR RESPONDENT: *Mm-mm*

CHAIRPERSON: *If the government decided to increase the salaries of my colleagues at my back without me knowing, how would I raise my concern? I can only raise my concern the moment I bump into one of them and*

realise that indeed my colleagues were earning something else and I am underpaid. You understand? I could only raise my voice from the point where I pick it up because it was hidden from me, you understand?"

[21] It is also clear from the record and in particular from the arbitrator's remarks to Mr Shipapo when he was attempting to testify, that the arbitrator had already made up his mind and had in fact pre-judged the issue. The following extracts from the record are some of the examples that illustrate this point. On page 147 of the record Mr Shipapo was asked on what did he base his statement that other colleagues of the claimants are on the B3 grading. Mr Shipapo said:

"FOR RESPONDENT: My justification is that the letter of 2002 dated so indicated clearly that she was no more an accounting assistant but an assistant accountant, but the *grading remains the same, which is B3."*

The arbitrator was not satisfied and sought concession from Mr Shipapo:

CHAIRPERSON: <u>What I want you to admit</u> is that by the time the title was downgraded, the assistant accountant was downgraded from C2 to B3."

(My underlining)

Still in respect of the salary issue the arbitrator interrupted Mr Shipapo's testimony:

"*CHAIRPERSON: No, all <u>I want you to admit</u> is that if she says... all <u>I want you to confirm</u> is that the information she got from the sources*

which she does not want to disclose is not wrong. It is not a rumour. It is not a basis rumour. Its correct."

(My emphasis)

(Record: 150.)

On page 154 of the record the arbitrator indicated what he understood from the evidence and again interrupted the testimony of Mr Shipapo:

"*CHAIRPERSON:* *Look, I think to me the picture is clear. We are just playing around with words here. <u>It is very clear to me what transpired.</u>*

FOR RESPONDENT: *Mm. but still, let me finish Mr Chair."*

(My emphasis)

When Mr Shipapo questioned the fact whether the other colleagues also got a letter of their grading to C2, as indicated, and told the arbitrator that he has a witness to testify in that regard, the arbitrator did not want to hear that evidence. The arbitrator said:

"*CHAIRPERSON:* *That is fine. That is not in dispute. You don't need to testify on that's, because that exactly the basis of her case.*

FOR RESPONDENT: *Ya.*

CHAIRPERSON: *That's what she is saying. Even if you call a witness he will just confirm what she said. If you want to testify, you testify to prove her wrong. What I wanted you to deal with (interrupted).*

FOR RESPONDENT: *I want Mr Chair, if I can finish (interrupted)*

(Record: 155.)

The arbitrator gave a clear indication that he is not interested in the testimony of other witnesses:

"*CHAIRPERSON:* *You can call hundred witnesses, but that is the issue."*

(Record: 159.)

The record shows that Mr Shipapo did not call any witness. He was also clearly disencouraged to do so. The arbitrator again indicated that he expects the respondent (appellant) to provide testimony that there is a difference in the work between the claimant and the other colleagues.

[22] The arbitrator continued in the same vein when the first respondent to this appeal testified. In the first instance he put leading questions to her in respect of her testimony and she only had to agree with what the arbitrator put to her. In respect of what her salary should have been, the arbitrator said the following:

"*CHAIRPERSON:* *No, no, if you were put at the C2 your salary should have been at least 79, nê?*

MS NAMBAHU: *Ya.*

CHAIRPERSON: *But it never happened?*

MS NAMBAHU: *It never happened to me. That is why I'm asking the question."*

(Record: 180)

When Mr Shipapo questioned first respondent about her claim that she expected the same salary as the other colleagues who were in that position before her and doing the same work as her, the arbitrator again interrupted and indicated whom he considered to be the correct people to compare her position with. It also appears to be the arbitrator who gave instructions to Mr Shipapo how he should conduct his case. He said at page 196 of the record:

> "*CHAIRPERSON:* *I think those would be the right people to compare with. Me when I will issue the award, I would want somebody to give me the very same people came with her, if there were any. It will be a different scenario if there is nobody who is in that category...*
>
> *FOR RESPONDENT:* *Then I (unclear)*
>
> *CHAIRPERSON:* *And the way for you to help us when you present your case, this case is not so complicated, concentrate and give me .... because you are official (unclear) give me two or three cases of people who came the same day with her or those who came after, how they were treated. Just to show me that no, her claim is unfounded; they are all treated the same. But if there is a 5 dollar difference you would have to justify to me why this one is getting 5 dollar more and this one is*

getting 5 dollar less, if they all came on the same day. I think that is the case we are handling.

FOR RESPONDENT: *If it is so then I (interrupted)*

CHAIRPERSON: *Ya, that's how the case is. It is not that complicated.*

FOR RESPONDENT: *Then if it is so then (interrupted)*

CHAIRPERSON: *What is difficult with it, what makes their case difficult is they do not have that full access to the official documents and as a result they are left to speculate and rely on some documents which might also be unofficial, but what made them suspicious is that they learned that some of their colleagues who ought to have been earning the same were earning slightly more, and that's where you should concentrate.*

FOR RESPONDENT: *No, then I stop my questions."*

(My emphasis)

From the above it is clear that the arbitrator again has a misconception of where the onus lies and clearly indicated to the respondent in the arbitration how it must conduct its case. When Mr Shipapo could not take this further, he was forced to end his cross-examination.

[23] Mr Shipapo was then called to testify again. (Record: 199) During his testimony the chairperson interrupted him after nearly every sentence. The arbitrator also

indicated at that stage already what his view of the evidence is. The following are some examples in this regard:

"*CHAIRPERSON:* *Okay. <u>Will you then agree with me</u> that during this period she is entitled to a difference between what she actually earn and what the others were earning as C 2's? If I were to make a ruling that she should have been paid as a C2, would you then see it fair if I use this table instead of using this one? Because it's no longer for you to decide. Its now for me to decide. I'm asking you; would you regard it as fair if I use this table to say "look, I will do my research but I'm likely to find that during that period she should have remunerated somewhere. I would believe, based on her experience also she cannot be at the bottom of the scale. She should be somewhere. You gave me a figure of N$4 480.00. I will maybe take N$5 040.00, which is a third notch. I'm just giving for argument sake."*

(My emphasis)

(Record: 208.)

On page 210 of the record the arbitrator stated:

"...But now it was an individual thing and only later did she learn that the others were treated differently. Now, for me that could be a ground of what we call inconsistency."

On page 214 the record again reflects the following of what the arbitrator stated:

"...I have already explained what is the basis why you are unable to come to terms because they are not very sure what is official. You know more, and they don't know. They end up using the wrong document, you have the correct document, you are no allowed to give it to them. They end up with this one, which was not very much official, they don't know what was there before, you understand. <u>But now I have the whole picture here</u>."

(My emphasis)

During the evidence of Mr Shipapo the arbitrator again used his own personal situation, which is an indication that he did not have an independent view of the proceedings. Referring to a colleague, he said on page 225 of the record:

"*CHAIRPERSON: And the position he occupied, I applied for it in 2000. We went for interview together. He was still working here, and I beat him, but I was an outsider. And then the post got mine. But I got another job outside and I declined it. That's why because he was second he got it. Then seven years later we met for the control position here in this board room. Again, he has been in the system for over ten years, I was coming*

in for the first time. I've never worked in this office. Again I beat him. You understand? He come second, but luckily there were two positions and we are all controls now. But I came seven years later."

The arbitrator continued in this vein for several pages.

In respect of a car allowance (which was never part of any dispute before him) the arbitrator said at page 230:

"*CHAIRPERSON:* *If you promote me to a minister, I will want to get my car allowance from the date I become a minister. Not the day before I become that.*

FOR RESPONDENT: *I don't have a problem.*

CHAIRPERSON: *That is the issue."*

(My emphasis)

Mr Shipapo then attempted to direct the arbitrator to what the real issue is, namely that the complainant's claim to receive the same salary as other colleagues, who were already in that position, but the arbitrator ignored it and continued with his own example:

"*CHAIRPERSON:* *Ya. Now, if you appoint me as a minister, I will find the Tjirianges who have been ministers since 1990.*

FOR RESPONDENT: *(unclear) pointing at others, Mr Chair.*

CHAIRPERSON: *No, no, no I'm just giving an example. I can even use a position of a deputy director that is the same. But there is a car allowance there. The day you make me a deputy director and you don't pay me a car*

allowance, I know it's an entitlement to that position. I will claim it and I will get it. You can come with all kinds of arguments. I will get it because it is an entitlement. The position goes with that. You understand?

FOR RESPONDENT: *Ya I think it's a problem that one.*

CHAIRPERSON: *That is the problem that you are having.*

FOR RESPONDENT: *But I have a problem (interrupted)*

CHAIRPERSON: *The only way you could convince me, sir (interrupted)*

FOR RESPONDENT: *(unclear)*

CHAIRPERSON: *Listen, the only way you could break through this thing, if you could say no, the policy in the company is that the position of an assistant accountant who works in the head office has a different job description and the different package as opposed the one of assistant accountant who is working in the region. Now the problem that we have, is nowhere before me and I can not make use of it when I make my ruling.*

FOR RESPONDENT: *It's what I said, I want to make use of my witness to come and confirm (interrupted)*

CHAIRPERSON: *Even if your witness come and repeats what you are saying here, for me it will not carry enough weight,*

you understand, because a job description is a document and I would prefer to see it."

(My emphasis)

(Record: 230-231)

Finally the arbitrator concluded with the following comment on page 248 of the record:

"*CHAIRPERSON:* *But to be honest, I think I've got the whole intestines of this case. Even if we sit here for another five hours very little will change. I think the issue is very specific and I would believe the company has also been aware of the issue. Its a question of how they were addressing it. I would believe this issue would not have come here if the company could have addressed it properly. I don't know why the company choose not to. But here we are now."*

(My emphasis)

This final comment by the arbitrator makes it clear that he has already made up his mind. It is significant that this was said before closing arguments were addressed to him. This seems to be the reason why the arbitrator initially did not consider closing arguments to be necessary at all.

[24] The arbitrator evidently misconceived where the onus rested. This is not a case of unfair discussal where s 33(4) of the Labour Act specifically provides that the employer bears the onus. The onus rested on the claimants (respondents in the appeal) they had to prove their case. It is obvious that in the arbitrator's view the employer (appellant) bore the onus. It was wrong to expect the appellant to produce evidence of witnesses which the claimants did not call, because they (in particular the second respondent) relied on "confidential" information which was and remained impermissible hearsay. Even without a strict application of the Rules of evidence the claimants had to provide some proof by way of oral or written evidence. The respondents evidently based their respective complaints on "suspicious" without supporting evidence.

[25] In the light of my finding that the arbitrator did not act in an independent and neutral manner and that the applicant (and even the two respondents) did not receive a fair trial before the arbitrator, the arbitrator's award has to be set aside. Section 89 (9) of the Labour Act stipulates what this court is entitled to do. Section 89(9) provides as follows:

"89(9) The Labour Court may –

a) *order that all or any part of the award <u>be suspended</u>; and*

b) *attach conditions to its order, including but not limited to –*

(i) *conditions requiring the payment of a monetary award into Court;*

(ii) *the continuation of the employers obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time."*

Section 89(10) deals with the situation when the arbitrator's award is set aside. That section stipulates:

> *"89(10) If the award is set aside, the Labour Court may –*
>
> a) *in a case of an appeal, determine the dispute in the manner it considers appropriate;*
>
> b) *refer it back to the arbitrator or direct that a new arbitrator be designated; or*
>
> c) *make any order it considers appropriate about the procedures to be followed to determine the dispute."*

[26] Mr Barnard submitted that his clients, the first and second respondents herein, who were the claimants in the hearing before the arbitrator, were also prejudiced because they, similarly as the appellant, did not receive a fair trial. Mr Philander, in reply, conceded that this may be so and on that basis he submitted that the matter should be referred back to a new arbitrator to hear the complaints afresh. I considered these submissions and came to the conclusion that there may be merit in this submission by Mr Barnard, as conceded by Mr Philander. Throughout the proceedings, the arbitrator interfered constantly, also when the first and second respondent testified. He further treated their claims as two cases; despite the fact that he mentioned at the end of the hearing that it is in fact one case. He further directed the appellant (respondent in the arbitration) to commence with closing submissions and not the claimants. Furthermore, he refused to allow both respondents, who were co-claimants before him, to make submissions. All in all, I am of the view that having set the award aside, it would only be

fair to refer the matter back to be arbitrated properly before another arbitrator. S 89(10)(b) expressly permits that the matter may be referred back to be conducted by a new arbitrator. For that very reason I do not intend to express any view on the merits of the claim of the respondents (claimants) at this stage.

Second point in limine – prescription of the claims

[27] Although I have come to the conclusion that the appeal should succeed and the award by the arbitrator set aside to be properly arbitrated, the issue of prescription should be addressed.

[28] Section 86(2) of the Labour Act 2007 provides as follows:

"86(2) A party may refer a dispute in terms of sub-section one (1) only –

a) *within six months after the date of dismissal, if the dispute concerns a dismissal; or*

b) *within one year after the dispute arising in any other case."*

What is commonly referred to as prescription, is in fact not prescription in the sense of a debt being prescribed according to the Prescription Act, no. 68 of 1969. It is more of a limitation on the institution of a claim. This is not a matter of unfair dismissal and consequently Section 86(2)(b) is applicable. Consequently, the claim has to be instituted within one year from the time when the dispute arose. This is common cause. Mr Philander referred to the decision by Henning AJ, an unreported judgment delivered on 30 November 2010 in the case of *Nedbank Namibia Limited v Jaqueline Wanda Louw*,

case no. LC 66/2010, where an arbitration award was based on a dismissal in terms of Section 86(2)(a) of the Act and where the claim had been launched out of time. The learned acting judge held that the arbitrator was not authorized to consider this issue at all: "...(*it) was ultra vires his authority and consequently a nullity*." On that basis the award was also a nullity and that award was set aside.

[29] The situation in this matter is somewhat different. The two respondents (co-complainants) claimed for under payment over a long period. It seems to me that Mr Barnard considered that part of the payment, namely before May 2008 might be *ultra vires* the authority of the arbitrator in terms of the provision of Section 86(2)(b), but that the salary payment from May 2008, as well as future payments are not affected by the provisions of Section 86(2)(b). If I had to consider this issue, called "*prescription*", I would only have dealt with claims arising from May 2008, depending of course if it could be found that the claimants were indeed entitled to such salary payments. In the light of my decision that the award should be set aside and referred back, I do not make any finding in respect of this issue.

Guidelines

[30] Most of the claimants in labour disputes are lay persons. They are seldom legally represented at the initial forum, the labour arbitration tribunal. In most of these matters the employer is represented by an employee, often involved in human relations at the employer's firm. The aim of the labour tribunal hearings is therefore not to require the strict procedure of a court of law, but rather to make it more flexible. In that way

laypersons without legal training can bring their claims and disputes before the arbitration tribunal for adjudication by an independent and impartial arbitrator. The arbitrator is empowered to determine the procedure to be followed. This empowerment of the arbitrator places a specific responsibility on him or her. Impartially and independence therefore becomes even more important. Often the arbitrator is the only person who has some legal training and parties look up to him or her to take the lead, to decide on where the onus rests, to determine who should begin, to rule how evidence shall be presented, etc. The manner in which the proceedings of the arbitration tribunal are conducted should never create any doubt or perception of impartiality or neutrality on the side of the arbitrator.

[31] It is against this background and having considered the manner in which the current arbitration had been conducted, as shown above, that the distinct impression is gained that some guidelines or at least "*tips"* to conduct a fair hearing may be necessary. In providing these guidelines the court is conscious of the more informal manner that the Labour Act requires proceedings of the arbitration tribunal should be conducted, as well as the empowerment of the arbitrator in this regard. Despite these legislative provisions contained in the Labour Act and its rules, the forum remains a tribunal and the requirements of the Namibian Constitution in respect of fair a hearing remains paramount. Other legal requirements in respect of what constitutes a fair hearing, cannot be ignored.

[32] An arbitrator, who conducts arbitration in terms of the Labour Act, should consider the following:

a) The arbitrator must against himself with what the dispute(s) of the complainant are;

b) The arbitrator has to be aware on whom the onus rests and determine who should commence;

c) The arbitrator should ensure that the parties are properly informed and understand how the proceedings will be conducted;

d) The arbitrator should always remain independent and impartial and he/she cannot allow that any party gain the perception that he/she is not a neutral and impartial adjudicator. In this regard the arbitrator:

(i) does not descend into the arena;

(ii) does not cross-examine any witness;

(iii) only ask questions for clarification or to provide guidance;

(iv) does not interrupt or stop cross-examination, unless it is clear that the questions being asked in cross-examination are repetitive, have already been answered, or do not have any relevance;

(v) never give any indication how he or she feels about the evidence or give any indication how he or she may decide;

(vi) allow closing arguments by all the parties.

e) The arbitrator should never refer to his/her personal circumstances or experience and thereby give an indication that he/she may be influenced by that in the decision he/she has to make;

f) Although the arbitrator sometimes is obliged to make rulings in respect of the conduct of witnesses, or specific matters during the hearing, he/she should always be cautious that no perception of partiality should be created that the parties, or any of them, will not receive a fair hearing;

g) In his/her award the arbitrator should deal with the evidence and his or her interpretation thereof. At that stage the arbitrator has the opportunity to decide and adjudicate;

h) The arbitrator should have a thorough knowledge of the provisions of the Labour Act and its Rules and the parties appearing before him should feel comfortable in this regard.

Conclusion

[33] In the result the following order is made:

1. The award by the arbitrator dated 17 September 2009 is set aside; and
2. The matter is referred back to the Labour Commissioner to appoint a new arbitrator to hear the arbitration *de novo*.

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MULLER, J.

ON BEHALF OF THE APPLICANT: **MR. PHILANDER**

INSTRUCTED BY: **LORENTZ ANGULA INC.**

ON BEHALF OF THE 1ST & 2ND RESPONDENT: **ADV. BARNARD**

INSTRUCTED BY: **TITUS IPUMBU LEGAL PRACTITIONERS**