REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LC 51/2010

In the matter between:

1.1.1.1. **NAMURA MINERAL RESOURCES (PTY) LTD**
APPLICANT

and

PHILLIP MWANDINGI **1st RESPONDENT**
THOMAS AMBUNDA **2nd RESPONDENT**
SAMUEL NELUMBU **3rd RESPONDENT**
WILLEM NAHENU **4th RESPONDENT**
PAULUS SHIKONGO **5th RESPONDENT**

Neutral citation: *Namura Mineral Resources (Pty) Ltd v Mwandingi (LC 51/2010) [2013] NALCMD4(23 January 2013)*

Coram: Schimming-Chase, AJ
Heard: 17 January 2013
Delivered: 23 January 2013

Flynote: Application for review of arbitration proceedings in respect of

labour dispute – Arbitrator refusing to recuse himself after it was established that he had prior knowledge of the dispute – Arbitrator further having discussions with one or more of the respondents before delivering his award in the absence of the applicant.

Flynote: Practice – Respondents raising point that they were not properly served because case number did not appear in newspaper tear sheets – Referral form (Form LC21) not signed.

ORDER

Granted in court *ex tempore*.

REASONS

SCHIMMING-CHASE, AJ

(b) On 18 January 2013, and after hearing submissions by counsel appearing for the applicant and counsel appearing for the second to fifth respondents, I made the following order with reasons to follow:

> "1. The arbitration proceedings in respect of a labour dispute between the applicant and the second to fifth respondents before the first respondent in his capacity as duly appointed arbitrator in case number CRWK 207-2010 conducted on 21 May 2010 as well as the resultant award is reviewed and set aside.
>
> 2. Should the second respondent wish to refer this dispute for arbitration, he must comply with Rules 14(1)(b) and 14(2) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour

Commissioner.

3. Should any of the other respondents wish to join the second respondent's dispute, they must comply with rules 5(2), 5(3) and 14(2)(c) of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner

4. The dispute, if so referred, shall be referred back to the labour commissioner to appoint a new arbitrator to hear the matter *de novo*."

I now provide the reasons for the above order.

(c) This is an application for the review and setting aside of the arbitration proceedings held in respect of a dispute between the applicant and the second to fifth respondents conducted on 21 May 2012 before the first respondent as the duly appointed arbitrator.

(d) The application for review is launched in terms of sections 89(4) and (5) of the Labour Act, 11 of 2007 ("the Labour Act") which provide that a party to an arbitration hearing may apply for the review and setting aside of an arbitration award if one or more of the following defects in the arbitration proceedings are present in the arbitration proceedings. The defects are set out in section 89(5) of the Labour Act as follows:

"(5) A defect referred to in subsection (4) means-

(a) that the arbitrator-

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the arbitrator's power; or

(b) that the award has been improperly obtained."

(e) The main basis for review is that the first respondent continued to arbitrate the dispute between the parties, despite having received correspondence relating to the dispute from one of the respondents before the arbitration proceedings commenced, and further that the first respondent had discussions concerning certain aspects of the dispute in the absence of the applicant and its representatives, both prior to the dispute being referred and after all evidence was led but before the award was finalised. The first respondent did not oppose the application. It was submitted that in the result, the first respondent committed a gross irregularity contrary to the provisions of section 89(5)(a) of the Labour Act.

(f) Counsel for the applicant also relied on two further considerations which he submitted, supported a decision to set aside the arbitration proceedings and to refer the dispute to arbitration *de novo* before a different arbitrator. The first is that the referral form from which the arbitration proceedings initially flowed (Form LC 21) was never signed. In this regard, Rules 14(1)(b) and 14(2)(a) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner provide that a party that wishes to refer a dispute to the labour commissioner for arbitration must do so by delivering a completed Form LC 21, which is called a "referral document" and that the referring party must sign the referral document in accordance with Rule 5. Rule 5 in turn provides as follows:

(g) "5 Service

(h)

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

(j)

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

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

(l) In this regard, counsel for the applicant relied on the unreported decision of this court delivered on 20 October 2011 in Waterberg Wilderness Lodge v Menesia Uses and 27 Others in case number LCA 16/2011 where it was held that anything that flowed from an unsigned referral form is a nullity.

(m) The second consideration (not raised on the papers) is that it was apparent from the record of arbitration proceedings as well as the first respondent's award that the second and third respondents did not testify under oath at the arbitration proceedings. It is clear that none of the statements made by the respondents at the hearing were made under oath, and the cross "questioning" of the respondents by the representatives of the applicant was also not under oath. In this regard counsel for the applicant relied on the unreported judgment of this court in Avbob Namibia v Sedekias Gam-Goaseb in case number LCA 36/2011 delivered on 8 June 2012 at par [4], [5] and [6] where it was held that the arbitrator committed a gross irregularity rendering the awards susceptible to review by accepting as evidence statements which were not made under oath or affirmed.

(n) At the commencement of the hearing, counsel for the second to fifth respondents applied for condonation for the late filing of the second and third respondents' opposing affidavits which were delivered 2 years after these proceedings were instituted. No affidavits were delivered by the fourth or fifth respondents, and no explanation was provided for this failure. The applicant, initially opposed the application for condonation but changed its stance on the basis that it wished to concentrate on reaching finality in these proceedings. The application for condonation was granted as a result, bearing in mind the provisions of Rule 7(1) of the Labour Court Rules.

(o)

(p) In his heads of argument, counsel for the second to fifth respondents conceded that the matter should be referred back to the Labour Commissioner for a hearing *de novo* because the referral form (Form LC 21) was not signed, and because the first respondent did not oppose the application. As regards the failure of the first respondent to recuse himself during the arbitration proceedings, counsel for the second to fifth respondents conceded that a reasonable litigant could apprehend fear of bias in the particular circumstances of the case.

(q) Counsel for the second to fifth respondents raised a further point for the first time in his heads of argument which he submitted should bring an end to the matter in the second to fifth respondents' favour in spite of the above concession. The point raised is that the second to fifth respondents did not receive proper service of the application as a result of which the application should be struck from the roll. I accordingly deal with this aspect first.

(r) It is common cause that the applicant instituted an urgent application against the first to fifth respondents for an order suspending the operation of the first respondent's award made in the above arbitration proceeding, pending the finalisation of the applicant's application for review and appeal against the award. By court order dated 18 June 2010, this court granted leave to the applicant to serve the urgent application, the review proceedings as well as to note the appeal against the first respondent's award via substituted service.

(s) In terms of this court order, substituted service was to be effected on the second to fifth respondents by way of publication of the notices of motion for the above relief in 2 consecutive editions of The Namibian and Die Republikein newspapers. It is common cause that the first respondent was properly served with these proceedings.

(t) In particular the court ordered that the original tear sheets of the relevant publications shall constitute proof of service of any process or documents in the urgent application for the suspension of the award, the application for review of the award as well as the appeal against the award.

(u) *Ex facie* the original tear sheets of the newspapers the notices of motion in respect of these appeared in two consecutive editions of The Namibian and Die Republikein on 28 and 29 June respectively. This is also not disputed on behalf of the respondents. However the case number allocated to these applications did not appear in the newspapers.

(v) Counsel for the second to fifth respondents submitted that as there was no case number included in the newspapers, service of the application was defective because the second to fifth respondents were not apprised of the case numbers in which the applications were launched as a result of which there was no proper service.

(w) Counsel for the second to fifth respondents did not refer the court to any authority for this proposition, and submitted that there was no authority to this effect. The only authority that could be found was in the Consolidated Practice Directives in particular Part V, relating to the numbering of a court document in respect of a case. Practice Directives 13(1) to 13(4) provide as follows:

> "(1) When a summons, application, provisional sentence summons or labour court application is filed for the purpose of issuing any of those processes, a court file must be opened.
>
> (2) The particulars of the litigants must be entered in the relevant registers and a permanent case number must be given to the case and that number must be placed in the right upper-hand corner of the file.
>
> (3) The case number given to each case must also appear on other relevant documents.
>
> (4) A case number must be in one of the following illustrative forms –
>
> (a) I 1/2007: in the case of action proceedings
>
> (b) A 1/2007: in the case of an application case

(c) PS 1/2007: in the case of a provisional sentence case

(d) LC 1/2007: in the case of a Labour Court application"

(x) Practice Directive 14 provides as follows:

"(1) In a criminal appeal, civil appeal, criminal review, admiralty case and Labour Court appeal, a permanent case number must be given for each case at the time of commencement of proceedings.

(2) A case number must be in one of the following forms:

(a) CA No. 1/2007: criminal and civil appeals

(b) CR No. 1/2007: criminal review

(c) AC No. 1/2007: Admiralty Court case

(d) LCA No. 1/2007: Labour Court appeal."

(y) It is clear from these Practice Directives that when a summons, application, provisional sentence summons or application is filed for purposes of issuing any of those processes, a court file must be opened and a case number must be given for each matter in the manner set out in the Practice Directives.

(z) Counsel for both parties attempted to provide information concerning the practice at the Registrar's Office to the effect that a case number is only allocated after the particular process has been served. However this amounted to testimony from the bar and was thus ignored. The court initially considered calling the Registrar to give evidence on this aspect, but from what appears below, it was not necessary.

(aa) This court now has to determine whether or not the substituted service was defective to the extent that the application set down for hearing some 2 years later should be struck from the roll. In this regard I am mindful of the

provisions of Rule 7(1) of the Labour Court Rules which provide that the hearing of the application must be conducted in such manner as the court considers most suitable to the clarification of the issues before it and generally to the just handling of proceedings, and the court must, so far as it appears appropriate, seek to avoid formality in the proceedings in order to ensure a speedy and fair disposal of the proceedings.

(bb) Bearing the above in mind the following aspects merit consideration. Firstly it is not disputed that in each of the newspaper tear sheets, the second to fifth respondents' names appeared in capitals. In The Namibian their names even appeared in bold lettering. Secondly, the full extent of the relief sought, in fact the notices of motion in their entirety were set out in the aforesaid newspapers. Thirdly, the case number in respect of the arbitration proceedings CRWK207-10 also clearly appeared in the newspapers.

(cc) Furthermore, the second to fifth respondents opposed the applications and were represented by legal practitioners who withdrew on 22 February 2012 from the matter. Counsel for the second to fifth respondents came on record for them on 27 June 2012. This matter also proceeded to case management, and counsel for the second to fifth respondents signed a joint case management report on 28 June 2012. The second and third respondents also filed answering affidavits, where the point of defective service was not taken. In their answering affidavits, the second and third respondents alleged, presumably for purposes of the application for condonation, that they were never served with any notice of motion and/or record by the applicant and were not able to file their notices of intention to oppose the review application as a result

(dd) In particular, the second and third respondents in identical terms stated the following:

> "21. I have now been briefed by my legal practitioner of record on the contents of the Applicant's notice of motion and in response would like to refer the above Honourable Court to paragraph 2 – 16 of this affidavit, and reiterate that:

21.1 I did not have any personal relationship with the First Respondent prior to the conciliation and arbitration hearing before him.

21.2 I did not disown my retrenchment or the merits of the case with the First Respondent before the conciliation and arbitration hearing.

22. I am aware that the application was made for the recusal of the First Respondent by the Applicant, however, as stated earlier, I did not discuss the merits of the case with the First Respondent and therefore submit that his finding is correct."

(ee) It is clear from the above that the second to fifth respondents became aware of the process instituted against them when they initially opposed the matter through their erstwhile and current legal representatives. In fact, they provided their version of events as well as reasons why the application for review should not be granted.

(ff)

(gg) It is trite that the purpose of an application for substituted service is to inform the opposing parties of the process instituted against them.

(hh) In my view, the absence of a case number could not prevent the respondents from becoming aware that an application had been instituted against them in respect of the arbitration proceedings bearing case number CRWK207-10. Thus the point raised by counsel for the second to fifth respondents at the last minute, and after the second and third respondents delivered affidavits containing their versions to the effect that, absent the case number service was defective is completely devoid of merit. In the result, the point is dismissed. I now turn to the merits of the review.

(ii) As regards the main ground of review, the record of the arbitration proceedings reveal that the first respondent during the arbitration proceedings of 21 May 2010, and while questioning the fourth respondent who had not taken the oath or made any form of affirmation that what he was stating was the truth,

stated that he had some time before the arbitration proceedings commenced, spoken to the third respondent's sister who was a Human Resources Officer at the Ministry of Labour concerning a retrenchment letter faxed to the third respondent by the applicant during February 2010. It is common cause that the aforesaid letter related to the dispute between the parties which was to be adjudicated upon by the first respondent at the proceedings.

(jj) According to the arbitrator, the letter was faxed to him on his request. He then called the fourth respondent to discuss the matter. The arbitrator stated the following during the arbitration proceedings:

> "I then called him, I think your number was on it, and then we discussed. Then you said other people are somewhere else and..... Ya. We just discussed. They just said they were retrenched and they were not (unclear). I said okay. I just explained the process how retrenchment is supposed to work and he left it there. Later, unfortunately the case came to me, like I'm picking it up now. I didn't even know him. Its just now when I saw Haitula here that I remembered that"

(kk) On 26 May 2010, and before judgment in the arbitration was handed down, the applicant launched a formal application to the first respondent for his recusal. The applicant alleged that on the basis of the above facts, the applicant apprehended that the first respondent was biased as he had knowledge of the dispute prior to it being heard, as a result of which he should not preside over the matter.

(ll) The second to fifth respondents were not served with this application. It is however not disputed that the applicant made attempts to contact these respondents in order to serve the recusal application. On the same date, the second to fifth respondents also launched an application for joinder on the applicant.

(mm) In his award handed down on 27 May 2010, the arbitrator dealt with the application for recusal as follows:

> "I am not aware of any rule or provision of the act that prevented me as an official of the Office of the Labour Commissioner to assist any employee or employer with any employment or labour related enquiries being telephonically or otherwise at any time during office hours. It is therefore true that one of the applicants has spoken to me over the telephone, after being referred by his sister who is an employee of the Ministry of labour, either on the 1st or 2nd February this year. It is also correct that he did later fax a one page retrenchment notice to me after informing me that he was in possession of a letter which he did not understand. The purpose was for me to get a clearer picture and be in a position to advice (*sic*) him accordingly. I recall he was calling from either Noordoewer or Aussenkehr that day.
>
> I also recall that the conversation was very brief when it ended when he indicated that he and his other colleagues were still to meet the respondent to either get more information or to negotiate on the package as indicated in the letter which he faxed to me. By that time there was no discussion of the dispute at hand as it was too premature to know that there was going to be a dispute some weeks later. It is important to note that this was long before 9 February 2010, the day which it would seem many of the things which led to toe dispute are alleged to have taken place. NB. I did not appoint myself to handle this case when it was eventually referred."

(nn) As regards the second to fifth respondent's application for joinder, which was never moved, the first respondent had the following to say:

> "Unfortunately for practical reasons <u>the applicants in this matter later informed me</u> that they would rather advice (*sic*) their colleagues to refer a separate dispute to the labour commissioner to be processed, and that I should proceed to finalise the awards in their case, which I hereby do."
> (emphasis supplied)

(oo) In this regard the applicant alleged in its founding papers in this review application that it became clear to it that the first respondent had some sort of discussions with one or more of the respondents prior to handing down his award. In fact, this is apparent from the words "the applicant in this matter later informed me ..." Furthermore the applicant alleged that it was not present at or

invited to be present at these "discussions". It also submitted that these meetings were impermissible and served to strengthen the applicant's reasonable apprehension that the first respondent would not be objective, and was biased against the applicant.

(pp) The general rule as to the duty of a judicial officer was summed up in S v Malindi and Others[1] as follows:

> "Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."

(qq) In Council of Review, South African Defence Force and Others v Mönnig and Others[2] Corbett CJ (as he then was) approving the dictum in S v Malindi also stated at 491F that the recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial.

(rr) I am in respectful agreement with the principles expounded in the above judgments. It is also trite that a judgment arriving from proceedings from which the presiding officer or officers ought to have recused himself is a nullity as the court would have lacked competence from the start.

(ss)

(tt) The concession by counsel for the second to fifth respondents is therefore correctly made as it is clear from the record and the undisputed facts that the applicant made out a clear case of a reasonable suspicion of bias on the part of the first respondent in the arbitration proceedings as a result of which the first respondent should have recused himself either once he remembered

[1] 1990 (1) SA 962 (A) at 969G-I

[2] 1992 (3) SA 482 (A) at 490A-D

receiving the letter or subsequent to the application for his recusal. His refusal to do so thus rendered the proceedings a nullity.

(uu) In addition, for the first respondent to then engage in discussions with the respondents in the applicant's absence before handing down his award in my view also amounted to a gross irregularity. In this regard the following principles reiterated in Sidumo and Another v Rustenberg Platinum Mines Ltd and Others[3] relating to the meaning of "gross irregularity" are apposite:

> "[262] The basic principle was laid down in the oft-quoted passage from Ellis v Morgan where the court said:
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> > 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined .'
>
> [263] In Goldfields, the court qualified this general principle. This case concerned a situation where the decision maker misconceived his or her mandate. The court held that where a decision maker misconceives the nature of the enquiry, the ensuing hearing cannot in principle be said to be fair because the decision maker has failed to perform his or her mandate. Schreiner J expressed the principle as follows:
>
> > 'The law, as stated in Ellis v. Morgan (a) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.'"

[3] (2007) 28 ILJ 2405 (CC) at 2488

(vv) The crucial question therefore is whether the conduct of the decision-maker complained of prevented a fair trial of the issues[4]. It is clear that the applicant did not have a fair trial and the proceedings must be set aside.

(ww) The concession made in respect of the status of the unsigned referral form (Form LC 21) is also correct, because, as mentioned above, anything that flows from an unsigned referral form is a nullity.

(xx) A judicial officer is required to be fair, biased and impartial if the rules of natural justice are to be maintained. I reiterate the guidelines issued to arbitrators by Muller J in Roads Contractor Company v Nambahu and Others[5] as follows:

> "[32] An arbitrator, who conducts arbitration in terms of the Labour Act, should consider the following:
>
> (a) The arbitrator must acquaint 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;

[4] See: Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) at par [71]-[73] and [78]; Sidumo v Rustenberg Platinum Mines *supra* at 265

[5] 2011 (2) NR 707 (LC) at par [32]

(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."

(emphasis supplied)

(yy) For the above reasons I granted the order set out above.

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EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANT:	Adv RL Maasdorp (with him Mr J Boltman) Instructed by GF Köpplinger Legal Practitioners
SECOND RESPONDENT:	Mr Mbaeva Instructed by Mbaeva & Associates