



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: LC 05/2016

In the matter between:

AFRICAN MEAT SUPPLIES CC

APPELLANT

and

LABOUR COMMISSIONER

1ST RESPONDENT

MAGANO NANGOMBE

2ND RESPONDENT

NAMIBIA WHOLESALE AND RETAIL WORKERS UNION

3RD RESPONDENT

Neutral citation: *African Meat Supplies CC v Labour Commissioner* (LC 05/2016)
[2016] NAHCNLD 90 (17 November 2016)

Coram: CHEDA J

Heard: 27.10.2016; 03.11.2016

Delivered: 17 November 2016

Flynote: Labour Law - A party which fails to fulfil its own agreement cannot find assistance from the courts. A representative of a union who fails to comply with the requirements of the Labour Act under which its members are regulated cannot succeed in litigation. A representative of a union, employers' organisation, company or body corporate must file a resolution for representation. A notice of opposition must be accompanied by an affidavit. Where a union has declared a labour dispute with an employer it cannot refer such dispute without submitting a summary of

dispute. The government attorney based in Windhoek must comply with the rules of court with regards to distance from the High Court where the matter is being heard (Oshakati). A defective notice of representation is a nullity. A party who fails to comply with the Rules of Court cannot avoid paying costs of suit.

Summary: Applicant applied to set aside a process which had been embarked on by third respondent at the Labour Court. The said process was not in compliance with the requirements of the Labour Court Act rules. Third respondent's representative clearly had no knowledge of the rules of Court and the Labour Act, inclusive of the procedure, thereto. The Government Attorney who purported to represent first and second respondents failed to comply with the rules of court regarding the address of service. They did not oppose the main application. Application to set aside the decision of second respondent and steps taken by third respondent succeeded.

ORDER

1. The decision taken by first respondent on the 27 July 2016 is set aside.
 2. The conciliatory hearing pursuant to section 82 (9) of the Labour Act, Act 11 of 2007 is amended.
 3. The referral of dispute by third respondent is declared to be materially defective on the basis of third respondent's failure to exhaust all domestic remedies.
 4. Third respondent should comply with clause 6 of the collective agreement entered into and between applicant and third respondent on 12 March 2012
 5. Costs of suit.
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JUDGMENT

CHEDA J:

[1] On the 30 August 2016 Applicant filed an application for review with this court. Applicant is a CC Company registered in terms of the Namibian laws and conducts its business at Erf R/1399, Oshakati.

[2] First respondent is the Labour Commissioner with its offices at 32 Mercedes Street, Windhoek.

[3] Second respondent is a Conciliator/Arbitrator, appointed by first respondent with offices at the Labour Commission at Leo Shoopala Street, Oshakati, while third respondent is the Namibia Wholesale & Retail Workers Union (hereinafter referred to as "the Union").

[4] Applicant and third respondent entered into a conciliation agreement on or about the 28 March 2012 which resulted in third respondent being declared an exclusive bargaining unit. Third respondent, therefore, represented the majority of the workforce of applicant.

[5] The conciliatory agreement (herein after referred to as "conciliation agreement") therefore, regulates, the relationship of the parties involved in labour disputes. Applicant sought the following relief:

" 1.1. that the court should review and set aside the decision taken by the first respondent on the 27th of July 2016 to –

1.1.1. Consider the referral of dispute filed by third respondent; and to

1.1.2. Set the matter down for a conciliation hearing pursuant to section 82 (9) of the Labour Act, Act 11 of 2007, as amended

1.2. Alternatively review and set aside the decision taken by second respondent by dismissing the points of law raised in the conciliation proceedings held on the 10th of August 2016;

1.3. Declare the referral of dispute of third respondent to be materially defective on the basis that third respondent failed to exhaust all internal remedies;

1.4. Direct the third respondent to comply with clause 6 of the collective agreement entered into and between the applicant and third respondent on the 12th of March 2012;

1.5. Cost of suit; and

1.6. Further and/or alternative relief."

[6] It is applicant's assertion that third respondent has abdicated its duties amongst which involves the compliance with the terms of the conciliation agreement. Despite applicant's calling upon it to prove that it has a majority membership in its membership, third respondent, failed to do so to date, resulting in these proceedings.

[7] The facts which are not disputed are that on the 08 January 2016, third respondent referred a dispute to first respondent wherein it sought an order from first respondent to force applicant to partake in the annual wage negotiations in terms of the conciliatory agreement.

[8] It is applicant's further averment that in embarking on this procedure, third respondent did not follow the dispute resolution procedures as provided for in the conciliation agreement. On the 27 July 2016 first respondent filed a Notice of Set down for conciliation.

[9] Applicant has attacked the procedure adopted by third respondent in this matter. It is applicant's view, that, third respondent has no authority to refer a dispute to first respondent where it is clear that it seeks to enforce the conciliation agreement and force applicant to enter the annual wage negotiations with it. Further, that it has failed to comply with the requirements for such a procedures chief amongst which, is the need for "a summary of dispute" in which it is required to state that it has taken all reasonable steps to resolve the dispute.

[10] In a nutshell, it is its view, that the dispute in question is a nullity in the absence of third respondent complying with such a requirement. Ultimately, it is its view that the first respondent, set this matter down pre-maturely as it had not had sight of "a summary of dispute" as required by the Act.

[11] For that reason it further argued that first respondent acted *ultra vires* its statutory discretion as it was not permitted to act the way it did, alternatively that it failed to apply its mind on the facts placed before it when it set the matter down.

[12] On the 26 September 2016, the Government Attorney of Windhoek filed a Notice of Representation on behalf of the second respondent. It gave its address of service as 2nd floor, Sanlam Building Windhoek. This notice was defective in terms of rule 14 of the Rules of Court which read:

“ 14(3) when a defendant delivers a notice of intention to defend he or she must in that notice-

(a) ...

(b) appoint an address within a flexible radius from the office of the registrar, not being a post office box or *poste restante*, for service on him or her of all documents in that action.”

[13] In as much as this rule does not state the kilometre radius as it refers to a flexible radius, Windhoek is 700±kilometers, away from the Northern Local Division of the High Court of Namibia (Oshakati) and that cannot by any liberal interpretation of the rules be regarded as a flexible distance. It is, therefore, expected to be a torch bearer when it comes to compliance of the rules of court. Therefore, it is clear, that the Government Attorney did not apply its mind to the rules.

[14] First and second respondents through their representatives, Government Attorney did not oppose this application as they decided to abide by the decision of the court.

[15] In *casu*, first and second respondents' further indicated that they were no longer opposed to this application and were going to abide by the court's decision. Whether they had done so or not, this notice of representation is defective and the court was not going to validate it anyway.

[16] It is trite law that a defective notice is as a nullity. The office of Government Attorney is a representative of interests of the State, inclusive of its nationals. The Government Attorney's office is warned to apply its mind when representing litigants as failure to do so may result in the state losing cases and increasing unnecessary litigation costs.

[17] Third respondent filed a notice of opposition and is represented by Victor Hamunyela (hereinafter referred to as "VH").

[18] On the 08 September 2016, third respondent filed a notice to oppose which was signed by VH. On the 27 October 2016 he filed heads of argument. His argument which unfortunately does not touch on the issue raised by applicant leaves a lot to be desired and is a clear indication that VH has not done a good job on behalf of third respondent.

[19] This is a very sorry and sad state of affairs, because third respondent's members look up to him as someone who is more knowledgeable than them. It is high time unions in this country sought to be represented by people who have proper and adequate knowledge of the rules that regulate their industries. In as much as workers are free to be represented by one of their own, they should try to engage legal practitioners to represent them where a labour dispute has arisen. Failure to do so is to take a costly conscious risk.

[20] VH rumbled on about the awards, but, failed to deal with applicants' attack upon third respondent's failure to comply with requirements pertaining to a referral to first respondent.

[21] VH has exhibited a clueless position regarding the conduct of labour procedures in this matter.

[22] Mr. Greyling for applicant filed supplementary heads of argument, whereinafter he pointed out certain anomalies. These anomalies are referred to as points *in limine* and I deal with them hereinafter:

Representation of parties

The Labour Court Rules Act, Act 11 of 2007 rule 4 (2) provides that:

"where the party is a company or other body corporate or trade union or an employers' organisation it may be represented by one of its directors or other officers or office bearers or officials, as the case may be, provided that a resolution of the company or other body corporate, trade union or employers' organisation authorising

such person to represent it is filed with the Registrar at the time the application is filed or the appeal is lodged or, if that is not possible, at least 5 days before the hearing of the matter.”

[23] This rule makes it clear that, whoever, has been elected or chosen to represent a company or body corporate or a union must file a Resolution with the Registrar. On perusal of the record, there is no such resolution. A resolution of such nature is very important as it removes doubt as to the purported representation. VH purports to act for the third respondent, but, there is no proof that he is so mandated by third respondent.

[24] It is trite that a person who seeks to act for and on behalf of someone must file a Power of Attorney, if it is a juristic person, he must file a company resolution as proof that he is mandated to do so. The rationale behind this is to safeguard the other party as far as costs are concerned in the event that they are so ordered. Without such a resolution, VH is not properly before the court. Authenticity to represent third respondent becomes doubtful.

[25] In the absence of such a document he is not properly before the court. A representative's authenticity can only be confirmed by such resolution. The intention of the legislature was to ensure that no one else comes to court to claim representation only to disappear when the represented company fails in its litigation, thereby, avoiding costs which invariably would follow suit.

[26] In the absence of a resolution, VH cannot claim to represent third respondent. Therefore, it follows that, all the court processes filed under his name are fatally defective and are, therefore, of no force or legal effect.

Answering affidavit

Mr. Greyling has argued that a third respondent's notice of opposition filed on 08 September 2016 was not in compliance with the Rule 6 (9) (b) of the Labour Court Rules which states:

“ (9) Any respondent opposing the grant of the relief sought in the notice of motion must-

(b) within 14 days of notifying the applicant of his or her intention to oppose the application.

- (i) deliver an answering affidavit together with any relevant documents, or
- (ii) if he or she intends to raise a point of law only, deliver notice of such intention stating concisely the point of law.”

[27] VH sought to respond to facts asserted to through heads of argument. It is the position of our law that evidence of such nature must be raised by an affidavit, see *Luther Natangwe Imbili v Nangolo* (I 230/2015) [2016] NAHCNLD 61 (22 July 2016). This is the correct legal position. At a later stage, VH sought to rectify his error, but, to no avail.

[28] In my mind, he was, throughout these proceedings been trying to correct his mistakes, wherever, they were raised by applicant. There is no other display of lack of knowledge than this. Again failure to comply with rules was fatal to third respondent's case.

[29] Third respondent of course through VH filed heads of argument, but, did not file an Answering Affidavit as is required by the rules.

[30] All having been said in this matter, VH failed to represent third respondent and accordingly there is no opposition to talk about.

[31] Failure to comply with the rules results in a fatal possess. Mr. Hamunyela (VH) admitted that he did not comply with the Rules of the Labour Act (supra). In his oral submissions, he stated that he relied on legal advice from their legal practitioner that they should just file a notice of opposition and then follow it up with an affidavit, suffice to say that this advice was wrong and has resulted in the mess they find themselves in. He further stated that he was not aware that he should have filed a resolution.

[32] First and second respondents elected not to oppose this application as they stated that they will abide by the decision of the court. It is clear that third respondent although it expressed its interest to oppose applicant's application it

failed to comply with the provisions of Rule 6 & 14 of the Labour Court Rules by failing to file an answering affidavit to oppose the application.

[33] That third respondent fell foul of these requirements admits of no doubt. This failure is fatal and incurable for third respondent's case and cannot be brought back into life.

[34] Third respondent has asked that it should be exempted from paying costs. This, is, despite its admission of failure to comply with the rules. This to me would be unfair to applicant who was forced to take this legal route due to third respondent's belligerent attitude. The costs must follow the cause.

[35] I should remark here that third respondent is a Registered National Trade Union whose membership is fairly large going by Namibian's Meat Industry. Its labour disputes are governed by the Labour Act (supra) and they are entitled to be represented by one of their members. In *casu* they appointed VH, the Secretary General, to be its representative in court. Its members have a right to proper representation and expect that, whoever, holds himself as their representative in court should be a person who will represent them with diligence, skill, ability and professionalism. Such attributes unfortunately were lacking in the person of VH.

[36] In my view, third respondent's interests are not served by a person who is bereft of very basic knowledge of labour laws. Even when his shortcomings were pointed out to him at an early stage by applicant's legal practitioner when he called upon him to regularise the disputed issues in the conciliation agreement, he did not see the legal and logical sense in this.

[37] I found VH to be a fairly intelligent man and eloquent one too. However, it is important to accept that in as much as one is articulate in his presentation that is not enough if it is not accompanied by legal points, as it is through them that the law is hinged and nowhere else.

[38] Trade Unions will save themselves a lot of money and time by instructing a legal practitioner and certainly not a layman.

[39] This is a case where VH totally failed third respondent by his failure to comply with rules of the Labour Court. This is confirmed by his admission that he is not familiar with the said rules in general and court procedures in particular.

[40] This matter, in my opinion, cannot pass the hurdles of *points in limine* raised by applicant in the circumstances. Third respondent fails at this stage. The following is the order:

1. The decision taken by first respondent on the 27 July 2016 is set aside.
2. The conciliatory hearing pursuant to section 82 (9) of the Labour Act, Act 11 of 2007 is amended.
3. The referral of dispute by third respondent is declared to be materially defective on the basis of third respondent's failure to exhaust all domestic remedies.
4. Third respondent should comply with clause 6 of the collective agreement entered into and between applicant and third respondent on 12 March 2012
5. Costs of suit.

M Cheda
Judge

APPEARANCES

APPELLANT: P. Greyling
Of Greyling & Associates, Oshakati

1ST RESPONDENT: Labour Commissioner
Office of the Labour Commissioner, Oshakati

2ND RESPONDENT: M. Nangombe
Office of the Labour Commissioner, Oshakati

3RD RESPONDENT: V. Hamunyela
Namibia Wholesale and Retail, Workers Union, Oshakati