A CRITICAL ANALYSIS OF THE PROHIBITION OF LEGAL REPRESENTATION IN ARBITRATION PROCEEDINGS IN TERMS OF SECTION 86 (12) AND (13)(a) OF THE LABOUR ACT 11 OF 2007

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ABSTRACT

An arbitrator may permit a legal practitioner to represent a party to a dispute in arbitration proceedings if the parties to the dispute agree; or at the request of a party to a dispute, the arbitrator is satisfied that (1) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and (2) the other party to the dispute will not be prejudiced. Essentially, the question of what standard or test is applied in such determination of complexity and prejudice and who determines whether a dispute is of such a nature to require legal representation implies representation is solely at the discretion of the arbitrator. As a result, the limitation placed on legal representation could be regarded as an encroachment of an individual's right to have a fair trial as envisaged in the Namibian Constitution, and consequently a fair hearing in dispute resolution proceedings. Ultimately, this study will attempt to arrive at a clarified and reasoned conclusion with regard to this problem.

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DECLARATIONS

I, Georgia Le Hanie, declare hereby that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

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GEORGIA LE HANIE 31 OCTOBER 2011

CHAPTER 1

GENERAL INTRODUCTION

1.1 Overview and background of the proposed study

Section 86 of the Labour Act, 2007[1] provides as follows in subsection 12 and 13(a):

> *(12) In any arbitration proceedings a party to a dispute may appear in person, if the party is an individual, or be represented, only by -*
>
> *(a) An office bearer or official of that party's registered trade union or of a registered employers' organisation;*
>
> *(b) If the party is an employee, a co-employee; or*
>
> *(c) If the party is a juristic person, an employee of that person,*
>
> *But a person who is a legal practitioner must not appear on behalf of a party except in the circumstances referred to in subsection (13).*
>
> *(13) An arbitrator may permit –*
>
> *(a) A legal practitioner to represent a party to a dispute in arbitration proceedings if -*
>
> *(i) the parties to the dispute agree; or*
>
> *(ii) At the request of a party to a dispute, the arbitrator is satisfied that -*

[1] Labour Act, 2007 (Act No. 11 of 2007).

(aa) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and

(bb) the other party to the dispute will not be prejudiced.

What this entails is that during arbitration proceedings, a party to the dispute has the right to appear in person or be represented by any of the persons listed in section 86(12) of the Act and may request, in exceptional cases, representation in terms of 86(13) of the Act. A party that wishes to request representation by a legal practitioner pursuant to section 86(13(a) of the Act must make an application to the arbitrator on Form LC 29, at least seven days prior to the arbitration.

However, at the request of a party to the dispute, the arbitrator must be satisfied that the dispute is of such a complexity to require representation by a legal practitioner and that the other party to the dispute will not be prejudiced.[2]

1.2 Statement of the problem

Essentially, the question of what standard or test is applied in such determination of complexity and prejudice and who determines whether a dispute is of such a nature to require legal representation implies representation is solely at the discretion of the arbitrator. As a result, the limitation placed on legal representation could be regarded as an encroachment of an individual's right to have a fair trial as envisaged in the Namibian Constitution, and consequently a fair hearing in dispute resolution

[2] Section 25 of the Labour General Regulations: Labour Act, 2007.

proceedings. Ultimately, this study will attempt to arrive at a clarified and reasoned conclusion with regard to this problem.

1.3 Objectives and research questions of the study

This study seeks to:

- Analyse the provisions of section 86 (12) and (13)(a) of the Labour Act 11 of 2007;
- Investigate the objections raised against the use of legal practitioners at dispute resolution proceedings;
- Determine whether the prohibition of legal representation at dispute resolution proceedings infringes on the right to a fair trial as provided in Article 12 of the Namibian Constitution;
- If so, analyse whether a labour dispute is a trial as per Article 12 and thus can be equated to the right to a fair hearing;
- Examine whether the exercise of discretion by arbitrators can be constrained and in what instances; and
- Assess the existing domestic legal framework in comparison to the South African jurisdiction.

In view of the outlined objectives, the research question for the present study may be summarised as follows: Firstly, why is there a limitation placed on the right to legal representation at dispute resolution proceedings?; and secondly, whether or not this limitation placed on having representation by a legal practitioner complies with

Article 12 of the Namibian Constitution which provides for the right to a fair trial, and in this case, possibly a fair hearing?

1.4 Significance of the study

Rules governing the prevention and resolution of workplace disputes underwent a radical overhaul under the Labour Act of 2007 (Act No. 11 of 2007) which sought to fill the gaps and loopholes of the recently replaced Labour Act of 1992, (Act No. 6 of 1992). Accordingly, this paper aims to address the concerns raised within the study, but with particular emphasis on the right to legal representation in dispute resolution proceedings. In light of this, it is trusted the outcome of this study will help Namibian literature from different perspectives by contributing to labour law jurisprudence, and consequently, give users guidance on labour law disputes in dispute resolution proceedings and the protection afforded by the use of legal representatives.

1.5 Methodology

The compilation of this study stems from collecting information on the existing issues pertaining to the right to legal representation at arbitration proceedings. As a result, in order to accurately base its interpretation on thorough consideration of relevant data, the most appropriate method for this research study consists of a thorough literature review of earlier research on the subject matter and desktop

research which entails reviewing the available evidence from (1) archival; (2) library and (3) internet sources.

1.6 Arrangement of the Dissertation

Chapter 2: Literature Review and Theoretical Framework, presents the literature review and brings to light the theoretical foundation of the study. In more precise terms, the chapter examines the context in which the study finds itself, starting with the historical background of the Namibian Labour Law Reform; secondly, the study will be examining the arbitration process in labour disputes; and consequently, the provisions of section 86 (12) and (13)(a) of the Labour Act, 2007; and furthermore, the comparison between the existing domestic framework and the South African position with regard to the present study will also be investigated.

Chapter 3: Research Analysis and Findings, which incorporates the result of the research study. In this chapter, the right to legal representation as envisaged by the Namibian Constitution will be examined and will thus explore if this is also applicable to labour disputes and therefore the right to a fair hearing. Within this chapter the element of procedural fairness will also be considered, and in addition the power of discretion exercised by arbitrators with regard to the determination of whether representation by legal practitioners is required as per an individual's request;.

Chapter 4: Conclusion and Discussions in which all the issues raised, whether directing falling under the research questions posed or related thereto will be consolidated and clarified and reasoned recommendations with regard to this discretion which is at the core of this study will be provided.

CHAPTER 2

LITERATURE REVIEW AND THEORETICAL FOUNDATION

2.1 Historical background of the Namibian Law Reform

After Namibia attained independence in 1990 from the South African apartheid regime, new Labour legislation was passed by Parliament, namely the Labour Act of 1992[3] and was signed into law by the first President of the Republic of Namibia on the 26 March 1992, in terms of the Namibian Constitution.[4]

This Labour Act, 1992 provides in its introductory clause that the purpose thereof is, namely:

> *"To make provision on for the regulation of the conditions of employment of employees in Namibia ... to provide for the settlement of disputes between employees or registered trade unions and employers or registered employers organisation; to provide for that purpose for the functions of the Labour Commissioner and inspectors; to establish for that purpose a Labour Advisory Council, a Labour Court, district labour courts and a Wage Commission amongst other things ...".*

Moreover, in the Preamble provisions, the Labour Act, 1992, further provides that the Republic of Namibia has adopted a labour policy aimed at enacting legislation

[3] Labour Act, 1992 (Act No 6 of 1992).
[4] The Labour Act, 1992 (Act No. 6 of 1992) was published in terms of Article 56 of that Constitution.

that take due regard to the furtherance of labour relations conducive to economic growth, stability and productivity through the promotion of an orderly system of free collective bargaining, including the promotion of sound labour relations and fair employment practice.

The first Labour Act, of 1992, was followed by two new statutes that furthered government's program of reform, in meeting with the economic demands of the country. These legislations went through a process of negotiations between registered organised labour, registered employer's organisation and government within the established statutory body called the Labour Advisory Council.[5] Despite contentious nature of the debates by this body, the outcome passed through Parliament and in the end, the process contributed to gaining the commitment of the parties to the new labour relations dispensation. As put by the Namibian Employers Federation: "*The new draft labour law set to replace the existing Labour Act, 1992, some time … is the product of intensive tripartite brainstorming"*. [6]

Following these deliberations, a subsequent, Labour Act, 2004[7] was passed by the National Assembly; however, it did not see life in its totality, as it was short-lived. As a result, another new Labour Act, 2007[8] was passed to replace both the first Act and the second Labour Act, 2004 which was not put into full operation. Accordingly, emphasises was put on this statute that sought to directly address the failures of the

[5] See Section 7 of the Labour Act, 1992.
[6] See also Paper presented by Dr van Rooyen at the 11th Round table on labour relations – Dispute Resolution – Consultation and involvement of third parties.
[7] Labour Act, 2004 (Act No 15 of 2004).
[8] Labour Act, 2007 (Act No 11 Of 2007).

previous system while also building on its successes. The success, which will, according to the Permanent Secretary of Labour, essentially depends on the social partners, i.e. employees, employers and Government to take ownership of the principles and concepts contained therein.[9]

2.2 Dispute resolution mechanisms

2.2.1 Labour Act of 1992

With regard to dispute resolution process, in terms of this first Labour Act, of 1992, a party to a labour dispute would report such dispute by notice in writing to the Labour Commissioner[10] and thereby serving a copy of such notice to the other disputing party.[11] In such a notice, the reporting party should include full particulars such as the names, address, the subject matter of the dispute and the facts and circumstances, which gave rise to the dispute. If the disputant alleges the existence of a right, the grounds on which such allegation is premised should also be communicated. However, before the Labour Commissioner entertains the dispute, the referring party must also show that the parties attempted to resolve the dispute by themselves and that they have failed to settle.[12]

[9] Keynote address by the Permanent Secretary of the Ministry of Labour delivered at the 11th Round Table on Labour Relations – dispute resolution, see fn 6.
[10] Labour Commissioner appointed in terms of Section 3 of the Labour Act, 1992.
[11] See section 74(1) of the Labour Act, 1992.
[12] See section 74(2).

On receipt of the notice, the Labour Commissioner is obliged to establish a conciliation board, to be chaired by a person agreed upon by the parties themselves, or in the absence of such an agreement, by the Labour Commissioner himself or herself or any person so designated by the Labour Commissioner. The conciliation board would then be constituted with equal numbers of representatives from both sides.[13]

In an event of the dispute being resolved or settled by conciliation, the parties would prepare a memorandum of agreement in which the agreed terms and conditions are recorded and if the parties so desire, file a copy of such an agreement with the Labour Commissioner for registration mutatis mutandis in accordance with the provisions of this Act as if such agreement were a collective agreement.[14] This though is optional for the parties to do so. However, where the dispute remains unresolved by conciliation, and where the dispute is a dispute of right[15], any party to such dispute have the right to apply to the Labour Court for adjudication; or the parties may, whether before or after the institution of any proceedings in the Labour Court, by mutual agreement refer the matter to arbitration.[16] This approach seems to be retained by the new Labour Act, 2007.

[13] See section 75 of the Labour Act, 1992.
[14] See section 78 of the Labour Act, 1992.
[15] A dispute of right is a dispute concerning the application, interpretation or implementation of a contract, collective agreement or legislative provision. In most labour dispensations, including Namibia, disputes of right may not legally be addressed through strike- or lockout action. The settlement or determination of such disputes usually occurs by means of specialised mediation, conciliation, arbitration or adjudication. See Namibian Labour Lexicon: Labour Law Terms and Concepts, p. 136.
[16] See section 79 of the Labour Act, 1992.

On the other hand, in a dispute of interest[17] where the deadlock persists, a party to such a dispute had the right to take industrial action in accordance with the provisions of section 81 of the Labour Act, 1992 by way of strike, if it is the employees or by lock-out, if it is the employer; or they may refer the matter for arbitration. This process must thus be met with the procedural requirement as outlined in the Act.[18]

Furthermore, besides the Labour Commissioner, the Labour Act, 1992 also established a Labour Court and district labour courts[19] with exclusive jurisdiction over labour matters[20], excluding the possibility of "forum-shopping". In general, most complaints about matters covered by the Labour Act would be taken to a district labour court, with a right of appeal to the Labour Court. However, more complex and serious matters would go directly to the Labour Court.

The Labour Court has jurisdiction[21] over:

- To hear and determine any appeal from any district labour court and/or any appeal noted in terms of section 54(4), 68(7), 70(6), 95(4), 100(2) or 114(6);

[17] A dispute of interest is a dispute involving an improvement or alteration of a term or condition of employment or concerning any other matter of mutual interest other than a matter which is the subject of a right. See Namibian Labour Lexicon: Labour Law Terms and Concepts, p. 136. Also, in terms of section 1 of the Labour Act, 2007, dispute of interest means any dispute concerning a proposal for new or changed conditions of employment but does not include a dispute that this Act or any other Act requires to be resolved by (a) adjudication in the Labour Court or other court of law; or (b) arbitration.
[18] See section 79(1)(c) of the Labour Act, 1992.
[19] See section 15 of the Labour Act, 1992.
[20] This means that the Labour Court and district labour courts is given the general power to deal with any matter which is necessary or incidental to its functions in terms of the Labour Act, and to deal with any labour matter – including matters covered by the Labour Act, by any other law, by the common law – or even labour matters which are not covered by any of these
[21] See section 18 of the Labour Act, 1992.

- To consider and give a decision on any application made to the Labour Court in accordance with the provisions of this Part in terms of the any provisions of this Act;
- Any application to review[22] and set aside or correct any decision taken by the Minister, the Permanent Secretary, the Labour Commissioner, or any labour inspector or officer involved in the administration of the provisions of this Act;
- To review the proceedings of any district labour court on the grounds[23] mutatis mutandis referred to in section 20 of the High Court Act, 1990 (Act 16 of 1990);
- To grant in any application referred to above, any urgent interim relief until a final order has been made in terms of the said above applications;[24]
- To issue any declaratory orders relating to the application or interpretation of any provision of the Labour Act, any law relating to persons employed by the State, a collective agreement, a wage order or a contract of employment;

[22] It should be noted that the grounds for review are much narrower than the grounds for appeal.

[23] These grounds include that the court lacked jurisdiction; the presiding judicial officer was influenced by interest in the cause, bias, malice or corruption; gross irregularity in the proceedings; or the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

[24] Applications for urgent relief is normally in cases such as where the Labour Court is given specific jurisdiction by the Labour Act to hear applications (as opposed to appeals); where the Labour Court is asked to review a decision by the Minister, the Permanent Secretary, the Labour Commissioner, or any labour inspector or officer (as distinct from an appeal against those decisions); where the Labour Court is asked to review the proceedings of any district labour court on the grounds that (a) the court lacked jurisdiction; (b) the presiding judicial officer was influenced by interest in the cause, bias, malice or corruption; (c) gross irregularity in the proceedings; or (d) the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence. The specific grounds for urgent interim relief listed here would make it appear that the Labour Court is not empowered to grant such relief in any other cases, unless specific provisions of the Act authorise it, such as authorisation for interim interdicts against individuals involved in strikes or lock-outs. However, the Court's general power to make any order which the circumstances may require would probably include the power to grant urgent interim relief in appropriate cases.

- To make any order which it is authorised to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act; and
- Generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.

As a result, it should be noted that the various provisions of the Labour Act which give the Labour Court jurisdiction over specific matters specify who may bring applications concerning such matters; therefore different parties have a right to approach the Labour Court on different questions.

The district labour courts have jurisdiction:[25]

- To hear all complaints lodged by an employee or employer regarding failure to comply with any provision of the Labour Act or any terms and conditions of a contract of employment or a collective agreement.
- To make any order against, or in respect of, the respondent or complainant, as the case may be, which it is empowered to make under any such provision of this Act.

If the district court believes that a complaint is brought before it is a dispute of interests, it may refer the complainant to the Labour Commissioner to be treated as though it had been reported as a dispute of interests. The district labour court may

[25] See Section 19(1) of the Labour Act, 1992

take this step at the request of the respondent, if the complainant consents, or of its own accord. If the matter is referred to the Labour Commissioner, the complainant must give a written notice reporting the dispute within 14 days (or within any longer period which has been approved by the Commissioner upon showing of good reason.[26] It is further required that, before the matter is heard in the District Labour Court, such a dispute be referred to a Labour Inspector[27] to attempt to resolve the dispute by holding a pre- trail conference.[28]

The above labour relations system, few years after its operation, became the subject of debate by social partners. Government stated that initially, there was a need for amendments to be focused on improving the dispute resolution system, but later as the process unfolded, Government found that it was necessary that other aspects of the Labour Act, 1992 also needed improvement.[29] It was at the same forum, where government admitted unequivocally that the first Labour Act, 1992 was drafted in a legal language that made it very difficulty to understand for non-lawyers.

Furthermore, that even lawyers themselves some times had difficulties in fully understanding some of the provisions. Thus an easy legislation was therefore necessary. In addition, the Namibia Employers Federation also expressed concerns on the inefficiency of the first Labour Act, 1992, in that the Act has a stifling effect on the labour market, on Namibia's international competitiveness and the creation of

[26] See section 19(2).
[27] An Inspector appointed in terms of section 3 of the Labour Act, 1992.
[28] See Rule 6 of the District Labour Court Rules.
[29] Keynote address by the Permanent Secretary of the Ministry of Labour delivered at the 11th Round Table on Labour Relations – dispute resolution, extract from Government speech, page 2.

employment. It, therefore, suggested a new labour legislation needed to be put in place that puts on high priority job creation and economic growth.[30]

Similarly, organised labour, under the umbrella of the National Union of Namibian Workers, (NUNW) criticised the dispute resolution system under the first Labour Act, 1992, in that it was not effective at all in its current form and thus needed an urgent overhaul.[31] The following reasons were listed for such a call:

- The process is too lengthy to resolve disputes;
- The system is costly and is not accessible to those who do not have the resources to bring their complaints to the Labour Courts and that workers are not an exception to this;
- Interdicts are being granted by our Courts without the other party being given an opportunity to be heard and state its case;
- The process is frustrating rather then promoting finality of the disputes;
- It is adversarial and it is not user friendly to the majority of the workers;
- The system is full of loopholes which are currently being misused by the parties to achieve their goals.[32]

These were some of the reasons that gave rise to the complete overhaul of the first Labour Act, 1992 to the Labour Act, 2004.

[30] See Paper presented by Namibian Employers Federation at the 11th Round table on labour relations – Dispute Resolution – Consultation and involvement of third parties.
[31] Musukubili, F. 2009. A Comparison of the South African and Namibian Labour Dispute Resolution System. Nelson Mandela Metropolitan University: South Africa, p. 5.
[32] Extract from an Input paper to the Round Table on Labour Relations- on Dispute Resolution, Consultation and Involvement of third Parties. Presented by Sackey Aipinge – Assistant General Secretary of Mine Workers Union on behalf of NUNW. Held on the 13th April 2000, Safari Hotel – Windhoek, page 2.

2.2.2 Labour Act of 2004

After several years of intense deliberations by social partners since 1997, the Labour Act, 2004 herein referred to as the "second Labour Act", represents the product from such conclusion. Some months after a protected devastating strike at Ongopolo Mine, in Tsumeb, Northern Namibia, both ordinary citizens and the social partners were in agreement that the first Labour Act or the labour relations system needed a drastic repair.[33] It was after the impact of that strike, stakeholders' recognised socio-economic development in the country depends on an equitable, stable employment environment in which parties to the employment relationship could unfold their full productive potential, which seemed wanting with the existing labour legislation of 1992.[34] Government immediately reacted to all these calls and concerns, thereby approaching the International Labour Organization (ILO) for assistance. Funding was secured from the ILO Swiss Government. A task force was appointed comprising of social partners with strong inputs from outside, essentially from the South African based experts close to the Commission for Conciliation, Mediation and Arbitration (CCMA). The proposed system of dispute resolution was therefore a comparative based system with the CCMA.[35]

The task force was given the requirements that the proposed labour law must be efficient yet simple, be impartial, and have high quality outcomes, be user friendly,

[33] Musukubili, F. 2009, p. 6.
[34] Dr JWF van Rooyen, (2004) *Namibian Labour Lexicon* Volume 2, the Namibian Labour Act, 2004 A-Z. Guide to the understanding and application of the new labour law. Namibia Institute of Democracy.
[35] Musukubili, F. 2009, p. 6.

cost effective.[36] On the other hand the employers also agreed with the trade unions calls for a labour legislation system that is-

- easily accessible to an ordinary worker;
- simple and quick and which is user friendly;
- sufficiently flexible to deal with the different nature of disputes;
- independent, legitimate and impartial; and
- free from technical problems and that will promote representation by trade unions and employers representation a well as the involvement of social partners.[37]

Much of the proposals were then accepted by social partners and culminated into the Labour Act, 2004. It is this Labour Act, 2004, that laid the foundation for the new system of dispute resolution of conciliation and arbitration by the Labour Commissioner. However, this Act did not see full implementation as all stakeholders agreed and accepted that it was full of typographic flaws and could cause or lead to ambiguity in interpretation and application. Accordingly, all the social partners with experts from the ILO and Commission for Conciliation and Arbitration (CCMA) agreed to redraft the Act in a simplified version acceptable to all. The result is the new Labour Act, 2007, which was the focus of these treaties.[38]

[36] Ibid.
[37] Ibid.
[38] Ibid.

2.2.3 Labour Act of 2007

The Labour Act, 2007 was passed by the National Assembly and signed into law by the President on the 31 December 2007. This new Act, establishes a system for dispute prevention and resolution (disputes involving employers and employee/ trade unions) including disputes about dismissal. The new Labour Act, 2007 provides for economic disputes or disputes of interest to be resolved through collective bargaining and if need be, by industrial actions (strike and/or lock-out).[39] Disputes of right must be resolved through the procedure of conciliation and adjudication.[40]

The new Labour Act 2007 presupposes conciliation to be the first stage of the process of dispute resolution. Thereafter, the Act provides for adjudication essentially in one of the two ways - by either arbitration or by the Labour Court.[41] Arbitration hearings will resort under the Labour Commissioner only, unless it is private arbitration.[42] In South Africa, there are Bargaining Councils and private agencies accredited by the CCMA to resolve disputes either by conciliation or arbitration[43]; however, this is not the case in Namibia. The Act does not make any provision for accreditation of any private agency, but however, provides for private arbitration.[44] This implies therefore that private agencies may be established for this purpose without necessarily being accredited by the Labour Commissioner and may function in terms of section 91 of the Act. Moreover, whether the dispute will be

[39] See section 74 of the Labour Act, 2007.
[40] See section 86(5).
[41] Jordaan and Steilzner. 2002. *Labour Arbitration.* Siber Ink.
[42] See section 86 of the Labour Act, 2007.
[43] See section 127 of the Labour Relations Act, 66 of 1995.
[44] See section 91 of the Labour Act, 2007.

dealt with by arbitration or by the Labour Court will depend on the nature of the dispute or in the case of dismissal dispute, the reason for the dismissal.

The new Labour Act 2007 is the legislation that seeks to create institutions to resolve conflict in the workplace effectively through conciliation and if conciliation fails, through arbitration. The Act retains the continuation of the Labour Court to continue to produce authoritative precedents and to supervise the arbitration institutions.[45]

The basic characteristics of the new disputes resolution system are similar in nature to that of the CCMA system in that:

- Employers, trade unions and employees are encouraged to resolve their own disputes through collective bargaining;[46]
- Strikes actions are impermissible in most rights disputes;[47]
- Unions and non-unionised disputants have easy access to conciliation through relatively simple procedures;[48] and
- Disputes are intended to be resolved quickly[49].

Notwithstanding the above characteristics, the new system of dispute resolution established by the new Labour Act, 2007 has a totally different point of departure from the first Labour Act, of 1992. The new Labour Act, 2007, is structured upon the key concept of conciliation, arbitration and adjudication. The Act recognizes the

[45] See section 115 of the Labour Act, 11 of 2007.
[46] See section 70.
[47] See section 75.
[48] See section 82.
[49] See section 82(10)(a) and 86(18).

importance of self-regulatory to be the primary mechanism for regulating collective disputes. In that registered trade unions and employers organization must ensure that all collective agreements contains procedures to resolve disputes about their interpretation, application and enforcement of such agreements.[50] The Labour Commissioner has only residual jurisdiction.[51] As a result, the system therefore strongly encourages a pivotal consensus –seeking process of conciliation and only if this process fails may the parties resort to other processes.[52] Consensus seeking is therefore an integral part of the new dispute resolution process. This new system of dispute resolution presupposes that most disputes rely as a first step on conciliation.[53] The Act further provides that if the dispute is referred to the Labour Commissioner, the Commissioner must appoint a conciliator to attempt to resolve that dispute through conciliation. It therefore follows that parties must not resort to industrial action without having gone through this process.[54]

It is established that conciliation by its very nature is a consensus – seeking process in that, it is a procedural step common to all types of disputes and that it does not only apply to disputes of right but also to disputes of interest and not only individual disputes, but also collective disputes.[55] It is further stated that the process of conciliation is aimed at seeking to resolve the dispute through agreement by the

[50] See section 73 of the Labour Act, 2007.
[51] See section 73(2). See also a similar situation in relation to the CCMA in Bosch, Molahlehi and Everett. 2004. *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedures.* LexisNexis: Durban, p. 89.
[52] See section 86(5) of the Labour Act, 2007 (Act No 11 of 2007). These same sentiments were expressed by Brand, Lotter, Mischke, and Stedman. 1997. *Labour Dispute Resolution*. Juta Law on the new Labour Relations Act 66 of 1995.
[53] See section 82 (3) of the Labour Act, 2007.
[54] See section 74 (1) (a-d).
[55] Brand et al, 1997, p.

parties themselves, thereby limiting damage to their long-term relationship. In light of this a relationship which may emerge from a successful conciliation even stronger than before.[56]

Similarly, conciliation process is seen as a process that serves to filter out disputes, in order to lessen the load of arbitration and formal labour court adjudications proceedings. Conciliation was therefore considered by the CCMA to be an effective filter, which should significantly reduce the number of disputes referred to arbitration.[57]

Consequently, the Minister of Labour and Social Welfare, announced in the National Assembly on the 25 September 2008, that the new Labour Act, 2007 will be put into effect on the November 1, 2008.[58] To this effect he stated as follows:

> *"The operationalisation of the Labour Act, 2007 signals the beginning of a new era in labour relations in Namibian. An era characterized by social dialogue on all key issues affecting the labour market, mutual respect between employers and employees and fairness at the workplace, effective communication and collective bargaining, improved productivity and early and peaceful resolution of labour disputes. This places a challenge before Government, employees, and employers to ensure that the Act fulfils it enormous promise".* [59]

[56] Ibid.
[57] LRA 66 of 1995, Explanatory Memorandum, the Conciliation of Dispute at p. 150.
[58] Musukubili, F. 2009, p. 7-8.
[59] Extract from the Statement by Hon. Immanuel Ngatjizeko, MP. Minister of Labour and Social Welfare, made in the National Assembly on the Labour Act 2007 (Act No 11 of 2007) p. 3.

He concluded by encouraging all stakeholders to become familiar with its provisions, utilize it effectively, and ensure strict adherence.

2.3 Legal representation at dispute resolution proceedings

The expression "legal representation" is usually understood to mean representation by attorneys or advocates practising as such, and thus other lawyers do not fall within its ambit. Similarly, the expression "proceedings" can be taken to mean the entire process commencing with the lodging of the complaint, or either the hearing before the conciliator or arbitrator, or a formal hearing (Court) before an adjudicator. Representation is limited to categories of persons defined in the Labour Act. As a result, legal representation at arbitration hearings is not an absolute right, but it is subject to the discretion of the arbitrator and the written agreement between the parties.

2.3.1 Comparison: Namibian and South African framework

Namibia

An arbitrator may permit a legal practitioner to represent a party to a dispute in arbitration proceedings if the parties to the dispute agree; or at the request of a party to a dispute, the arbitrator is satisfied that (1) the dispute is of such complexity that it

is appropriate for a party to be represented by a legal practitioner; and (2) the other party to the dispute will not be prejudiced.[60]

South Africa

It should always be borne in mind that legal representation is allowed at the CCMA in all cases except those concerning dismissals for misconduct and incapacity (as a result of poor performance, ill-health or injury). It is also important to note, however, that the disallowance of legal representation in dismissals involving conduct and capacity is not absolute. Representation can be permitted provided all the parties to the dispute, including the arbitrating commissioner, agree. It may also be allowed on application by a party if the commissioner concludes that it would be unreasonable to expect a party to deal with the dispute without legal representation, having regard to (1) the nature of the questions of law raised by the dispute; (2) the complexity of the dispute; (3) the public interest; and (4) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.[61] Thus, where arbitration is likely to be difficult and complex, or ground-breaking or where the employee is represented by a very inexperienced union representative, there may be grounds to argue that representation is ought to be allowed.[62]

[60] Section 86 (12) and (13)(a) of the Labour Act, 11 of 2007.
[61] Jordaan, B. and Stelzner, S. 2002. *Labour Arbitration.* Siber Ink: Claremont, South Africa, p. 88.
[62] Ibid

CHAPTER 3

RESEARCH ANALYSIS AND FINDINGS

According to the Namibian and South African jurisprudential basis, parties do not have an absolute right to legal representation in all arbitration proceedings.[63] A principle authority in this regard is *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (2002) 23 ILJ 1531 (SCA) where it was held that:

> *"Entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention.*

As a result, various positions, namely constitutional, common law and statutory provisions will be examined in this regard.

3.1 Constitutional Position

A right to legal representation is today, generally regarded as a necessity, and not as a privilege.[64] Within the Constitutional framework, the right to legal representation flows from two principles: that an accused person is entitled to a fair trial, and that of equality before the law, as well as the application of these principles to the judicial process.[65]

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[63] Stemmett, J. *Legal representation at the CCMA* accessed on August 2011. Law Society of Northern Provinces.

[64] This point was emphasized by the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts RP 78/1983 volume 1 part II par 6.4.1.

[65] Buchner, J. 2003. *The Constitutional Right to Legal Representation during Disciplinary Hearings and Proceedings before the CCMA.* University of Port Elizabeth: South Arica, p. 5.

Article 12 of the Namibian Constitution provides[66] for the right to a fair trail. Article 12 (1)(a) provide as follows:

> *"In the determination of their 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…"*

Article 12(1)(e) goes further and states:

> *"All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice"*

Consequently, it can be interpreted that arbitrations conducted in terms of the provisions of the Act are indeed tribunals as envisaged by the provisions of Article 12(1)(a) and (e). Thus in giving meaning to the concept of a fair hearing; allowance needs to be made for the existence of different forms of dispute resolution. At the very least, all parties to the proceedings should have a reasonable opportunity of presenting their case to the court or forum.

In support of an argument that parties have an "absolute right" to legal representation in all arbitration proceedings before the Labour Commissioner, including those concerning dismissals for misconduct and incapacity, it is submitted that the

[66] Namibian Constitution, Act 1 of 1990.

restriction on legal representation infringes the constitutional right to equality, that the provision was irrational and that it was in conflict with the right to fair administrative action. However, it has been argued that it is doubtful that such opportunity should always include the right to be assisted by a legal representative.

As a result, the contention that can be drawn is that these arguments can be rejected on the basis that the restriction did not infringe the right to equality because arbitrations concerning matters, in respect of which legal representation was allowed as of right, were distinguishable, because these matters were generally more complex.[67] Hence, there was accordingly good reason to allow for the exclusion of Legal Representatives from such disputes. The need to avoid the technicalities and delays normally associated with the involvement of legal representation, was in accordance with one of the main objectives of the Labour Act, namely to resolve disputes inexpensively and swiftly. Moreover, since Commissioners have discretion to decide when legal representation should be allowed; if parties feel that a matter is too complex for arbitration proceedings, they can apply for the matter to be transferred to the Labour Court, where legal representation is automatically allowed.[68]

It has further been established that the argument that the denial of legal representation conflicts with the right to fair administrative action should also be

[67] Stemmett, J. Councillor Law Society of Northern Provinces in *Legal representation at the CCMA* accessed on August 2011.
[68] Ibid

rejected, because not even the PAJA[69], which regulates the constitutional right to a fair administrative action, confers an absolute right to legal representation before administrative tribunals.[70]

In the case of *Netherburn Engineering CC t/a Netherburn Ceramics v Mundau NO & others,*[71] the issue was legal representation of parties in the CCMA. This matter had made its way through the Labour Court and the Labour Appeal Court. The employee was dismissed more than 10 years ago; she referred a dispute to the CCMA. At the CCMA arbitration proceedings the employee was represented by a trade union official. The employer was represented by an attorney. The trade union representative objected to the employer being represented by an attorney. His objection was made in terms of a provision contained in the Labour Relations Act at the time (2000) – section 140(1).[72] This section was repealed in 2002 and rule 25(1) of the CCMA rules now provides that if a party objects to the representation of another party (or if the commissioner suspects that the representative of a party does not qualify to be a representative), the commissioner must determine the issue.[73]

Back to the story: the commissioner refused to allow the employer legal representation and said that the arbitration was to begin immediately. The employer requested a postponement (saying that its managing director could not proceed

[69] Promotion of Administrative Justice Act 3 of 2000
[70] Stemmett, J. Councillor Law Society of Northern Provinces in *Legal representation at the CCMA* accessed on August 2011.
[71] (2009) 30 IJL 269 (LAC)
[72] Labourman. 2010. *Matters of Practice in the Constitutional Court.* Accessed at www.labourman.co.za on August 2011.
[73] Ibid.

without a lawyer) was refused. The employer then withdrew from the arbitration; the commissioner found that the employee had been unfairly dismissed and the employer was ordered to reinstate the employee and pay her compensation.[74] The employer referred the matter to the Labour Court for review on the basis that the commissioner had not given any rational reasons for refusing the employer's right to legal representation, that the commissioner was biased against the employer and that the employer's constitutional right to legal representation had been ignored. The Labour Court said that the commissioner had not misdirected himself by refusing to permit legal representation and the Court also dismissed the employer's claim that the commissioner was biased.[75] The Labour Court did find that the commissioner was wrong in not granting a postponement after he had excluded the employer's legal representative. On this basis the arbitration award was set aside and sent back to the CCMA to be heard by another commissioner.[76]

Before the Labour Appeal Court (LAC) the case focused on the employer's constitutional right to legal representation. Both judgments dismissed the employer's argument that it had a constitutional right to this effect. [77] This is so because The LAC found that section 140(1) of the LRA (now embodied in a footnote to CCMA Rule 25) accords with the Constitution and the common law, neither of which confers an absolute right to legal representation in administrative bodies. Thus it

[74] Labourman. 2010. *Matters of Practice in the Constitutional Court.* Accessed at www.labourman.co.za on August 2011.
[75] See Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others (2003) 12 LC 1.11.27
[76] Labourman. 2010, at www.labourman.co.za.
[77] See Netherburn Engineering CC t/a Netherburn Ceramics v Mundau & others (2008) 17 LAC 1.11.85.

could not argue that its right had been unreasonably limited, because there was no right to limit.

Essentially, what this meant was that the following view could be expressed, namely that the Constitutional Court would probably agree that the qualified exclusion of lawyers from statutory arbitrations concerning misconduct and incapacity dismissals, is constitutionally compliant.[78]

The Labour Law Committee of the LSSA declined to became involved in Netherburn's review application when it was launched, because section 140(1) had been repealed by then.[79] Whether it is feasible to challenge the constitutionality of CCMA Rule 25(1) may be doubtful in light of the decisions of the LAC in the Netherburn case and the Constitutional Court in the Sidumo case[80].

This does not mean, however that Commissioners are free to exclude lawyers from such arbitrations as and when they please. Although the LAC's judgment in Netherburn does not say as much, when confronted with applications for legal representation, Commissioners must still apply their minds to the considerations set out in Rule 25(1) (c) of the CCMA Rules. However, if a party's lawyer is refused right of appearance, that party would probably be entitled to a postponement (*"a breather to be primed by his attorney"*, as stated in the Labour Court case) and to

[78] This sentiments expressed in Sidumo & Another v Rustenburg platinum Mines Ltd & other [2007] 12BLLR 1097 (CC).
[79] Stemmett, J. Councillor Law Society of Northern Provinces in *Legal representation at the CCMA* accessed on August 2011.
[80] Sidumo & Another v Rustenburg platinum Mines Ltd & other [2007] 12BLLR 1097 (CC)

take the Commissioner's decision on review at the conclusion of the arbitration proceedings.[81]

3.1 The Common Law Position

As a general rule, the common law affords a party a fair opportunity to present his or her case (*audi alteram partem* principle). This raises the question whether the right to legal representation may be included within the framework of the *audi alteram partem* principle, and therefore inherent to the rules of natural justice.[82]

As early as 1920, the Appellate Division of the High Court of South Africa in the case of *Dabner v SA Railways and Harbours*[83] established the principle that there was no common law authority for the proposition that a party had a right to legal representation before tribunals other than courts of law. The point at issue was whether Dabner, an employee of the railway administration, against whom a charge of misconduct had been formulated, was entitled to be legally represented at an internal statutory enquiry that followed. The appeal court, per Innes JA with the full bench concurring, held that a person before such an enquiry was not entitled to legal representation as legal representation was not an essential concomitant of the duty to proceed fairly.[84] He remarked:

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[81] Stemmett, J. Councillor Law Society of Northern Provinces in *Legal representation at the CCMA* accessed on August 2011.
[82] Buchner, J. 2003, p. 22.
[83] 1920 AD 583.
[84] This dictum has been confirmed in various other decisions. See for example *Balomenos v Jockey Club of South Africa* 1959 (4) SA 381(W) and *Feinstein & Another v Taylor & Others* 1961(4) SA 554 (W).

> *"No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none".*[85]

A large portion of the *ratio* of its decision is to be found in the following passage:

> *"Now clearly the statutory board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports it finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character".*

On almost every issue raised by Innes CJ as a justification for not permitting legal representation as of right, the situation differs from that pertaining in the case of arbitration; hence under such arbitration:

- There are two parties to the proceedings;

[85] *Dabner v SA Railways and Harbours* at 598

- The parties and/or other persons may be compelled as witnesses to attend the arbitration;
- The witnesses may be forced to be sworn; and
- The commission has the power to make an order, which shall be final and binding.[86]

Thus, having regard to the sometimes severe consequences which a finding of guilty can have on the lives of the alleged perpetrator and his or her dependants, the following view of Lord Denning over the exercise of discretion in *Enderby Town Football Club Ltd v The Football Association Ltd*[87] is still defensible and does it reflect those values which form part of a human rights culture:

> *"Is a party who is charged before a domestic tribunal entitled as to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure, and if they, in the proper exercise of their discretion, decline to allow legal representation, the Courts will not interfere".*

Accordingly, it can be said that the right to legal representation is not an essential feature of the *audi alteram partem*- principle, but points out that the flexibility of the rules of natural justice accommodates legal representation, but only under certain circumstances. These circumstances include: [88]

[86] Buchner, J. 2003. p. 23.
[87] 1971(1) All ER 215.
[88] Buchner, J. 2003. p. 24-25.

- Disputes of a complex nature;
- The demands of public policy within the context of natural justice and equity,
- Cases involving a conferred right to legal representation in contract,
- The express or implicit incorporation of the rules of natural justice, as well as
- The intention of the parties as contemplated from the wording of the contract.

In *Morali v President of the Industrial Court*,[89] the court held that the mere fact that a rule is contrary to natural justice does not necessarily make it contrary to good morals and therefore void.

In *Ibhayi City Council v Yantolo*,[90] Zietsman AJP opined that there was:

> *"No rule of natural justice, or rule of practice in labour matters, that determines that the word "representation", where it is not qualified, must be interpreted to mean lay representation only. There is certainly, in my opinion, no reason to so restrict the meaning of the word as it is used in the staff regulations".*

The court, however, pointed out that where regulations provide that only lay representation, and not legal representation, will be allowed; then such regulations

[89] 1986 (7) ILJ 690 C.
[90] 1991 (12) ILJ 1005 (E).

will be valid.[91] Zietsman AJP summarized the authority on the right to legal representation into two categories, namely:

- Where no specific right to representation before a tribunal is given in the statute or regulation governing the proceedings of that tribunal, no representation need be allowed; and
- Where the relevant statute or regulation do allow representation, such representation can be limited by the terms of the statute or regulation to exclude, for example, representation by an attorney, or the statute can state specifically that representation by an attorney will be allowed.

Zietsman AJP continues in stating that there is no rule of natural justice that requires that representation be followed. An exception to this rule may apply where it appears that because of the complexity of the issues to be determined, a person who can be adversely affected by the findings of the tribunal cannot be said to have been given a fair hearing or a fair opportunity to present his case if he has been deemed some form of representation. This case is certainly not authority for the proposition that legal representation may be permitted at all proceedings including those with which we are concerned here.[92]

In *Lace v Diack and Others*,[93] the employee faced charges of attempted fraud, the using of abusive language to a pay-mistress and acting aggressively towards a security guard. The court held:

[91] Buchner, J. 2003. p. 26.
[92] Ibid.
[93] 1992 (13) ILJ 860 (W).

> *"There is certainly no absolute right to legal representation in our law, but where an employee faces the threat of a serious sanction, such as dismissal, it may, in the circumstances, be advisable that he be permitted the representative of his choice".*

The Court went further and said the disciplinary procedure usually provides for representation by an employee or shop steward and because it had not been persuaded that the appeal hearing involving such complex and difficult issues that legal representation should have been permitted for a fair hearing to take place; this ground of review against the outcome of the disciplinary hearing failed.[94]

Accordingly, what can be extracted from this judgement is the view that our law has not developed to the point where the right to legal representation should be regarded as a fundamental right required by the demands of natural justice and equity. Insofar as these judgments have focused on the nature of the enquiry as being a decisive factor, it would appear that they are reconcilable. However, it is interesting to note that the view of the court in the *McNellie v Lamprecht and Nissan SA (Pty) Ltd* judgment[95], i.e. that an enquiry relating to charges involving fraud, involved such complex issues that legal representation became necessary for a fair hearing, was not followed in *Lace v Diack and Others*, which involved similar charges.

[94] Buchner, J. 2003. p. 26-27.
[95] 1994 (3) SA 665 (A).

In the arbitration award of CCMA commissioner Hambidge, *in SACCAWU v Citi Kem*,[96] she addressed, in general, the employee's right to be represented at internal disciplinary enquiries. She identified the right of employees to be represented in one way or another at such proceedings as one of the requirements of a fair hearing. This right, according to her, does not necessarily imply actual or physical representation, but at least to be made aware and afforded an opportunity to be represented. She continues by stating that in instances where employees request representation and the representative is not available, it is advisable to postpone the hearing until a representative is available. She concludes her findings on representation by stating that the mere fact that the charges relates to serious offences would have convinced her to insist on employees being represented by either a co-employee or a trade union representative. Hambidge, unfortunately did not address or discuss the entitlement of representation by a legal representative, as it was not necessary on the merits of the case.[97]

Furthermore, in *Yates v University of Bophuthatswana and Others*[98] the court held the view that apart from a recognition of the right to legal representation, what is generally accepted as an essential aspect of cases before tribunals is the principle of a fair hearing. The celebrated principles of natural justice, according to the court, provide that persons who are likely to be affected by administrative action should be entitled and afforded a fair and impartial hearing before a decision to act is taken. [99]

[96] (1998) 2 BALR 160 (CCMA).
[97] Buchner, J. 2003. p. 27.
[98] 1994 (3) SA 815.
[99] *Yates v University of Bophuthatswana and Others* at 835 F-G.

As a result, it can be said that those principles are relevant to almost all systems founded on the principles of the common law.[100]

In *Yates*, Friedman J held that it is to be welcomed that the principles of natural justice escalate with increasing strength. He remarked that these principles constitute the forthright values of *"those fundamental principles of fairness which underlie and ought to underlie every civilized system of law"*. Basically people have an instinctive reaction to what is fair and unfair.

In light of the above, the principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration the enforcement serves as a lesson for future administrative action. But more than that and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignores.[101] The policy of the courts was crisply stated by Lord Wright in 1943:

> *"If the principles of natural justice are violated, in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decisions must be declared to be no decision."*

[100] The basic requirements of a fair and impartial hearing are now enjoying almost universal recognition, and have become reliable aphorisms in the Namibian and South African legal lexicon.
[101] Baxter, 1984, p. 540.

The courts have therefore nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. Friedman J agrees with the above mentioned interpretation by Baxter and continues by focusing on the importance of procedural justice. According to the judge it is imperative that a distinction be drawn between the merits of a decision and the process of reaching it. Even if the merits are unassailable, they cannot justify and infraction of the rules of procedure in which the principle of natural justice have been ignored or subverted. The judge concludes that justice presupposes that a party be afforded a fair and proper opportunity to present his or her case. The basic test of fairness also involves the absence of bias. Both parties must be given an equal opportunity to present their cases, and consequently *"administrative action must not be vitiated, tainted or actuated"* by bias.

The rule against bias has also been stated by Lord Denning MR in *Metropolitan Properties (FCG) Co Ltd v Lannon*[102] in which he stated the logical philosophical theory underlying it in the following words:

> *"Suffice it that reasonable people might think that he (was biased). The reason is plain enough. Justice must be rooted in confidence: and justice is destroyed when right minded people go away thinking: the Judge was biased".*

In *Lunt v University of Cape Town and Another,*[103] Howie J held that the operation of contractual principles does not exclude the right to a hearing. In this view the sphere

[102] (1969) 1 QB 577 (CA).

on contract is a major vehicle for the application of the rules of natural justice. According to him the reason for reading natural justice into contracts is to constrain the exercise of powers that arise from contracts in exactly the same way as it is read into statutes to constrain the exercise of certain statutory powers.[104]

In *McNellie v Lamprecht and Nissan SA (Pty) Ltd*,[105] the Transvaal Provincial Division had to decide whether the right to be represented by a person of his choice from his working area, which was conferred on the Applicant in terms of the disciplinary guidelines of his employment contract, included the right to be legally represented. In the case, the charges facing the Applicant at the disciplinary hearing were:

- Fraudulent action as a result of changing expensive radios with cheaper radios;
- Possession of company property without authorization; Non compliance with company procedures; and
- Misuse of position of trust.

The court held that the Applicant was entitled to legal representation and in so doing, took into account the following factors:

- The serious charges facing the Applicant, who ran a considerable risk of being dismissed (surely by virtue of facing a formal disciplinary hearing, anyone runs the risk of dismissal), and

[103] 1989 (2) SA 438C.
[104] Buchner, J. 2003. p. 29.
[105] Unreported Case 396/92.

- The nature of the enquiry, and more specifically the presentation of evidence and documents on behalf of the complainant, the fact that the Applicant had a right to cross-examine the complainant's witnesses, and that evidence had then to be presented on behalf of the Applicant and arguments addressed.

The court concluded that the nature of the enquiry suggested a type of *quasi-judicial proceeding* which was far more than a mere informal enquiry as to casual breach of contract of employment. The serious nature of the charges, namely fraud, could not adequately be handled by a fellow workman, and in the court's view legal representation should have been allowed. The court held that however informal the enquiry may have been, the rules of natural justice were violated and the Applicant was prejudiced thereby to the extent that a review should be allowed.[106]

It may therefore be summarized that while at common law there is a clear right to legal representation before the courts, the weight of authority supports the view that the right to a fair hearing before other tribunals does not necessarily involve an entitlement to legal representation. Yet, it must be born in mind that although the common law does not entitle a party before an administrative tribunal to legal representation as of right, it does provide that such a party be afforded a fair opportunity of presenting his or her case- an application of the *audi alteram partem* rule.

[106] Buchner, J. 2003. p. 28

CHAPTER 4

CASE STUDY: HENDERSON V ESKOM AT CASE NO.: PFA/WE/88/98.

4.1 The Statutory Law Position

In dispute resolution proceedings, at the request of a party to the dispute, the arbitrator must be satisfied that the dispute is of such a complexity to require representation by a legal practitioner and that the other party to the dispute will not be prejudiced. The questions that has arisen relates mainly as to whether parties have a right to have legal representation present at alternative dispute settlement mechanisms such as arbitration proceedings? Why there is a limitation placed on the right to legal representation at dispute resolution proceedings? If such limitation is placed, whether or not this infringes an individual's constitutional rights as provided in the Bill of Rights? And furthermore, whether legal representation is only a question of the proper exercise of discretion within the broader context of being '*masters of their own procedure'*? Within the labour law context, the entitlement to, interpretation and extent of the right to representation is expressed in the Labour Act, 11 of 2007.

An example of an labour dispute matter with regard to the right to legal representation is as follows: J Henderson (the complainant) on 23 April 1998 lodged a complaint in terms of section 30A(3) of the Pension Funds Act with the office of the Pension Funds Adjudicator against Eskom (First Respondent) and Eskom Pension and Provident Fund (Second Respondent). Broadly, he complained over

various issues but of relevance was the submission that the Pension Fund Adjudicator lacked jurisdiction to determine the complaint because the complainant has failed to comply with the procedural provisions of section 30A(1).[107]

Section 30K of the Pension Funds Act, 1956 reads as follows:

> *"No party shall be entitled to legal representation at proceedings before the Adjudicator"*.

This provision accordingly raised challenging and interesting questions of interpretation. Many parties had argued that the provision constitutes an absolute bar to legal representation in proceedings of tribunal adjudication while the adjudicator was of the view section 30K of the Pension Funds Act of 1956 granted him discretion whether or not to allow legal representation. For that reason, a preliminary ruling was to be made on the issue of the right to legal representation.

Section 39(2) of the South African Constitution requires the interpretation of any legislation and the development of the common law by every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights. When interpreting section 30K, therefore, it is prudent to consider the provisions of section 34 of the South African Constitution of 1996. Section 34 of the Constitution reads:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum"*

[107] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.

In the preliminary hearing of the Tribunal of the Pension Funds, case no: PFA/WE/88/98 it was stated that the Pension Funds Adjudicator was not a court of law. It is an office and an administrative tribunal. Section 30B of the of the Pension Funds Act makes it clear that what is established is an office and that the functions of the office shall be performed by the Adjudicator. No mention is made that the office is a court or that the Adjudicator is a judicial officer; although in many respects the office and the functions of the Adjudicator resemble those of a court of law.[108] On this basis, it would seem that the Adjudicator is a quasi-judicial organ with power to determine disputes and who performs judicial acts upon consideration of facts and circumstances, and imposes liability and affects the rights of others. Nevertheless, as an administrative tribunal the adjudicator is required to act in a procedurally fair manner in terms of the Constitution, section 30D of the Pension Funds Act of 1956 and the common law.[109]

In *Smith v Beleggende Outoriteit, Kommandement Noord-Transvaal van die SA Weermag* 1980(3) SA 519 (T) the court held:

> *"Although parties have no right to legal representation, administrative tribunals subject to the common law have the power or discretion to allow legal representation in giving effect to their obligation to proceed fairly. The*

[108] For example, the Adjudicator is required to be trained and experienced like a judicial officer; his object is to dispose of complaints and to make an order which any court of law may make; receipt of a complaint by the Adjudicator interrupts prescription; interest runs on awards made by him; and his determinations have the legal force of a civil judgment of a court of law and may be executed by means of a writ. On the other hand, a party aggrieved by a determination of the Adjudicator may apply to the Labour Court for relief. The possible relief sought includes a review, an appeal in the ordinary sense, and an appeal de novo in the sense of a re-hearing by the court of the matter on the merits.
[109] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.

common law discretion granted to an administrative tribunal to allow legal representation, however, can be excluded by legislation. Normally, this will be the case where the legislation expressly or by necessary implication prohibits legal representation".

In the case of *Ikuambi v Tax Free Warehouse* NLLP 2002 (2) 273 (NLC), it was held:

"Throughout history employees struggle to make a living and have frequently been preyed on by unscrupulous legal advisors. The Law Society keeps a strict control of its members to protect the public from such conduct but a type of advisor (Northern Labour Consult Close Corporation) who is not subject to its rules and ethics of the Law Society therefore misuses the institutions established to protect the worker, for their own gain. Do the work of attorney, must be prepared to suffer the disadvantages and risks provided in that profession".

In *Metropolitan Namibia Ltd v Haimbili* NLLP 2004 (4) 110 NLC, the court was of the view:

"Representation of employee at internal hearing is limited to fellow employee, even if the preferred choice of representative is from the outside the company".

The question to be asked, therefore, was whether section 30K of the Pension Funds Act expressly or by necessary implication prohibited legal representation in

proceedings before the Adjudicator. In answering this, one should not lose sight of the presumption of interpretation that the legislature does not intend to alter the existing law more than is necessary. The application of this presumption facilitates legal certainty and the effective administration of justice. The presumption aims at a restrictive interpretation in favour of the existing general system of law, both common and statutory.[110]

Therefore, section 30K can be viewed as not amounting to an express prohibition of legal representation. Nor can such a prohibition be necessarily implied from the language or context. This is so because the provision restrictively provides that neither the complainant nor the respondent have any right or entitlement to legal representation in the proceedings before the Adjudicator. The section proscribes entitlement. It does not banish representation. It does not seek to remove the common law discretion to allow legal representation. Put differently, the parties before the Adjudicator cannot insist on legal representation. Should either of them wish to be legally represented, they are at the mercy of the Adjudicator's discretion which must be exercised reasonably, fairly and in the interests of justice. If it had been the legislature's intention that parties before the Adjudicator were to have no right to legal representation whatsoever, one would have expected a clearer indication to that effect. The wording of section 30K imposes no prohibition. Had prohibition been the intention, the provision might have read: *"No party shall be legally represented in proceedings before the Adjudicator"*; or *"legal representation before the Adjudicator shall be prohibited"*. Alternatively, Parliament could have provided for legal

[110] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.

representation only with the consent of both parties. Consequently, in the absence of such a prohibition, the common law discretion of the Adjudicator remains intact.[111]

The existence of a residual discretion to allow legal representation ought not to be undervalued. There has been argument in some quarters that legal representation before the Adjudicator impacts negatively upon the legislative aim to achieve informality in the proceedings. Without question, one of the aims of Chapter VA of the Pension Funds Act of 1956 is to establish an informal system of appropriate dispute resolution. Litigation before the courts has become prohibitively expensive and formalised. Formal legal proceedings are frequently lengthy and the aim is to provide for greater expedition through less formal means. Any endeavour to design an alternative, informal system of dispute resolution in the pension law area, involves a balancing of the competing goals of efficiency, accessibility, informality, expeditiousness and fairness. The system is expected to be accessible, efficient, informal, cheap and fair. These do not always sit comfortably together, and, at times it seems almost impossible to marry them into a workable system which adequately serves each of their underlying precepts.[112]

Accordingly, legal representation frequently advances the value of efficiency. Unfortunately, it usually does so at a cost to an inexpensive process and informality. On the other hand, the plea for informality has its limits.[113] It has been suggested that an ideal system of dispute resolution should be as informal and non-technical as

[111] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.
[112] Ibid.
[113] Brand et al, 1997.

possible is obvious, the ideal of informality being based on the negative experience of legal proceedings being formal and technical in the extreme. In a perfect labour dispute resolution system, it would possible for a dismissed employee to approach an institution virtually unaided, and, where appropriate, obtain relief after having presented his or her own case, in simple terms, and using non-technical procedures.

However, the question arises as to what motivates this ideal of informality? Is it a dream that parties will, under all circumstances, be able to themselves put their case before an institution of a dispute resolution system? Do considerations of informality necessarily mean that no legal representation is to be allowed? Or, to take these considerations one step further, does the ideal of an informal system of dispute resolution entail that no representation of whatever nature is to be allowed? This view seems to imply that the use of legal representatives inevitably brings about formalised and technical arguments and procedures, the further implication being that legal representatives are by their nature (and by training) inclined to stick to formalities and get obscurely technical - that only the disputing parties themselves are in a position to keep proceedings informal by virtue of their lack of legal training. No legal representatives, no formalities and technicalities, in other words. The implicit assumption appears to be that maintaining relatively informal proceedings is possible only by parties not being legally represented. But can it really be said that the parties themselves are the guarantors of informality? Is it not rather the case that the dispute resolver, involved in either consensus - seeking processes such as conciliation or mediation or other processes such as arbitration or adjudication is the holder of the reins of informality? Whether the dispute resolution proceedings of

whatever nature, are either formal and technical or informal and by implication efficient, depend not on the parties or their representatives, but on the manner in which the person charged with resolving the dispute controls the dispute resolution procedure.[114]

It is sometimes argued that legal representation is counter productive because it enables lawyers to over-judicialise the proceedings of the tribunal. It is claimed that this draws out the length of hearings. In Britain there was absurd over-reaction against lawyers which led to the rule, for one tribunal, that a party was entitled to any representative bar a lawyer. Attitudes have since changed and a right to legal representation is now generally accepted as an essential facet of tribunal justice in Britain.[115]

Of course a lawyer can abuse procedure. But the remedy lies in the hands of the tribunal's chairman. Most tribunals are empowered to make punitive orders as to costs, and the chairman may rule undesirable behaviour and technical hair-splitting out of order. Observing from an admittedly partisan point of view, the writer's experience is that a party's case before a tribunal is usually better organised and more efficiently presented when he is represented by a lawyer.

According it can be said that lawyers can demonstrate a capacity to adjust their methods and practices to serve the interests of informality. Indeed, they invariably

[114] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.
[115] Prof Lawrence Baxter, 1984, echoes a similar sentiment in his book Administrative Law. Juta, p. 251.

bring order and structure to the proceedings by clearly defining the issues for the benefit of all parties. On the other hand, it must be said, the complaints process has been besieged by a feast of technical point taking by lawyers. Yet, one should resist the temptation to blame the lawyers alone in this regard. The source of the problem could very well lie with the legislative draftsmen. As a result, the solution to the tendency to formalism, therefore, does not necessarily lie with barring legal representation; rather it lies in redrafting the legislation to ensure that the aims and objectives of a system of dispute resolution are properly served. The strengths and weaknesses of any legislation are only ever fully revealed in its practical application. Where evident weaknesses and inefficiencies appear, consideration must be given to removing them - sooner rather than later.[116]

It is common knowledge that dispute resolution proceedings can be inadequately resourced. In such circumstances, legal representatives can and do play an invaluable role in advancing the interests of efficiency by ensuring that the parties' cases are properly presented. Where neither party has legal representation, it is usually incumbent on the conciliator and/or arbitrator to act as investigator, representative of both parties and umpire. This leads to the process being slowed down and becoming unduly lengthy and cumbersome, especially in circumstances where sufficient human resources are lacking. In cases where only one party has the benefit of legal representation, it is absolutely essential that the conciliator and/or arbitrator should assume a more active role in ensuring that the party without legal representation is

[116] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.

afforded a proper opportunity to present his case and to challenge the case of the other party. [117]

Accordingly, extensive considerations of the nature of the questions of law and fact raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties to deal with the adjudication of the dispute, inevitably must inform the decision to allow or disallow legal representation.[118]

In the Tribunal of the Pension Funds matter, the respondents requested permission to be represented by a practising attorney. They argued that the issues in dispute raise a number of complex legal issues. These include jurisdictional questions and whether the complainant had a legitimate expectation to be granted the request forming the subject matter of his complaint. The complaint also raised factual issues of misrepresentation and is of great importance to both parties with major financial implications for both of them. Additionally, the complaint poses questions about the extent of pension fund adjudicator's powers. All these issues are of importance to the retirement fund industry as a whole and the respondents submitted that it would be in the public interest that legal representation be allowed in order to assist the pension fund adjudicator to set appropriate standards of general application.[119]

[117] Murphy, J. 1998. Pension Fund Adjudicator in Henderson v Eskom at CASE NO.: PFA/WE/88/98.
[118] Ibid
[119] Ibid

The complainant countered these submissions, essentially maintaining that the pension fund adjudicator was sufficiently an expert and capable of reaching the decisions without the benefit of legal argument. Moreover, he contended that the determination of the issues would be of importance only to the parties concerned.[120] Consequently, the pension fund adjudicator was satisfied that although the complainant was concerned that he would be placed at a tactical disadvantage without legal representation, the issues at stake were sufficiently important to the respondents, as well as the industry as a whole, to allow legal representation. The complainant had demonstrated that he is a man of considerable intelligence and sophistication capable of pursuing his claim with vigour and insight. Insofar as he fears being placed at a disadvantage, the solution lies not in excluding legal representatives but in following an informal and inquisitorial procedure. Section 30J(1) of the Pension Funds Act,1956 provides:

> *"The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner".*

The application of these methods will amongst other things go some of the way towards ensuring that the complainant is not significantly disadvantaged in any way by allowing the respondents legal representation. Accordingly, the preliminary ruling of this tribunal on the question of legal representation was as follows:

> *"The respondents shall be entitled to legal representation in the proceedings before the Adjudicator scheduled for 16 November 1998".*

[120] Ibid

CHAPTER 5

CONCLUSION AND DISCUSSION

The Labour Act, 6 of 1992 dispute resolution mechanisms, which entailed working through the courts, were regarded as adversarial and confrontational. The courts were overburdened by their caseloads, adding that the bureaucratese of the judicial route resulted in frequent delays. Access to the legal system has also been highlighted as a major setback for less well-off employees; hence the District Labour Courts have lost credibility due to severe backlogs. It was further argued that the orders and decisions are difficult to enforce and implement due to the unclear divisions of responsibility of court officials and labour inspectors. Interim orders granted by the Labour Court have been viewed by those in the workplace as fuelling conflict and inducing violence. Accordingly, dispute resolution procedures laid down in the Labour Act (1992) was merely a means to encourage legal strikes and lockouts and this lead to the proposed legislation of the 2007 Act after the second Labour Act was un-operational. [121]

Labour Act, 11 of 2007 entails the Labour Courts retains their powers of review and appeal in certain disputes, but ultimately a formal conciliation and arbitration procedure was recommended. Thus should conciliation fail to settle the dispute, the process will proceed to arbitration. Individuals will, however, still be able to approach the Labour Court directly on any matter affecting workplace conditions.[122]

[121] Labour Resource and Research Institute (LaRRI). 2003. Promoting Worker Rights and Labour Standards: The Case of Namibia. International Labour Right Fund, p. 12-13.
[122] Ibid

Arbitration derives its authority from the Constitution, as a tribunal of record.[123] The purpose thereof is to hear and determine disputes by a third party who bring finality to the dispute, after hearing, assessing and evaluating the testimonies and arguments advanced by the parties to the dispute. Although, arbitration may be likened to adjudication, it remains a quasi-judicial process rather than adjudication.[124]

Arbitration is therefore compulsory in terms of the Labour Act, 2007 (Act No 11 of 2007) under the auspices of the Labour Commissioner[125], compulsory in that the parties are compelled to attend the hearing, failure which the arbitrator may determine the dispute. At the arbitration hearing, [126] the arbitrator has an inquisitorial role to play and have discretion to conduct the hearing in a manner he/ she may consider appropriate in order to determine the dispute fairly and quickly and should deal with the substantial merits of the dispute with minimum of legal formalities. The dispute should be referred within the prescribed time limits and in accordance with the prescribed procedure; failing to adhere to the time limits may requires an additional application for condonation.[127]

In the District Labour Courts and Labour Court, legal representation is not compulsory but most employers and many employees are usually represented. In the dispute resolution proceedings, legal representation is permitted, save for incapacity

[123] Article 12(1)(a) of the Namibian Constitution provides for the establishment of arbitration tribunals for the purpose of resolving disputes.
[124] Musukubili, F. 2009. *A Comparison of the South African and Namibian Labour Dispute Resolution System.* Nelson Mandela Metropolitan University. p, 76.
[125] Section 86 of the Labour Act, 11 of 2007.
[126] Brand, Lotter, Mischke, Stedman. 1997. *Labour Dispute Resolution*.
[127] Musukubili, F. 2009, p. 76.

and misconduct cases where legal representation is in the discretion of the commissioner and must be on application by one or both parties. Legal representation in such matters is not normally permitted unless there are complex issues of facts and law, conflicting arbitration awards or it is in the interests of public policy that legal representation be permitted. Generally, if legal representation is sought it is preferable to apply for the appointment of a senior commissioner, which, if successful, will normally result in the parties being afforded legal representation.

Accordingly, the following arguments were raised either for the prohibition and/or to allow the use of legal representation.

4.1 Arguments against the right to legal representation[128]

In light of the above discussion, we can identify the following arguments against admitting legal representation at administrative and quasi judicial proceedings:

- Tribunals are regarded as being masters of their own procedure and the courts will not lightly interfere in the proper exercising of the discretion of such tribunals.
- Proceedings before a tribunal ought not to be equated with proceedings before a court of law.
- The practice and policy has developed that no legal representation is allowed in some enquiries as they are conducted informally, and by lay persons having no special knowledge of the law.

[128] Buchner, J. 2003. p. 38.

- Legal representation should not be considered in cases not involving complex legal and factual issues.
- Legal representation should not be allowed in cases where the employee does not run the risk of a serious infringement of his or her rights.
- Representation (other than legal), often adds a more valuable contribution to first hand knowledge and relevant circumstantial considerations, ensuring equal, or even sometimes greater competence to a representative to defend the affected person.
- In situations where there are relevant guidelines one could discern the overall intention that the enquiry was to become a domestic matter.
- Situations where there were applicable regulations allowing an employer to restrict the choice of the representative, an employee is entitled to request assistance at an enquiry, and
- In situations where binding contractual terms were applicable, the party seeking legal representation had to show an intention that the rules of natural justice were to be incorporated into the contract and that the contract conferred the right.

4.2 Arguments in favour of allowing legal representation[129]

The previous discussions also raised the following arguments in favour of legal representation:

[129] Buchner, J. 2003. p. 39.

- Professional legal representation is best equipped to present someone on purely legal issues.
- The dire consequences to the affected person, if found guilty, should allow for the right to representation of the affected person's choice.
- The lack of skill in such proceedings on the part of representatives other than legal representatives.
- The need for legal representation for a proper presentation of a defence endorsed by the inadequate defences proffered in most cases by lay persons fending for themselves.
- The difference between protagonists: an ignorant, illiterate and inarticulate affected person against a well-trained, experienced and competent in-house specialist, or in a situation where the applicant is a foreigner with no knowledge of local legal proceedings.

It is submitted that any attempt to ascertain whether one category of the above argument outweighs the other would not merely be subjective, speculative and arbitrary with no regard to the nature of the dispute or the relationship between the parties, but would also negate justice between the disputants. The challenge lies in an inclusive and accommodatory approach which at once ensures that the procedures adopted by and before tribunals are not *"over judicialised"* and which also leaves the affected person with the belief that he or she has been given a fair opportunity to present the other side of the story.

A possible formula will be one which will therefore preserve the independence and the integrity of tribunals (in terms of simplicity, speed, cost, informality, accessibility, expertise and flexibility); but which is simultaneously flexible enough to translate *"fair opportunity to reply"* within the context of the *audi alteram partem* principle into the most effective and adequate answer to allegations against the affected party.

But, from an affected person's perspective, this entitlement addresses to some extent the factors such as faith in the quality of the defence being proffered, as well as in the person making the representation on his or her behalf. It establishes a sustained belief that justice is being done and is being seen to be done and that irrespective of the outcome of the proceedings, faith in the procedure that she of he has been given a fair opportunity to present the other competently, adequately and effectively. From the view of the tribunal, it has both an equal entitlement to claim legal representation and to object to such representation under circumstances where it does not deem it appropriate.

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