



CASE NO.: LC 3/10

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

JOHANNES GARISEB & 32 OTHERS

APPLICANT

and

TRANSNAMIB HOLDING LTD

RESPONDENT

CORAM: UEITELE, J.

Heard on: 20 September 2010

Delivered on:

JUDGMENT:**UEITELE, J.:****A Introduction and Background**

[1] The applicant and thirty two other applicants approached this court seeking an order compelling the respondent to comply with the terms of an agreement which they allege, was concluded on 16 January 2009.

[2] The thirty three applicants are or were all at one time employees of the respondent, and are or were employed in the security department of the respondent.

[3] The applicants allege that ever since they were employed by the respondent, their contracts of employment provided that they would work for 48 (Fourty Eight) hours per week.

[4] On 6 October 1999, the respondent issued a letter to the various applicants informing them that their working conditions in respect of the working hours will change with effect from 16 November 1999. From that day (i.e. 16 November 1999) on the working hours will now be 60 (sixty) hours per week and that there will be no changes to the basic pay.

[5] The applicants were required to indicate that they are consenting to the changes in the conditions of service, by signing the letters at a place provided for on the letters. The applicants indeed signed the letters.

[6] The applicants allege that after signing the letters they engaged the respondent for it to consider compensating them for the additional hours that they had to render services. The negotiation bore no fruits. The applicants then referred the dispute to the Labour Commission for conciliation and arbitration. The dispute was referred to the Labour Commissioner on 8 December 2008.

[7] The conciliation proceedings commenced on 16 January 2009, before a conciliator named Meriam Nicodemus. The applicant alleges that during the conciliation proceedings, the respondents' representative was in contact with their superiors and after consultation informed the conciliator that they had a mandate to settle the dispute. This allegation is disputed by the respondent.

[8] The terms of the alleged settlement agreement were reduced to writing and signed by both parties. The alleged agreement was annexed to the applicants' affidavit and marked as Annexure "JG6". After the parties signed the alleged agreement the conciliator issued a certificate of resolution of dispute. The applicants further allege that in terms of the settlement agreement the obligations agreed upon had to be performed by 27 February 2009.

[9] By December 2009 the respondent had failed to perform as agreed, hence this application (instituted in May 2010) to compel the respondent to abide by the terms of the alleged agreement.

[10] The respondent opposes the applicants' application. The major ground on which it opposes the application is that, the alleged agreement is not binding on it;

for want of authority by the representatives of the respondent who signed the agreement.

[11] The application to compel the respondent to comply with the alleged settlement agreement came before me for hearing on 20 September 2010.

[12] At the commencement of the hearing the respondent raised two preliminary objections which if upheld will dispose of the matter. I will therefore in the next ensuing paragraphs briefly evaluate the points *in limine* raised by the respondent.

B THE POINTS *IN LIMINE*

First Point in Limine (Jurisdiction of this Court)

[13] The first preliminary objection raised by the respondent is that the Labour Court does not have jurisdiction to hear this matter.

[14] Mr Heathcote, who appeared for the respondent, argued that this Court is established by section 15 of the Labour Act, 1992 and has no jurisdiction to grant the orders sought by the applicants.

[15] It is true that the Labour Court was first established by section 15 of the Labour Act, 1992, and its existence has been continued by section 115 of the Labour Act, 2007, which in material terms provides as follows: “*The Labour Court established by section 15 of the Labour Act, 1992 (Act 6 of 1992) is continued, as a division of the High Court, subject to this Part*”.

[16] Mr Narib who appeared for the applicants argued that his Court does, in terms of section 117(1)(h) of the Labour Act, 2007, have jurisdiction to hear the matter. Section 117(1)(h) in material terms provides as follows:

- “(1) The Labour Court has exclusive jurisdiction to-
- (a) ...
 - (h) make an order which the circumstances may require in order to give effect to the objects of this Act;...”

[17] It may be true that section 117 of the Labour Act, 2007, does not specifically provide that the Labour Court may grant an order which compels a party to conciliation or arbitration proceedings to comply with an agreement which was concluded pursuant to conciliation or arbitration proceedings conducted under the Labour Act. 2007.

[18] It has been held, in the case of *Cronje v Municipal Council of Mariental* (an unreported Supreme Court Judgment dated 01 August 2003, Case No 18/2002) that section 18 of the Labour Act, 1992, which is worded similarly as section 117(1)(h) grants the Labour Court very wide and extensive powers. O’Linn AJA (as he then was) said at page 36 of that judgement:

“It should be noted however, that the term “objects of this Act” referred to in subsection (f) is in itself a term with wide import. Those objects would at least include the aim to ensure that the Rule of Law is maintained in industrial and labour relations and activities; that constructive cooperation between employer, employee and the government of the day takes place; that countrywide stable conditions are maintained for investment and economic development and for increased social benefits for all the rôle players.

The words – “its functions under this Act” in subsection (g) are similarly words of wide import and contributes to the need for a relatively wide interpretation of the jurisdiction clauses.”

[19] In the present case the long title of the Labour Act, 2007, sets out the objects of the Act amongst others “...*the systematic prevention and resolution of labour disputes.*”

[20] The applicants in this matter are seeking an order whereby this Court must compel the respondent to comply with the terms of an agreement which was allegedly concluded on 16 January 2009, between the applicants and the respondent in pursuance of conciliation proceedings which the applicants initiated under sections 82 and 86 of the Labour Act 2007.

[21] Chapter 8 of the Labour Act, 2007, deals with the prevention and resolution of disputes. Section 82 of the Labour Act, 2007, makes provision for the resolution of disputes through conciliation.

[22] I therefore share the view that the wording of section 117(1)(h) is of wide import and this Court does have jurisdiction to make an order prayed for by the applicants as it will give effect to the objects of this Act;. I therefore dismiss the first point in *limine*.

Second point in limine raised by the respondent.

[23] The respondent submitted that the applicants failed to comply with the requirements of Rule 9(2) read with Rule 9(3) of the Labour Court Rules and that the application can thus not be heard as a joint application.

[24] Mr Heathcote specifically agree that: *“The agreement filed in the present matter does not state that Mr Gariseb may file affidavits of the other applicants. This is fatal to the application.”*

[25] Rule 9 of the Labour Court Rules reads as follows:

“(i) (1) An application (hereinafter referred to as a "joint application") may be brought on behalf of a group of applicants named in such joint application, against the same respondent and for a similar claim.

(2) A joint application referred to in subrule (1) may be brought in the name of any one of the applicants as a representative of some or all of the other applicants, provided that such other applicants agree thereto in writing and file the agreement on Form 8 simultaneously with the lodging of the application.

(3) In the agreement referred to in subrule (2), each person represented authorises the representative applicant on his or her behalf to-

- (a) file affidavits, statements or any other documents;
- (b) amend the application or abandon it;
- (c) call witnesses and give evidence and make submissions to the court on any matter arising during the hearing of the application; and
- (d) take any other necessary step incidental to the prosecution of the application.”

[26] The joint agreement which is filed of record, states that parties who have signed the agreement *“agree that Johannes Gariseb is hereby authorised to represent us in the above named application and have the following powers:*

- (a) to file affidavits, statements or any other documents;*
- (b) to amend the application or to abandon it;*
- (c) to call witnesses and give evidence and make submissions to the Court on any matter arising during the hearing of the application;*

(d) *to take any other necessary steps incidental to the prosecution of the application.*”

I therefore have no hesitation in arriving at the conclusion that, the joint agreement which was filed in this matter substantially complies with the provisions of Rule 9.

[27] Mr Heathcote’s argument that “*Rule 9 cannot permit the deponent, Mr Gariseb to depose to matters in respect whereof he has no personal knowledge (and in circumstances where such personal knowledge is held by certain of other applicants)*” is correct as a general statement, but must be seen in this instance in this instance in the context of, our law of evidence which has sufficient rules to regulate the admissibility and inadmissibility of hearsay evidence. Surely if the representative in a joint application deposes to matters in respect of which he or she has not knowledge, the other parties can apply to have these matters struck out. I accordingly find that there is no merit in the second point in *limine*.

C AD THE MERITS

[28] I now turn to the merits of the merits of this matter. As I have indicated in the introductory part of this judgement, the applicants are seeking an order compelling the respondent, to comply with the terms of a settlement agreement signed on 16 January 2012. The most relevant parts of the agreement is that: “*the parties agreed that the difference of 4 hours per shift need to be paid back from the date that the 12 hour shift was implemented.*”

[29] The facts of this case which are not in dispute are that:

- (a) the applicants' referred a dispute of unilateral change of conditions of employment and unfair labour practices to the Labour Commissioner in terms of the Labour Act, 2007;
- (b) the Labour Commissioner assigned a certain Ms Meriam Nicodemus as the Conciliator/Arbitrator to conciliate and arbitrate over the dispute;
- (c) at the conciliation stage the parties reached an agreement and the agreement was reduced to writing and signed by Mr Gariseb for the applicants and Mr Nekomba for the respondent.

[30] The respondent however is the view that it is not bound by the agreement that was signed on 16 January 2009. The respondent view is based on several different reasons. In a nutshell the respondent's reasons for denying that the agreement of 16 January 2009 is binding on is, are that:

- (a) Mr Nekomba who signed the agreement on its behalf was not authorised to sign that agreement;
- (b) The applicants' complaint was time barred and has both in terms of the Prescription Act and the Labour Act, prescribed;
- (c) There is no prove that Miriam Nicodemus was properly appointed as an Arbitrator/Conciliator and therefore the proceedings before her are a nullity.
- (d) Not all the applicants signed the complaint Form LC 21 and therefore there is not complaint lodged in accordance with the Rules of the Labour Court.

Failure of applicants to sign Form LC 21

[31] I will start off with the argument that not all the applicants signed the referral document which must be substantially in the form of Form LC 21. Mr

Heathcote on behalf of the respondent argued that *“in terms of Rule 14 of the Rules relating to the conduct of Conciliation and Arbitration before the Labour Commissioner (GN 262 of 2008) each individual party who wished to initiate arbitration proceedings against the respondent should have completed the necessary prescribed form LC 21. In the present instance each individual party did not complete the necessary form LC 21. Mr Gariseb purported to launch the aforesaid conciliation/arbitration proceedings in terms of form LC 21 by simply referring to the applicant as “J Gariseb and others”. The identity of “the others” was not detailed and remains uncertain until today.* He then submitted that these proceedings were tainted from the outset and are a nullity.

[32] The argument and submission of Mr Heathcote appears attractive, but the weakness and lack of merit of this argument is laid bare by the interpretation and application of Rule 5 (1) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (which I will refer to as the Conciliation Rules in this judgment) which in material terms provides as follows:

“Signing of documents

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

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

(3) A statement authorising the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document or opposition, together with a legible list of their full names and address”

[33] It is unquestionably clear that Rule 5(1) of the Conciliation Rules does authorize a representative of the applicants to sign the Form LC 21 on behalf of the thirty three applicants.

[34] The referral document LC 21 which was annexed to the applicants' affidavit indicates that the representative of the applicants is Namel Conciliation and Arbitration Consultants. From the affidavit of Mr Gariseb it is clear that the applicants were represented by a labour consultant at the initial conciliation meeting. Since the referral document "Form LC 21" was not signed by Mr Gariseb on behalf of the other applicants, but by the Labour Consultant I do not find anything irregular about that. The referral document is thus substantially in accordance with the provisions of the "Conciliation Rules".

Prescription of the complaint

[35] I now turn to the argument with respect to the prescription of the dispute. Mr. Heathcote on behalf of the respondents argued that the "respondent relies on the provisions of sec 24 of the Labour Act, 1992, as well as the relevant provisions of the Prescription Act, and paragraph 15(3) of schedule 1 of the Labour Act, 2007. The respondent argues that 'at the time when the arbitration/conciliation was initiated in terms of the Labour Act, 2007, the referral to arbitration by the applicants was in any event barred by law at that stage.'

[36] Section 24 of the Labour Act, 1992, in material terms provides as follows:

"Notwithstanding the provisions of any other law to the contrary, no proceedings shall be instituted in the Labour Court or any other complaint lodged with any district labour court after

the expiration of a period of 12 months as from the date on which the cause of action has arisen or the contravention or failure in question has taken place or from the date on which the party instituting such proceedings or lodging such complaint has become or could reasonably have become aware of such cause of action or contravention or failure as the case may be, except with the approval of the Labour Court or district labour court as the case may be on good cause shown.”

Paragraph 15(3) of schedule 1 of the Labour Act, 2007, provides as follows:

“(3) Despite subitem (2), section 86(2)(a), in respect of a dispute that, as at the effective date, was not yet been barred due to the passage of time in terms section 24 of the previous Act, that section applies to determine when the dispute is barred due to the passage of time, as if it had not been repealed.”

[37] Mr Nekomba in his affidavit on behalf of the respondent states that *“...on the applicants’ own version no payment is due to them. They have accepted that section 26 of the Labour Act, 1992, should govern their relationship with the respondent. They could only receive overtime for hours worked in excess of 60 hours per week. The consensual change of the conditional (sic) of employment is not challenged (with the necessary relief claimed) in these proceedings neither can the applicants do so. Such a claim has become prescribed.”*

[38] I have read and read the above quoted paragraph in attempt to decipher what the respondent wants to convey, but I could not make out the facts that the deponent of that affidavit wanted to place before this Court. I pause here and observe that, it is the obligation of every party who approaches a Court to put before Court so much of the facts and evidence which the Court must use to arrive at a given conclusion. This is not what Mr Nekomba has done, he has arrived at legal conclusions, on what basis I do not know.

[39] The facts which are not in dispute in this matter are that during October 1999 the applicants received letters informing them about the change in working hours, the applicants' instituted grievance proceeding with respect to the change in the working conditions, the respondent and the applicants were engaged in negotiations to resolve the applicants' grievances, those negotiations lasted until 2008, and in 2009 the applicants referred the dispute to the Labour Commissioner. I am thus not convinced that the respondent has placed sufficient facts and evidence before me to enable me to arrive at a conclusion that the applicant's complaint is time barred in terms of the Prescription Act, 1969 or the Labour Act, 2007.

The appointment of Ms Meriam Nicodemus

[40] Another basis on which the respondent relies, to deny the binding nature of the agreement of 16 January 2009, is the contention that *'Ms Meriam Nicodemus was not duly appointed by the Minister of Labour for the purpose of exercising powers as a conciliator/arbitrator and that as such the proceedings which led to the signing of the settlement agreement are fundamentally tainted and irregular'*.

[41] Section 82(1)(2) & (3) and section 85(5) of the Labour Act, 2007 in material terms provide as follows:

“82 Resolution of disputes through conciliation

(1) Subject to the laws governing the public service, the Minister may appoint conciliators to perform the duties and functions or to exercise the powers conferred on conciliators in terms of this Act.

(2) The Minister may, subject to such terms and conditions as the Minister may determine, also appoint, on a part-time basis, conciliators from individuals who may or may not be staff members.

(3) The Labour Commissioner may, from individuals appointed by the Minister as conciliators in terms of subsection (1) or (2), designate a conciliator to try to resolve by conciliation, any dispute referred to the Labour Commissioner in terms of this Act.” And

“85 Arbitration

(1) There are established, as contemplated in Article 12(1)(a) of the Namibian Constitution, arbitration tribunals for the purpose of resolving disputes.

(2) ...

(3) Subject to the laws governing the public service, the Minister may appoint arbitrators to perform the duties and functions or to exercise the powers conferred on arbitrators in terms of this Act.

(4) The Minister may, subject to such terms and conditions as the Minister may determine, also appoint, on a part-time basis, arbitrators from individuals who may or may not be staff members.

(5) The Labour Commissioner may, from individuals appointed by the Minister as arbitrators in terms of subsection (3) or (4), designate one or more arbitrators to constitute an arbitration tribunal to hear and determine disputes”

[42] From the above quoted provisions of the Labour Act, 2007, it is clear that the Minister appoints conciliators and arbitrators. From the persons appointed by the Minister as conciliator or arbitrators the Labour Commissioner designates a person to conciliate or arbitrate a dispute. In the case of Ms Nicodemus, she was designated by the Labour Commissioner to conciliate/arbitrate the dispute between the applicants and the respondents.

[43] I have no iota of hesitation to conclude that when the Minister responsible for Labour and the Labour Commissioner appoint and designate conciliator or arbitrator, respectively, they act in their capacities as public officers and perform and exercise public power as envisaged in Article 18 of the Namibia Constitution.

It follows that the presumption, commonly known as the presumption of regularity, encapsulated in the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium* “*omnia praesumuntur rite esse acta Donec probetur in contrarium.*” may be applicable here.

[44] In the case of ***Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*** 2010 (2) NR 487 (SC) the Supreme Court said the following:

“The principle which the maxim contemplates seems to be that there is a general disposition in the court of justice to uphold official, judicial or other acts rather than to render them inoperative; and with this view, there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy. In *Byers v Chinn and Another* Stratford JA noted with reference to *Wigmore on Evidence* that its application is, in most instances, attended by several conditions:

...first, that the matter is more or less in the past, and incapable of easy procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability.”

[45] Whether or not the presumption applies to a given situation depends on the question whether some of the conditions enumerated by Wigmore as quoted in the preceding paragraph are present.

[46] The Minister's decision to appoint a person as a conciliator or arbitrator clearly a matter of the past and involves a formality in the Minister's or Labour Commissioner's actions. Once the applicants are informed of the identity of the

conciliator or arbitrator they acquired the right to prosecute it upon compliance with the other requirements of the Labour Act and the Conciliation Rules (regarding referral and service of documents) and, ultimately, to have their labour complaint adjudicated. Finally I find it probable that the Minister responsible for Labour did appoint Ms Nicodemus as a conciliator or arbitrator. With most of the usual requirements met, I am satisfied that the presumption of regularity applies to the actions of the Labour Commissioner.

[47] It is therefore not enough that the respondent “challenges” the applicant to prove Ms Nicodemus was properly appointed, the respondents must take action to set aside the designation of Ms Nicodemus as arbitration by the Labour Commissioner. The presumption, Devenish *et al* Administrative ***Law and Justice in South Africa*** 228 observes —

“...is a seminal one, on which the operation of the entire edifice of state administration and administrative law rests. The operation of the administrative state would be completely untenable without it. Consequently, administrative acts are valid until they are found to be unlawful by a court of law.”

Nekomba’s lack of authority to sign the settlement agreement.

[48] The respondent admits through the affidavit filed on its behalf by Tobias Nekomba that it was represented at the conciliation phase of the proceedings by Mr Tobias Nekomba (its Chief Industrial Relations Officer) Mr Jakes Mbandi (its Manager: Health, Safety and Loss Control) and Ms Ndapanda Kanyemba (its Industrial Relations Officer: Central). The respondent further admits that Mr Nekomba signed the settlement agreement dated 16 January 2009.

[49] The respondent is, however, of the view that it is not bound by the agreement of 16 January 2009 because argued Mr Heathcote “*Mr Nekomba had no authority (whether original or delegated) to bind the respondent and to conclude ‘JG 6’ (i.e. the agreement dated 16 January 2009) on its behalf.*” Mr Nekomba himself puts it as follows:

“...to the knowledge of both Ms Nicodemus and Mr Gariseb, I had no authority (whether original or delegated) to bind the respondent, and to conclude “JG6” on its behalf. I informed Ms Nicodemus, and the applicants there present (along with their representative), of my lack of authority.”

[50] Mr Nekomba’s denial of his authority to sign a binding agreement is contrast to the allegations of both Mr Gariseb and Ms Nicodemus. Mr Gariseb alleged the following:

“Ms Meriam Nicodemus commenced with the conciliation proceedings. After the commencement of the and caucusing of the issues between requested the representatives of the Respondent requested the conciliator Ms Meriam Nicodemus, to be excused on two occasions from the hearing in order to obtain instructions from the head office . Upon the representatives’ return from the last break to the conciliation proceedings, Mr Tobias Nekomba then informed the conciliator that got instructions from the Respondent to settle the matter...”

[51] Ms Meriam Nicodemus made the following allegations:

“It is important to outline what had transpired during the conciliation/arbitration proceedings. The proceedings took place in my office. I then gave the Applicants a chance to present their case and upon applicants’ have (*sic*) concluded with the presentation an opportunity was then availed to the respondent’s representatives to respond and/or state their case. The representative of the Respondent did not utilise the opportunity instead requested to be excused to caucus on the issue. I then requested the Applicants to leave the office and it was that moment that Mr Nekomba informed me that he needs to contact the head office to request for instructions. I immediately vacated my office to afford Mr Nekomba and other representative of Respondent such privacy. Whilst at one of my colleagues’ office, I was alerted to return to the office. Upon my return Mr Nekomba informed me that they have instructions from the head office to settle the matter, I then summoned the Applicants to the office and informed them of what Mr

Nekomba has indicated to me. It is denied that Mr Nekomba informed me that he had no authority to sign annexure “JG6”.

[52] In view of the dispute on the papers I have to resort to the established principles of resolving disputes of facts in motion proceedings. Quoting from the case of ***Republican Party of Namibia and Another v Electoral Commission of Namibia and 7 Others*** case No A387/2005 (unreported) delivered on 26 April 2005, Damaseb JP, in the case of ***Kavendjaa v Kaunozondunge NO and Others*** 2005 NR 450 (HC) at page 469-470, said:

“It is trite law that where conflicts of fact exist in motion proceedings and there has been no resort to oral evidence, such conflicts of fact should be resolved on the admitted facts and the facts deposed to by or on behalf of the respondent. The facts set out in the respondent's papers are to be accepted unless the court considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers. (*Nqumba en 'n Ander v Staatspresident en Andere; Damas NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C-263D). At home it was recently said by Strydom CJ in the unreported Supreme Court judgment of *Walter Mostert v The Minister of Justice* (case No SA 3/2002) at 18, as follows:

". . . as the dispute was not referred to evidence, the principles applied in cases such as *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, the court is bound to accept the version of the respondent and facts admitted by the respondent." (My emphasis.)

[53] From the above statement of the law, the crucial question is always whether there is a **real dispute of fact**. How does a genuine dispute of fact arise? In the case of ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** 1949 (3) SA 1155 (T), at page 1163, Murray AJP stated thus:

"It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest

instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting the applicant to the proof ..."

[54] In the present matter the Applicants allege that Mr Nekomba informed the 'arbitrator that he had received instructions from his employer's head office to settle the matter. Mr Nekomba denies that and state that he alleges that he informed Ms Nicodemus, and the applicants there present (along with their representative), of his lack of authority. But does that denial raise a real and *bona fide* dispute of facts. I do not think so. I say so for the following reasons. As stated in the **Room Hire's** case a real dispute of fact arise when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary.

[55] In the present matter Mr Nekomba denies that he had authority to sign the settlement agreement, he did not produce any positive evidence to contradict the applicant's version. I am furthermore satisfied as to the inherent credibility of the applicant's factual averments.

[56] My satisfaction is based on the fact that apart from the denial of authority Mr Nekomba amongst others avers that:

- (a) Ms Nicodemus, stated that he must simply sign the document whereafter I can take it to the respondent's Board of Directors for approval. When he requested that she insert a clause in annexure "JG6" to that effect, she "*ruled*" against me.
- (b) He signed the agreement in the *bona fide* belief that Ms Nicodemus, or the applicants, will not endeavour to enforce the document if the respondent's Board of Directors does not approve annexure "JG6".
- (c) He was misled, either fraudulently or negligently in signing the agreement. Ms Nicodemus is well aware of the fact that the dispute was not settled.
- (d) That their purpose of attending the proceedings was, most certainly, no to sign and conclude settlement agreements – they had no mandate to do so.
- (e) Ms Nicodemus used the Labour Act 2007 as a threat to have them submit to reaching a settlement agreement.
- (f) Ms Nicodemus was not impartial.

I thus am not sure whether denial of authority is genuinely made as Mr Nekomba appears to grab at every available 'straw' to demonstrate that he did not have authority to sign the agreement. I consider the facts set out in the respondent's papers (especially the allegation that Mr Nekomba informed Ms Nicodemus that he had no authority to sign the settlement agreement) to be so far-fetched or clearly untenable that I can safely reject them on the papers. see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A).

UEITELE, J.

ON BEHALF OF APPLICANT:

MR NARIB

Instructed by:

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ON BEHALF OF RESPONDENT:

MR HEATHCOTE

Instructed by:

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