REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: LCA 12/2014

NAMPOWER CORPORATION (PTY) LTD **APPELLANT**

And

PRISKU NDESHITEELELA **RESPONDENT**

Neutral citation: *Nampower Corporation (Pty) Ltd v Prisku Ndeshiteelela* (LCA 12/2014) [2016] NAHCMD 9 (25 January 2016)

Coram: GEIER J
Heard: **22 January 2016**
Delivered: **25 January 2016**
Released: **08 March 2016**

Flynote: Labour law — Arbitration — Appeal against award — Misconduct by arbitrator — Nature of irregularity committed by arbitrator justifying setting aside of award — Such irregularity had negated fair trial rights - .

Summary: During the arbitration proceedings the arbitrator cross examined the appellant's witnesses without first allowing the appellant's legal practitioner to lead his witnesses. The arbitrator thus did not allow the proper ventilation of the appellant's case and she interfered in a material respect in its presentation. The conclusion had to be drawn that the arbitrator descended into the arena and that her conduct therefore was such that the appellant did not receive a fair trial.

Appellant's counsel urging court not to refer the matter back to be arbitrated afresh before another arbitrator. Court holding that the cardinal factor in deciding this issue was that both parties also in labour proceedings, and thus also during arbitration proceedings, conducted in terms of the Labour Act 2007, are entitled to the fair trial rights encapsulated in Article 12 of the Constitution and thus to a fair hearing in order to have their disputes resolved in a constitutional manner. This requirement was not met in the arbitration *a quo*. A referral back is aimed at satisfying the prescribed requirements set by the constitution. Not to do so would result in a situation of finding for the appellant and upholding the appellant's case on the basis of an unfair trial and the thereby vitiated proceedings after it had been held that a fair trial was not had. This cannot be. The matter therefore had to be referred back.

Held: that due to the fundamental irregularities committed by the arbitrator the award had to be set aside and the matter would have to be referred back to be arbitrated upon afresh.

ORDER

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1. The award made on 28 February 2014 by arbitrator Ms Fabiola Katjivena is hereby set aside.

2. The matter is referred back to the Labour Commissioner before a new arbitrator to hear the arbitration *de novo*.

JUDGMENT

GEIER J:

[1] The background to this Labour Appeal is sketched in the appellant's heads of argument as follows:

'1. The respondent was employed by the appellant for about 3 years in the position of Senior Security Officer: Investigations when, during 2012, she was charged with the following:

1.1 Misappropriation of a company vehicle for private purposes;

1.2 Driving a company vehicle without authorisation and under the influence of alcohol on 9 June 2012.

2. A disciplinary hearing for the respondent commenced on 18 July 2012 and was concluded on 3 October 2012.

3. The respondent was convicted on both charges and dismissed with effect from 3 October 2012. She appealed against her conviction and the appeal hearing was held on 30 October 2012. On 22 November 2012 the respondent's appeal was dismissed.

4. On 26 November 2012 the respondent lodged a dispute of unfair dismissal with the Office of the Labour Commissioner.

5. On 28 February 2014 the arbitrator, Ms Fabiola Katjivena, found the respondent's dismissal to be substantively and procedurally unfair. She awarded the respondent losses of 12 months of her basic salary of N$12,031.00 per month, amounting to N$144,372.00 and ordered that the respondent be reinstated in the same position she occupied prior to her dismissal.

6. The parties have agreed that, pending the outcome of this appeal, the respondent would be paid her monthly salary, but that she would not be required to work or be entitled to enter upon the appellant's premises. On this basis the respondent has been paid without working since February 2014.

7. This appeal is against the whole of the arbitration award and therefore against the findings of procedural and substantive unfairness, as well as the award of losses and the order of reinstatement.'

[2] After the record had become available the appellant amplified its grounds of appeal, these grounds also now included the ground through which the conduct of the arbitrator, Mrs Fabiola Katjivena, during the arbitration, became the *in limine* focus of this appeal.[1]

[3] The appellant claims that the arbitrator unlawfully descended into the arena when she improperly and irregularly cross examined the appellant's witnesses at length and also refused such witnesses the opportunity to explain.

[4] It should be mentioned that the respondent opposed this point initially on a number of technical grounds i.e. that the point was raised for the first time in heads of argument and that such point should have been raised by way of review proceedings for instance.

[5] At the hearing Mr Phatela, who appeared on behalf of the respondent, however abandoned these technical objections, correctly so in my view.

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[1]See paragraph 10 of the amplified grounds of Appeal as delivered on 11 September 2015.

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[6] His concessions then cleared the way for the consideration of this point which was argued by Mr Dicks, counsel for the appellant as follows:

> '12. This court has clearly stipulated what is expected from an arbitrator:
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> "(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:
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> (i) does not descend into the arena;
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> (ii) does not cross-examine any witness;
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> (iii) only ask questions for clarification or to provide guidance;
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> (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;
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> (iv) never give any indication how he or she feels about the evidence or give any indication how he or she may decide;
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> 13. The Supreme Court has expressed itself as follows in respect of the conduct of arbitrators[2]:
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> "[31] It needs to be pointed out that the duty to act independently and impartially is imposed by statute. ….. On the one hand, the courts must be loath to second-guess an arbitrator's handling of arbitration under the Act, lest doing so provides fodder for all manner of unmeritorious applications to courts to set aside arbitration awards and thus defeating the legislative intent that arbitrations be conducted summarily, with minimum formalities and minimum delay. On the other hand, is the equally important consideration that justice must not become a chimera by allowing arbitrators to act arbitrarily and oppressively.

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

[32] It is trite that an arbitrator is entrusted with the foremost task of determining the facts. In terms of s 89(1)(a) of the Act, a party to a dispute may appeal to the Labour Court against an arbitrator's award 'on any question of law alone'. The same principle applied even under s 21(1) of the old Labour Act 6 of 1992. It follows that on questions of fact, the arbitrator is the final arbiter and it is not open to the Labour Court on appeal to depart from a finding of fact by an arbitrator.

[33] Given that the law reposes so much authority in an arbitrator as the trier of fact, that imposes a special duty on the arbitrator to allow the ventilation by the parties of all the material and relevant facts. Conduct by an arbitrator which frustrates a party in ventilating all material and relevant evidence, especially where the party bears the risk of non-persuasion, will amount to a gross irregularity, unless it is patently obvious that the irregularity did not have a material effect on the outcome of the proceedings.

[34] The proper approach to be taken when the conduct of an arbitrator is impugned on the basis that it constitutes 'a gross irregularity', is that set out by Muller J in *Roads Contractor Company v Nambahu and Others* [3]. In that case, the following conduct by the arbitrator was found to constitute a gross irregularity within the meaning of ss 89(4) and 89(5)(a)(i) and (ii) of the Act:

(a) Exhibiting pre-conceived ideas and pre-judging issues;

(b) incessantly intervening while witnesses testified and asking questions which went beyond seeking clarifications: as the learned judge observed, the arbitrator became 'the most active questioner'.

[35] The arbitrator's conduct with which the court was concerned in the Roads Contractor Company case is on all fours with the conduct of the arbitrator in the case before us. The ratio for the court's conclusion that the arbitrator in the Roads Contractor matter failed to be neutral and independent, was succinctly set out by Muller J in the following terms:

[3] 2011 (2) NR 707 (LC)

> '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. . . . 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 of 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'.

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

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[42] Mr Elago, for the employee, argued before us that although such conduct may draw criticism, it was excusable because the arbitrator enjoys discretion under s 86(7) to 'conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and must deal with the substantial merits of the dispute with the minimum of legal formalities'. I gained the distinct impression from Mr Elago's submissions (both oral and written) that he is of the view that even if the conduct of the arbitrator was not beyond reproach in all respects, it was not proved by the appellant that the arbitrator 'failed to deal with the substantial

merits of the dispute'. He submitted that the arbitrator's conduct could not be faulted as it was not shown to be mala fide or dishonest.

[43] Mr Elago's submission loses sight of the fact that justice has both a substantive and procedural dimension, and hence the adage (in the words of Lord Hewart CJ) in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 ([1923] All ER Rep 233) —

'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'."

14. The appellant called five witnesses, namely Mr Knoetze, Mr van der Berg, Mr Nambazi, Nr Dumeni and Mr Maritz.

15. In respect of all of these witnesses called by the appellant the arbitrator opened the questioning. In respect of the first two witnesses she handed the leading of the witness over to Mr Harmse after a few introductory questions.

16. In respect of the appellant's third, fourth and fifth witnesses, however, the arbitrator lost all self-control and, immediately after swearing in each witness, embarked upon extensive cross-examination and interrogation.

17. She interrogated Mr Nambazi for 27 pages of the record before handing over to Mr Harmse with the following, rather confusing, admonition:

"CHAIRPERSON Do you want to ask him questions? But please let us do one thing, please (intervention)
RESPONDENT'S REPRESENTATIVE: (Indistinct) whether that was done?
MR NAMBAZI: No, no, no.
RESPONDENT'S REPRESENTATIVE: Did you ask him whether that was done?
CHAIRPERSON: How was it done.
MR NAMBAZI: How was it done. The police took the breathalyser.

CHAIRPERSON: Let me say this, do not ask questions that I asked already, please. Because I am not sitting here to ask questions and then for parties to go and repeat the questions, please.

RESPONDENT'S REPRESENTATIVE: Madam Chair, with all due respect, I just wanted to, you said to him *is that what was done*. That was not done.

CHAIRPERSON: No, I want to give you a chance to cross-examine him, but I am saying let us not ask questions that I asked already.

RESPONDENT'S REPRESENTATIVE: Yes, I will definitely, in any event, I (indistinct) maybe just take instructions but I do not intend to ask any further questions. Maybe I will just ask him one question, Madam Chair."

18. During these 27 pages of interrogation:

18.1 The arbitrator refused to accept Mr Nambazi's interpretation of a statement by Mr van der Berg. She told Mr Nambazi what was meant by the word "other" and certain sentences in the statement, instead of listening to his evidence and deciding the matter at the conclusion of all the evidence. Her gripe seemingly was that Mr van der Berg should have been charged along with the respondent, instead of being used as a company witness against the Senior Security Officer: Investigations;

18.2 She clearly sided with the respondent and was of the opinion that because the respondent had use of the vehicle for 24 hours per day, she could use it as she pleases;

> "CHAIRPERSON: How was it given to her? Because from what was testified by the previous witness it came to light that she stayed with the car 24/7.
>
> MR NAMBAZI: 24/7 does not mean you have to drive the car. The car is allocated to you whenever you are on duty or you are doing NamPower duty. That is all.
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> CHAIRPERSON: That is not what (intervention)
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> MR NAMBAZI : For you to drive with the car from Brakwater to home does not mean you 24 hours have to drive that car. It is just it is under your care.
>
> CHAIRPERSON: So is it not under your care for 24 hours?

MR NAMBAZI: It is under your care for 24 hours, but not to misuse it.

CHAIRPERSON: I am not even asking about misuse, I am just asking as to how the car was allocated to her personally, what (intervention)

MR NAMBAZI: That is what I am saying.

CHAIRPERSON: No, no, no that is not what you are answering, sir. Please let us cooperate here. I am just trying to get this because I am the one who is going to write the award, I need this information for me to (incomplete). Perhaps is there any document that you can refer to us? Since you are *mos* the IR official, that is why I am asking you these questions, and you are the one that investigated and everything. A document that perhaps shows as to how the car was supposed to be used. Surely, if a person is given a car, whatever document it is, a car is given to this persons for 24 hours. Can you perhaps, is there any document you can refer us to so that we can have an understanding as to under which circumstances the car was allocated to her?

MR NAMBAZI: Then we go to the transport policy.

CHAIRPERSON: Is it there?

MR NAMBAZI: Yes, there is a transport policy."

18.3 Although Mr Nambazi explained that he had no choice but to charge the respondent because she refused to make a statement, the respondent was argumentative and accused him of not conducting a proper investigation and pre-empting the case because "you did not even know as to whether she misappropriated the car";

18.4 She refused to allow Mr Nambazi to provide an explanation of the scenario at Brakwater where the respondent was stationed:

"MR NAMBAZI: Can I give you the scenario at Brakwater?

CHAIRPERSON: No.

MR NAMBAZI: Maybe you would understand better.

CHAIRPERSON: I understand everything, sir."

18.5 Without Mr Harmse even having had the chance to lead the evidence of the witness, the arbitrator interrogated the witness on why he said the respondent's use

of the motor vehicle on 9 June 2012 was unauthorized, why she could not use the vehicle for a sports event after 3 o'clock on a Saturday and what the company policy was regarding driving under the influence of alcohol.

19. When Mr Dumeni was called as the appellant's fourth witness the arbitrator carried on in the same vein as with the previous witness for some 13 pages of the record before the arbitrator made the following telling statement to Mr Harmse:

"You can continue with cross-examination."

20. During her interrogation of Mr Dumeni she attacked and tried to whittle away at the appellant's case. She questioned whether this specific car which was given to the respondent was misused, she again raised the issue of consistency in respect of Mr van den Berg and persons with subsidized vehicles.

21. The arbitrator refused to accept that the respondent was not permitted to convey her child to school and back with the company vehicle:

"CHAIRPERSON: Okay. Your case scenario, what is expected to happen, let us say for instance if a person has to go and fetch a child for instance whereas you are given a company car to sleep with it, what happens in that instance?

MR DUMENI: Let me take an example (intervention)

CHAIRPERSON: Or what are the right procedures to follow?

MR DUMENI: Everybody, and I mean, she is not the only one who was having a car allocated to her (indistinct) at Brakwater, you make your own arrangements, you go with your car and you go and pick up your child. And it is through the (intervention)

CHAIRPERSON: What do you mean *go with your car*? With which car?

MR DUMENI: If you are having a private car (intervention).

CHAIRPERSON: No, I am asking, from Brakwater what happens? Just give me a scenario as to what happens. Now I am talking about a person who is given a car 24/7, and I have to go and fetch my child at 1 o'clock, how does it work?

MR DUMENI: You make your own arrangements. Your child is not part of NamPower, and I make it very, very clear here that your car or that car that is allocated to you only to use (intervention).

CHAIRPERSON: That I understand, that is clear, because testimony was given here (incomplete) I am just asking, because if a person takes that car and goes and put it home and takes my car and goes and fetch the child, that will be regarded as what?

MR DUMENI: You are misusing.

CHAIRPERSON: If I drive the car up to my house, that NamPower car, and drive with it home and leave it at home, and take my private car and go and fetch the child, that is misuse?

MR DUMENI: They will see it as misuse.

CHAIRPERSON: If I were given the car 24/7, how am I supposed to fetch my child from school, even if I (indistinct) any other person to go and fetch my child from school?

MR DUMENI: [*No audible response]*

CHAIRPERSON: Okay, it is fine. You can proceed, perhaps. I do not know, I was just asking about this issue.

MR DUMENI: I made it very clear that you make your own arrangements. We all make our own arrangements. Everybody at Brakwater makes our own arrangements. We have hundreds of employees (intervention).

CHAIRPERSON: I am not talking about other employees, I am talking about, because we have a case here pending."

22. The arbitrator adopted the same approach when Mr Maritz, the appellant's fifth witness, was called to testify. Without allowing Mr Harmse to first lead his witness, the arbitrator embarked upon a similar interrogation of the witness. It was evident that the arbitrator had made up her mind (even before the respondent had testified) that the procedures on her misuse of motor vehicles had not been consistently applied:

"CHAIRPERSON: Okay. So were you also given a car at times? (Indistinct) a company car?

MR MARITZ: Yes, I have got one, yes.

CHAIRPERSON: Alright, what are the procedures?

MR MARITZ: Procedures, you have to follow the rules, like you have to only work-related.

CHAIRPERSON: How does it work? Apparently you (indistinct) Brakwater?

MR MARITZ: Yes.

CHAIRPERSON: How does it work? How do you use the car? How is the car to be used?

MR MARITZ: What I know about this is that you use the vehicle for work purposes, and if you have to go somewhere else you have to get permission for that.

CHAIRPERSON: Are you acquainted with the provisions of the company policy pertaining to misuse of company vehicles?

MR MARITZ: Can yoyu make it clearly for me?

CHAIRPERSON: Are you aware of the company policies regarding this whole thing, like how cars should be treated and (incomplete).

MR MARITZ: Yes.

CHAIRPERSON: Was there a rule?

MR MARITZ: Yes.

CHAIRPERSON: Perhaps as someone who investigated this, would you say this rule was consistently applied?

RESPONDENT'S REPRESENTATIVE: May I just say, he did not investigate the incident, Madam Chair, it is only the Ctrack report that he had (intervention).

CHAIRPERSON: What is Ctrack? Is it not part of investigating?

RESPONDENT'S REPRESENTATIVE: No, he did not conduct the investigation, he was requested to gather information, madam.

CHAIRPERSON: Did I ask him whether he did the investigation? I just asked him a clear question as to whether you think the rule was consistently applied or not. Surely he knows. He was also given a car, that is why I am asking.

RESPONDENT'S REPRESENTATIVE: Is this in general?

CHAIRPERSON: No, it is not general. I am asking if that rule is consistently applied in NamPower or not. It is not general, it is a very important question to me. I am the one going to write this award. And this is, like I said from the beginning, this is a fact-finding (incomplete).

23. When the appellant attempted to prove, through CTrack, where across Windhoek the vehicle allocated to the respondent was found over the relevant period, the arbitrator's response was:

"Do you really want us to go through this whole thing?"

24. Her interrogation of the appellant's witnesses reflected and air of disbelief in the evidence that a company vehicle should be used for company purposes only and may not be used for private purposes, even when the vehicle is allocated to the employee for 24 hours per day. The arbitrator was clearly in the camp of the respondent and her questioning displayed a partiality towards the respondent and a belief that she had been wronged. The arbitrator was annoyed that Mr van der Berg was used as a company witness against the respondent, instead of being charged too. She exhibited pre-conceived ideas and had clearly pre-judged the issue. Her interrogations began the minute the witnesses entered the box and went far beyond mere clarification. In respect of appellant's 3rd, 4th and 5th witnesses she was the most active questioner. It is submitted that the arbitrator did not act in an independent and neutral manner and therefore that the appellant did not receive a fair trial before her.

25. It is submitted that on this basis, together with the evidence implicating the respondent in the offences with which she was charged, the award should be set aside and the appeal upheld.'

[7] During oral argument Mr Dicks reiterated why he considered that the point was properly before the court and he submitted further that the record reflected that the arbitrator had made up her mind when that she attacked all the appellants witnesses and thus had conducted herself in a highly irregular and improper manner.

[8] Mr Phatela, on the other hand, and in spite of the concessions as already mentioned, urged the court to never the less consider that the parties were legally represented at the time and that the appellant's legal practitioners should thus have objected to the arbitrator's complained of conduct, which they had failed to do. He submitted that the record reflected that the cross examination by the arbitrator was actually conducted to enable her to better understand the issues as she had to write the award and that she was thus merely seeking clarity for this purpose on the issues on which she questioned the witnesses. He pointed out that the arbitrator was entitled to conduct the proceedings in a less formal manner and that in any event her questioning was not conducted in such a manner that the parties were prevented from presenting their cases.

[9] The point must of course be determined with reference to the authorities referred to and quoted above by Mr Dicks and from which it appears that the arbitrator at least transgressed the rules of conduct, as laid down in the *Roads Contractor Co v Nambahu*[4] and *Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another*[5] cases in the following respects:

1. She cross examined the appellant's witnesses. This becomes clear beyond doubt from the manner in which she questioned Mr Dumeni for example, without allowing the appellant's legal practitioner to first lead his witness.

2. The arbitrator questioned Mr Dumeni at length, this interrogation spanned some 13 pages of the record before she turned to Mr Harmse stating *'you can continue with cross examination'*. This instruction thus gives away what the real purpose of the arbitrator's preceding questions had been and that these questions were thus not simply put to provide some clarification for her own mind or to obtain guidance to enable her to write the award, as argued by Mr Phatela.

3. Instead of allowing the appellant's legal practitioner to lead his witnesses and thereby allowing him to place the appellant's case before the arbitration tribunal she also opened the questioning in respect of all the other witnesses of the appellant.

4. In respect of the first two witnesses, she allowed the appellant's legal practitioner to take over after a view introductory questions. In regard to the appellant's third, fourth and fifth witnesses however the record reflects that she for instance interrogated Mr Nambasi for some 27 pages of the record. Mr Dumeni for some 13 pages and Mr Maritz for some 7 pages.

5. These examples, in my view, prove that the arbitrator did not allow the proper ventilation of the appellant's case and that she interfered in a material respect in its presentation.

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[4] 2011 (2) NR 707 (LC)
[5] 2014 (4) NR 915 (SC)

[10] In this sense the proper ventilation of the issues was also negatively affected which was thus frustrated in these respects by her conduct.

[11] In this regard it is apposite to once again call to mind what the Supreme Court has said in *Atlantic Chicken Co (Pty) Ltd v Mwandingi and Another*[6] :

'[39] The fact that the arbitrator has discretion to determine the procedure of an arbitration in terms of s 86(7) of the Act does not justify an arbitrator completely disregarding the legitimate expectation of parties to be allowed procedural rights which are commonly associated with a hearing before a 'tribunal' as envisaged in art 12 of the Constitution. It is trite that arbitration is a tribunal contemplated in art 12. 21. To call witnesses, to present evidence and to challenge the evidence of the opposing party — all within reason (ie without the hearing being converted into a full-blown prolonged adversarial contest) — are procedural rights which should be accorded to the parties, unless there is a cogent reason, which must be apparent from the record, to depart therefrom or the parties either waive their rights or agree otherwise. The discretion to determine procedure is certainly not a warrant for an arbitrator to act arbitrarily or oppressively towards the parties.'

[12] I might add the record does not reveal that there was a cogent reason for the arbitrator conducting herself in the aforementioned manner or that the parties waived their rights in this regard.

[13] The dictum from the Supreme Court then also makes it clear that the conclusion must be drawn that the arbitrator did in fact descend into the arena and that her conduct therefore was such that the appellant did not receive a fair trial before her, as was submitted by Mr Dicks.

[14] At the same time, this finding means that I cannot uphold Mr Phatela's submissions made in this regard.

[15] Mr Phatela has also submitted that if this were to be the finding of the court i.e. if the court should uphold the *in limine* ground of appeal raised by the appellant,

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[6] 2014 (4) NR 915 (SC)

then the matter should be referred back to be arbitrated afresh before another arbitrator.

[16] Mr Dicks has urged the court on the other hand, not to do so, and to decide the case now and to dismiss the respondent finally from her position. He drew the court's attention to the prejudice which would be suffered by the appellant due to the agreement concluded between the parties that the respondent would be paid her salary pending the outcome of this appeal, although, she would not be required to work or be entitled to enter the appellant's premises. He urged the court to consider the entire case cumulatively and he pointed out that the court, in terms of Section 89 (10) (a) of the Labour Act, would have the power to determine the dispute in the manner it would consider most appropriate.

[17] In this regard, the court should also take into account the time the dispute has already been pending as well as the fact that the arbitrator descended into the arena and that the respondent has benefited throughout this time by having been remunerated. The court should also not turn a blind eye to the fact that the appellant had proved the charges, at least the one relating to the respondent's unauthorised use of the company vehicle relating to the driving of the company vehicle in excess of the prescribed alcohol levels, beyond all doubt.

[18] I cannot accede to the request made by Mr Dicks on the appellant's behalf as to do so would mean that the court would blow hot and cold, so to speak, at the same time, in the sense that the court would, on the one hand, have found that the proceedings before the arbitrator were irregular and were vitiated on account of the material irregularities committed by the arbitrator and find, at the same time, on the other, that, on the basis of the vitiated proceedings, the appeal should succeed.

[19] Put differently - it would be a contradiction in terms to hold on the one hand that a fair trial was not had – and - on the other - to uphold the appellant's case and finally dismiss the respondent, on the basis of an unfair trial.

[20] I accept the argument and I take note of the fact that the appellant will be prejudiced by a referral back, as it has agreed to remunerate the respondent pending the outcome of this appeal.

[21] On the other hand Mr Phatela is also correct with his submission that his client is innocent in all this when he submits that the sins of the arbitrator should not be visited upon his client.

[22] What must be of cardinal importance in deciding this issue is that both parties before the court, also in labour proceedings, and also during arbitration proceedings, conducted in terms of the Labour Act 2007, are entitled to the fair trial rights encapsulated in Article 12 of the Constitution and thus to a fair hearing in order to have their disputes resolved in a constitutional manner. This requirement was not met in the arbitration *a quo*, when the arbitrator did not act in an independent manner and descended into the arena. A referral back is aimed at achieving precisely the prescribed requirements set by the constitution. Surely this is what is to follow and surely this is what must be complied with.

[23] Due to the fundamental irregularities committed by the arbitrator, it becomes clear that the award cannot stand, and, in the result, I am therefore constrained to make the following orders:

1. The award made on 28 February 2014 by arbitrator Ms Fabiola K Katjivena is hereby set aside.

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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H GEIER

Judge

APPEARANCES

APPELLANT:	Mr G Dicks Instructed by Fisher, Quarmby & Pfeifer, Windhoek
RESPONDENT:	Mr TC Phatela Instructed by Clement Daniels Attorneys, Windhoek