THE REPUBLIC OF NAMIBIA

CASE NO. : LCA 16/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

WATERBERG WILDERNESS LODGE

Appellant

and

MENESIA USES AND 27 OTHERS

Respondents

CORAM: **VAN NIEKERK, J**

Heard: 23 September 2011

Delivered: 20 October 2011

JUDGMENT

VAN NIEKERK, J: [1] During September 2010 the appellant dismissed the 28 respondents, who were its employees. The dispute was referred to the Labour Commissioner for arbitration as provided for by the Labour Act, 2007 (Act 11 of 2007). On 23 December 2010 the arbitrator found that the dismissal of the respondents was procedurally and substantively unfair and made an award for payment of certain amounts in favour of the respondents, including an order for costs. This award was varied on 19 January 2011 by increasing the amount.

[2] The appellant duly gave notice of its intention to appeal on several points of law to this Court against the whole of the award in terms of section 89 of the Labour Act. On appeal leave was given to amend the formulation of two of the points of law and the accompanying grounds of appeal. The appeal is not opposed.

[3] Before me Mr *Barnard* for the appellant confined his submissions to three of the points raised in the notice of appeal. He also attacked the costs order which the arbitrator made against the appellant.

[4] The first point on which Mr *Barnard* relies relates to the referral of the dispute to the Labour Commissioner. Essentially the submission is that, as the referral was not done in accordance with the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (published by Government Notice 262 of 31 October 2008) (hereinafter "the RCCA"), the dispute was not properly placed before the Labour Commissioner and arbitrator, who were therefore not able to act in terms of the enabling statute and rules; and consequently the proceedings and the award are a nullity. The second point relates to the manner in which the arbitrator dealt with an application for his recusal lodged by the appellant. The third point is that the respondents did not

discharge the burden of proof resting on them to prove the quantum of their claim against the appellant.

[5] It is convenient to deal with the recusal point first. Before the arbitration commenced, the appellant lodged an application for the arbitrator's recusal. In his affidavit filed on behalf of the appellant, Mr Joachim Rust, who is a member of the close corporation which trades as the appellant and who is also the latter's manager, mentions that the dismissals of the respondents were preceded by a strike. The arbitrator became involved in an attempt by the Labour Commissioner's office to resolve the strike and for that purpose came to the farm where appellant's business is located. These facts are, indeed, common cause. At the time the arbitrator allegedly made remarks to the effect that Mr Rust was to blame for the strike and that if he were to employ the arbitrator or his colleague as human resource managers, the appellant would never again experience such labour problems. The arbitrator also allegedly announced to the employees, who presumably included the respondents, that, as Mr Rust had claimed that appellant was losing more than N$30 000 per day due to the strike, such claim was proof that the appellant was making large profits. The arbitrator allegedly advised the employees to take this into account when negotiating for better salaries. The arbitrator and his colleague allegedly also tried to force Mr Rust into an agreement to resolve the strike and threatened that he would have to bear the consequences if he does not adhere to the agreement. He did not experience the arbitrator's behaviour and attitude as neutral and objective.

[6] Section 85(6) of the Labour Act enjoins arbitrators to be independent and impartial in the performance of duties in terms of the Act. The arbitrator dealt

with the application for his recusal as follows in his written award, stating that the objection to his involvement –

> "…. was overruled as the arbitrator does not have any interest or personal association with any of the parties to the dispute. The arbitrator does also not have any interest in the outcome of the said dispute."

[7] Mr *Barnard* submitted that the reasons provided by the arbitrator for not recusing himself at best amounts to a bare denial of the appellant's accusations. He submitted that there are no facts on record to dispute the factual allegations in the application for recusal. I agree with counsel's submissions. It is clear that the arbitrator did not deal with the substance of the complaint against him. The essence of the complaint is not that he had a personal association with the respondents or an interest in the outcome, but that he was in fact biased against the appellant, for whatever reason. He further failed to address the specific factual allegations made by the appellant.

[8] This being so, coupled with the fact that there are no allegations contradicting the appellant's allegations, the issue of the arbitrator's recusal should be decided on the basis of the appellant's allegations. In *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC) at 769H-770A the Supreme Court affirmed with reference to older cases that the test in an application for recusal is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case" and that the test "is objective and . . . the onus of establishing it rests upon the applicant". Assessing the issue of bias only on appellant's allegations I am satisfied that the requirements of the above-mentioned test have been met and that the arbitrator should have recused himself.

[9] Mr *Barnard* held instructions to pray that the appeal be upheld and that the matter be referred back to the Labour Commissioner for the arbitration to be re-commenced before a different arbitrator. This brings me to the first point raised by counsel when he argued this appeal. It seems to me that I should also consider this point, otherwise there may be no purpose in referring the matter back to the Labour Commissioner.

[10] Rule 14(1)(b) of the RCCA states that a party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed Form LC 21, which is called "the referral document". Rule 14(2)(a) states that the referring party must sign the referral document in accordance with rule 5. Rule 5, in turn, provides as follows:

> "**5. 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 this Act or these rules to represent that party in the proceedings.
>
> (2) If proceedings are jointly instituted ... 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 ..., together with a legible list of their full names and addresses."

[11] In this case the referral document states that the applicant is "Menesia Uses plus 27 others". The other particulars like the physical and postal address, telephone en fax numbers appear to be that of one person, presumably Ms Menesia Uses. It further states that the nature of the dispute is one of unfair dismissal and unfair labour practice and specifies that a joint complaint is being referred. The form, which is prescribed by Regulation 20(1) of the Labour

General Regulations (Government Notice No. 261 of 31 October 2008), makes provision for signature by the "Representative of the Applicant" (but not for signature by the applicant) and requires that the name of the signatory be printed and signed. At this place on the form the following is inscribed '"Menesia Uses Plus Others" and further on the same line there appears to be a signature, namely "M. Uses".

[11] Attached to Form 21 is a summary of the dispute under the heading "MENESIA USES PLUS 27 OTHERS". The summary clearly indicates that the intention is to institute joint proceedings. Attached to the summary is a handwritten list with the heading "COMPLAINANTS NAMES AND NUMBERS". The 27 names on the list are written out in full, except for some second names which are only indicated by an initial, but they do not appear to be signatures. In fact, it is clear from the handwriting that the same person wrote several of the names. The numbers listed are telephone numbers.

[12] Mr *Barnard* submitted that none of the respondents signed the referral document. It is however clear that Ms Uses did sign it. Her dispute was therefore properly referred. However, as far as the other respondents are concerned, their dispute was not properly referred, because (i) they did not comply with the provisions of rule 5(1) by signing Form 21 themselves; or (ii) they did not comply with rule 5(3), in that they did not sign a statement authorising Ms Uses to sign documents on their behalf. In this case the latter is a crucial requirement, as this statement would, in terms of the subrule, complete the mandate given to the first respondent to refer the dispute on their behalf. Furthermore (and perhaps less importantly), the list attached to the referral document does not specify their addresses, as required by rule 5(3). In my view

these omissions must be rectified first should the 27 other respondents wish to have their dispute referred to arbitration. Obviously the necessary application for condonation in terms of rule 14(2)(c) for referral out of time would have to accompany the referral document.

[13] In view of the conclusions reached on the first two points raised by the appellant, it is not necessary to deal with the third point and the argument relating to the costs order.

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

1. The appeal is upheld. The award and costs order are set aside.

2. The dispute of the first respondent is referred back for arbitration by a different arbitrator.

3. Should the other 27 respondents wish to join the first respondent's dispute, they must comply with rules 5(3) and 14(2)(c) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner.

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VAN NIEKERK, J

Appearance for the parties:

For the appellant: Mr P Barnard

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