



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: LC 74/2016

In the matter between:

ALFONS TJIJOROKISA

APPLICANT

and

**LAHYA DUMENI
LABOUR COMMISSIONER
WP TRANSPORT (PTY) LTD
ATTORNEY GENERAL
MINISTER OF LABOUR**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT**

Neutral citation: *Tjijorokisa v Dumeni* (LC 74/2016) [2017] NALCMD 34 (15 November 2017)

Coram: USIKU, J

Heard on: 09 June 2017

Delivered: 15 November 2017

Flynote: Labour law – Labour Act 11 of 2007 – Application to review a decision by arbitrator, brought in terms of rule 14 (1)(b) of the rules of the Labour Court – Application for condonation in terms of rule 15, for non-compliance with rule 14(2)(a) (ii) – Arbitrator having dismissed or struck matter from roll, before commencement of conciliation contemplated in section 86 (5) of the Act – Applicant contending that the decision to dismiss or strike from roll was taken by a conciliator (an administrative functionary) and the conciliator acted ultra vires the powers given to her by the Act – Court finding that the decision was taken by an arbitrator duly designed in terms of section 85(5) of the Act, but the decision taken does not amount to an award contemplated under section 86(15), and therefore the provisions of section 89 are not applicable – Such decision is a decision taken by a body (an arbitration tribunal) referred to under section 117(1)(b)(ii) and is therefore reviewable – No defects have been shown in respect of the decision and therefore the application is dismissed.

Summary: Applicant was dismissed from employment following disciplinary proceedings – He referred a dispute of unfair dismissal to the office of the Labour Commissioner – His referral form (Form LC21) was not signed – Arbitrator took issue with the unsigned referral form at the outset of the conciliation proceedings contemplated under section 86(5), and “dismissed or struck” the matter from the roll – Applicant launched review proceedings on the ground that the decision to dismiss or strike matter from the roll, was taken by a conciliator and therefore the conciliator had acted ultra vires the Act – Court held that the decision was taken by an arbitrator – The decision is not an award contemplated under section 86(15), therefore the provisions of section 89 are not applicable – No defects have been shown in regard to the decision – Application is dismissed.

ORDER

1. Applicant’s non-compliance with the time limits prescribed by Rule 14 (2)(a) (ii) of the Rules of the Labour Court is hereby condoned.
2. The late delivery of the applicant’s heads of argument is condoned.
3. The review application is dismissed.

4. There is no order as to costs.

JUDGMENT

USIKU, J:

Introduction

[1] This is an application for review of a decision by an arbitrator (“the first respondent”) in which she “dismissed or struck down from the roll” a dispute referred to her by the applicant.

[2] The application for review also contains an application for condonation of the late filing thereof.

[3] The applicant was employed by the third respondent as a truck-driver. On the 20th March 2015 he was charged with misconduct. A disciplinary hearing was conducted and he was found guilty and subsequently dismissed from his employment.

[4] On the 15 September 2015 the applicant referred to the office of the Labour Commissioner by delivery of the prescribed Form 21, a dispute of unfair dismissal, for conciliation or arbitration.

[5] On the 24 September 2015 the Labour Commissioner, under Form LC27, designated the first respondent as “arbitrator” in terms of section 85(5) of the Labour Act¹ (“the Act”), to arbitrate the matter.

[6] Following a series of abortive meetings, the first respondent ultimately set the matter down for “conciliation meeting or arbitration hearing”, for the 5 January 2016.

¹ Act No.11 of 2007

[7] On the 5 January 2016, at the commencement of the conciliation meeting, the first respondent took issue with the referral Form 21, by pointing out that the form should have been signed by the applicant and since it was not signed, the form was defective. The third respondent supported the opinion of the first respondent. Thereafter the first respondent “dismissed or struck down” the matter from the roll, and then issued a notice headed “*Notice of Dismissal or/and Struck Down from Roll*” on Form LC50 dated 5 January 2016.

[8] There is no record of proceedings as no conciliation or arbitration took place. Aggrieved by the aforesaid decision by the first respondent, the applicant launched the present application on 29 April 2016, which application also contains application for condonation of the late filing of the review application.

[9] In his application the applicant seeks an order in the following terms:

(a) In so far as it may be necessary to do so, condoning the applicant’s non-compliance with the time prescribed in Rule 14(2) to bring a review application; and

(b) Granting the applicant leave to file this review application out of time as contemplated in Rule 14(2) of the Rules of the Honourable Court and extending the time upon which the applicant can file this application;

(c) Reviewing and correcting or setting aside the decision taken by the first respondent on 5 January 2016 dismissing or striking down from the roll with effect from 5 January 2015 case number CRWK 907 – 15;

(d) Reviewing and correcting or setting aside the decision taken by the second respondent on 5 January 2016 that the applicant’s LC 21 was in conflict with the Rules Relating to the Conduct of Conciliation/Arbitration No. 262, Part 4 (14) before the Labour Commissioner, Labour Act, 2007 (Act No. 11 of 2007);

(e) Ordering and/or directing the first respondent to proceed with conciliation proceedings as contemplated in Part C of chapter 8 of the Labour Act, Act No. 11 of 2007;

(f) Ordering and/or directing the first respondent to determine alternative dates for the conciliation proceedings, after consultation and agreement thereto by the applicant and first respondent;

(g) Alternatively, ordering and/or directing the second respondent to appoint an alternative conciliator in terms of section 89(10) (b) of the Labour Act, Act 11 of 2007;

(h) Alternatively, declaring that the 30 days prescribed in Rule 14 (2)(a) (ii) of the Rule of the Honourable Court to be *ultra vires* the provisions of the Labour Act, Act 11 of 2007;

(i) In any event, declaring Rule 14(2)(a) (ii) of the Rules of the Honourable Court to be unconstitutional for unduly placing an unreasonable limitation to the applicant’s right contemplated in Article 12 of the Namibian Constitution.

(j) That the costs of the application shall be borne by any respondent who opposes the application;

(k) Granting such further or alternative relief as the above Honourable Court may deem fit.'

[10] The review application is opposed by the third respondent. The fourth and fifth respondents oppose prayers (h), (i) and (j) only. The first and second respondents did not oppose the application, and indicated that they will abide by the decision of the court.

Condonation

[11] Prayer one of the notice of motion seeks to remedy applicant's failure to launch the review application within 30 days after the decision of the arbitrator was served on him.

[12] Rule 14² reads as follows:

'Reviews

14. (1) This rule applies to any application -

(a) to review an award of an arbitration tribunal in terms of the Act;

(b) to review and set aside or correct any decision taken by the Minister, the Permanent Secretary, the Commissioner or any other body or official in terms of the Act or any other Act for which the Minister is responsible; or

(c) for review, despite any other provision of any other Act, any decision of anybody or official provided for in terms of any such Act, so long as the decision concerns a matter within the scope of the Act.

2. An application to which this rule applies must be made-

(a) within 30 days after-

(i) the award was served on the party;

(ii) the decision taken by the Minister, the Permanent Secretary, the Commissioner or any other body or official in terms of the Act or any other Act for which the Minister is responsible;

(iii) the decision contemplated in sub rule (1) was taken.'

[13] It is common cause that the relevant decision by the arbitrator was made on the 5 January 2016 and that the applicant filed the present review application on the

² Rule 14 of the Labour Court Rules: Labour Court Act No. 11 of 2007.

29 April 2016, (some 3 months and about 3 weeks after the impugned decision). The third respondent contends that the decision complained of by the applicant was taken by the arbitrator in the course of arbitration proceedings. In terms of section 89(4) the court is not permitted to condone the late filing of a review application. The third respondent goes further to state that neither section 117³ nor section 89 of the Act, grants the court authority to condone the late filing of the review application. Where the Act does not provide such powers the Rules cannot bestow such powers on the court.

[14] The applicant, on the other hand, argues that the impugned decision was not an “award” within the context of section 86(15) of the Act, as no conciliation or arbitration had taken place when the decision was made. The arbitrator/conciliator was still seized with a conciliation process as set out in section 86(5) and (6) of the Act.

[15] I am of the opinion that the decision of the arbitrator does not amount to an award within the context of section 86(15) of the Act, as no arbitration had taken place when the decision was made. An award contemplated in section 86 (15) takes place following arbitration.

[16] I am further of the opinion that a decision in question was not taken by a “conciliator” as contended by the applicant. Such decision was taken by an “arbitrator” duly designated as such in terms of section 85(5) of the Act. As such, the decision was a decision of a “body” (ie an arbitration tribunal) contemplated in section 117 (1) (b)(ii) of the Act, and the decision is, therefore, reviewable in terms of section 117 (1) (b) (ii) of the Act, and section 89 of the Act does not apply.

³ The relevant part of section 117 reads as follows:

‘Jurisdiction of the Labour Court

117.(1) The Labour Court has exclusive jurisdiction to-

(a).....

(b) review

(i) arbitration tribunals’ award in terms of this Act; and

(ii) decision of the Minister, Permanent Secretary, the Labour Commissioner, or any other body or official in terms of –

(aa) this act; or

(bb) any other Act relating to labour or employment for which the Minister is responsible;

(c) review, despite any other provision of any Act, any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act.’

[17] On the question whether the court has power to condone the non-compliance with the 30 days period set out in Rule 14 of the Labour Court Rules, I am of the view that the court has such powers, in terms of Rule 15 of the Labour Court Rules.⁴

[18] Rules 14 and 15 were made pursuant to the provisions of section 119 of the Act, with a view to effect a speedy and fair disposal of the proceedings of the Labour Court. The legality of the provisions of Rules 14 and 15 is therefore beyond reproach.

[19] As the decision of the arbitrator taken on the 5 January 2016 is not an award, the provisions of section 89 of the Act are not applicable. This court, therefore, has power to condone the non-compliance of the 30 days period set out in Rule 14 (2) (ii) of the Rules of the Labour Court Rules.

Explanation given for applicant's non-compliance with Rule 14 (2) (a) (ii)

[20] In his founding affidavit, the applicant states that he faxed the record of the decision given by the arbitrator to the offices of the Mineworkers Union of Namibia ("MUN") on the 6 January 2016, with a view to seek explanation on the effect of the decision. The applicant states that he is a member of MUN and Mr Ebben Zarondo, the Secretary General of MUN, is his chosen union representatives in respect of the labour dispute in question. He added that the MUN offices were closed for holidays on the 6 January 2016 and Mr Zarondo only returned to office from holidays on the 22 January 2016. By that time the applicant had travelled outside Namibia, as he had in the meantime secured a temporary employment as a truck-driver, which employment required him to travel outside the country.

[21] The applicant further related that he could only consult with Mr Zarondo towards the end of February 2016 and got explained the effect of the dismissal of his dispute by the arbitrator. The applicant then requested the MUN to avail him services of a legal practitioner. In March 2016 the MUN informed him that his

⁴ Rules 15 provides that: -

'Non-compliance with rules

15. The court may, on application and on good cause shown, at any time-

(a) condone any non-compliance with these rules;

(b) extend or abridge any period prescribed by these rule, whether before or after the expiry of such period.'

request was approved. Due to certain stated commitments on the part of Mr Zarondo, appointment with the legal representatives was made for the 16 March 2016, and later the legal representatives instructed counsel on the 28 March 2016. The present application was ultimately filed on the 29 April 2016.

[22] As far as his prospects of success are concerned, the applicant submitted that the arbitrator when conducting conciliation proceedings, had no power to dismiss or to strike off the roll, a dispute referred for conciliation. Therefore, the arbitrator/conciliator acted ultra-vires the powers conferred upon her under section 86 (5) and (6) of the Act. On that basis, the decision of the arbitrator/conciliator is reviewable.

[23] In regard to the defect on Form LC21, the applicant acknowledges that Form LC21 is not signed. However, he submits that Rule 14 (2) (a) of the Rules of conducting Conciliation and Arbitration⁵, is not peremptory and does not result in a nullity if Form 21 is not signed.

[24] The applicant also acknowledges that he was invited by the arbitrator on the 15 October 2015 to correct his papers. However when the applicant attended to the offices of the arbitrator, the applicant and the arbitrator did not discuss the issue of correcting the “documents”. The applicant did not explicitly state what needed correction and why he did not take the issue up when he next went to the offices of the arbitrator. The respondents alleged that the applicant was invited to correct the defects on Form LC21 but failed to do so (see para 22 of third respondent’s

⁵ Rule 14 of the Rules for Conducting Conciliation and Arbitration, reads as follows:

‘Referral of dispute to arbitration

14. (1) A party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed-

(a) Form LC 12, in case of a dispute involving non-recognition as an exclusive bargaining agent as contemplated in section 64(6) of the Act; or

(b) Form LC 21, in case of any other dispute (“the referral document” in both cases).

(2) The referring party must-

(a) sign the referral document in accordance with rule 5;

(b) attach to the referral document written proof that the referral document was served on the other parties to the dispute in accordance with rule 7; and

(c) if the referral document is served out of time, attach and application for condonation made in accordance with rule 10.’

The relevant part of Rule 5 of the same rules provides:

‘signing of documents

5.(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.’

answering affidavit). In his replying affidavit, the applicant simply does not deal with this issue explicitly. I will therefore take as correct the version of the respondents that the applicant was invited to correct the unsigned Form LC21 and he failed to do so.

[25] The third respondent, on the other hand, contends that the applicant has delayed in launching the review application. The decision of the arbitrator was handed down in the presence of the applicant, yet the applicant delayed in bringing the application by more than 115 days.

[26] In addition, the third respondent argues that the decision of the arbitrator was taken in terms of Rule 14 (2)(a),⁶ which requires the referring party to sign the referral document. If the parties had proceeded with conciliation and arbitration, participation in such proceedings would have constituted ratification of the unsigned referral form.⁷

[27] On the facts of the present matter, I do not consider the delay of 3 months and 3 weeks to have been unreasonable in the circumstances. The applicant has explained his reasons for the delay, namely: that he travelled outside the country on work related business, when he returned he sought appointment with his union representative to have the effect the decision explained, and then requested the union to secure him legal representation. I am of the opinion that the applicant was entitled to ascertain the effect of the decision sought to be impugned and to seek legal and expert advice. Furthermore, I am of the view that the reasons for the delay have been sufficiently explained. For the reasons foregoing I grant the applicant condonation for the non-compliance with the time period prescribed in Rule 14 (2) (a) (ii) of the Rules of the Labour Court.

[28] I should add that the applicant also sought condonation for the late delivery of his heads of argument. The heads of argument were delivered late by one day. The application for this condonation was not opposed. The delay was not unreasonable and sufficient explanation was given for the delay. The late delivery of the applicant's heads of argument is therefore condoned.

⁶ Of the Rules Relating to the Conduct of Conciliation and Arbitrator.

⁷ On the authority of: Auto Exec CC v Van Wyk (unreported) LC 150/2013[2014] NALCMM 16 (16 April 2014)

Merits

[29] From the provisions of Rule 14 (2) (a) of the Rules Relating to the Conduct of Conciliation and Arbitration, it appears that the party referring the dispute must sign the referral form (Form LC21)⁸. It appears to me that Rule 14 (2) (a), read with Rule 5 of the same Rules, requires Form LC21 to be signed either by the party himself or by a union representative who is entitled to represent the party at the conciliation/arbitration proceedings.

[30] It is common cause that in the present matter Form LC21 is not signed. All that appears at the end of the form are the full names of the union representative of the applicant, and the position of the union-representative in the MUN. The name of the union representative appear above the printed words reading: "*Representative of the Applicant (print name and sign).*"

[31] In the matter of *Auto Exec CC v Van Wyk*⁹ an employer launched review proceedings on the grounds that the referral form (LC21) had not been signed by the referring party (employee). This point was taken after arbitration had been completed and where the parties participated. It turned out that the referring party had signed another referral form, accepted by the arbitrator but which was not served on the applicant (employer). The Labour Court held that the failure to have signed the initial form, in the face of the subsequent participation by the applicant/employer, where the point was never taken and which would have amounted to a ratification, would not vitiate arbitration proceedings. The fact that the referring party had signed another form before the conciliator/arbitrator was appointed did address the problem. The fact that the signed form was not subsequently served upon the applicant would not result in a vitiating irregularity of the arbitration proceedings which ensued thereafter.¹⁰

⁸ Also see *Waterberg Wilderness v Uses* (Unreported) Case No LCA 16/2010 delivered on 20 October 2011 at para [10] where it was held that R14 is set out in peremptory terms.

⁹ (Unreported) (Case No. LC 150/2013) [2014] NALCMD 16 (16 April 2016)

¹⁰ *Supra* at para [32]

[32] In *Purity Manganese (Pty) Ltd v Katjivena*¹¹ the referring party did not sign the referral form (LC21). The applicant (employer) took this point at the commencement of the arbitration proceedings but after conciliation had been completed. The arbitrator dismissed the point. The applicant sought to set aside the arbitrator's award by reason of the referring party's failure to sign the referral form. The applicant alleged that the term "must" in the applicable rules, resulted in the proceedings being a nullity. The court dismissed the application with reference to the law giver's intention in making those rules and because the applicant's participation in conciliation and thereafter in arbitration amounted to a ratification of the referral form.

[33] In *Purity Manganese (Pty) Ltd v Katjevena*¹² the learned Smuts J, after analysing various Namibian and South African authorities had the following to say:

[35] It thus seems to me on the facts of this matter that there had been ratification on the part of the third respondent of his failure to have signed the referral which had been in writing. It would seem to me that once parties have participated in proceedings which are the consequences of the submission and delivery of a referral form, then it would not be open to the other protagonist to take the point of the failure to have signed form because the question of authority would then not arise. The position may be different in cases of joint referrals where parties have not signed or not identified as was found in *Springbok Patrol* which is to be confined to the facts of that case and is also to be qualified by the views expressed in this judgment. It would in my view be a point for the office of the Labour Commissioner to take up before participation commences and for that office to require compliance with the provisions of rules 5 and 14 for the matter to proceed in conciliation and arbitration. If that office does not invoke these provisions, and reject a referral it may then be for the protagonist to raise non-compliance with that rule prior to participation in conciliation and arbitration as the case may be, so that non-compliance can be rectified then. But once the Labour Commissioner has appointed a conciliator and arbitrator to conciliate and thereafter determine the dispute and who has assumed jurisdiction to do so, and once the parties have participated in those proceedings, then it would not in my view be open to the other protagonist in the proceedings to take this point.

[36] This conclusion is re-inforced by examples which readily come to mind. If Mr Dicks's point is sound, then an employer would be able to sit back at arbitration proceedings in the

¹¹ Unreported (LC 86/2012) [2014] NALCMD 10 (26 February 2014).

¹² *Supra*, at paras [35] and [36].

face of an unsigned form and take the point on appeal, given the fact that, in accordance with his argument, a nullity would result. But he stressed that the facts of this matter are different because the applicant had taken the point at the commencement of the arbitration proceedings. Although the arbitrator did not fully articulate reasons for the dismissal of that preliminary point in this way, it would seem to me that it was rejected on the basis that the applicant had already participated without objection in conciliation proceedings (which also required a signed referral form) and it was thus not open to it to take the point at a later stage. There seems to me to be much substance in that approach. I can find no fault with it, even if it were not articulated in the way. This is akin to instances where parties are precluded in the High Court Rules from applying to set aside proceedings as irregular if that party has already taken further steps in those proceedings.

[36] I accordingly conclude that, despite the language used by the rule giver, the failure to have signed the referral form in this instance where there has already been participation in conciliation, would not result in the award being a nullity. I thus decline to grant the application to review and set aside the award which was confined to this ground only.'

[34] In the Auto Exec matter, the issue of the unsigned referral form was raised after arbitration proceedings, whereas in the Purity Manganese matter, the issue of unsigned referral form was raised at the outset of the arbitration proceedings, after conciliation was conducted.

[35] In the present matter the arbitrator appears to have acted in harmony with the views expressed in the Purity Manganese matter referred to above. She had invited the applicant to rectify the unsigned form and the applicant had failed or refused. She raised the matter of the unsigned referral form before the commencement of conciliation proceedings. The referral form being still unsigned, she handed down the decision dismissing or striking the matter from the roll, and then issued a notice headed "*Notice of Dismissal or/and Struck Down from the Roll*" on Form LC50, dated 05 January 2016.

[36] I am in agreement with the views expressed by Smuts J, above. The issue of an unsigned referral form is a point for the Office of the Labour Commissioner to take up before participation commences and for that office to require compliance with the provisions of rules 5 and 14 for the matter to proceed to conciliation and arbitration.

Should that office fail to invoke those provisions and reject the referral, a party may raise the issue of the non-compliance, prior to participation, so that the non-compliance can be rectified. Once conciliation/arbitration has started, and the parties have participated in those proceedings, then it would not be open to the other party in the proceedings to take the point of an unsigned referral form.

[37] On the strength of that legal position as more fully set out in the Purity Manganese matter, I cannot fault the decision taken by the arbitrator in the present matter. The arbitrator did not act *ultra vires* and there are no defects shown in the proceedings she conducted warranting the setting aside of her decision. In view of this finding, the application for review stands to be dismissed.

[38] Insofar as the constitutional challenge is concerned, section 117 (1)(d) of the Act empowers the court to grant a declaratory order in respect of any provision of the Act, provided that the declaratory order is the only order sought. It is trite law that where a party seeks a declarator in addition to other relief, the Labour Court does not have jurisdiction.¹³ For this reason I decline to entertain the declaratory relief sought in paragraph (h) and (i) of the Notice of Motion, on jurisdictional grounds.

[39] For the foregoing reasons I make the following order:

1. Applicant's non-compliance with the time limits prescribed by Rule 14(2) (a)(ii) of the Rules of the Labour Court is hereby condoned.
2. The late delivery of applicant's heads for argument is condoned.
3. The review application is dismissed.
4. There is no order as to costs.

¹³ Namdeb Diamond Corporation Pty Ltd v Mineworkers of Union of Namibia LC 103/2011 delivered on 13 April 2012, paras: 26-28
Also see Meatco v Namibia Food Allied Workers Union (Unreported) NALCMD 14 (19 April 2013) para [12].

B Usiku
Judge

APPEARANCES

APPLICANT

TC Phatela
Instructed by AngulaCo. Inc
Windhoek

THIRD RESPONDENT:

PJ de Beer
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FOURTH AND FIFTH
RESPONDENTS:

MC Khupe
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