(a) REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LC 150/2013

In the matter between:

1.1.1.1. **AUTO EXEC CC**

APPLICANT

and

JOHAN VAN WYK **1st RESPONDENT**

TUULIKKE MWAFUFYA-SHIKONGO **2nd RESPONDENT**

Neutral Citation: Auto Exec CC v Johan Van Wyk (LC 150/2013) [2014] NALCMD 16 (16 April 2014)

Coram: SMUTS, J
Heard: 12 March 2014
Delivered: 16 April 2014

Flynote: Review of an arbitrator's award on the grounds that the referral form (LC21) had not been signed by the referring party. This point was first taken after the arbitration had been completed and where the parties had participated. It turned out that the referring party had signed another referral form – whose terms were all identical to the original form – at the instance of the office of the labour

Commissioner. But the later form had not been served on the applicant. The court followed *Purity Manganese (Pty) Ltd v Katjivena and Others* in holding that the rule giver had not intended that proceedings would result in a nullity where the referral form had not been signed and when the parties had participated on the proceedings. That is because the participation amounted to a ratification of the unsigned form. The failure to serve an identically worded form which was signed did not constitute a defect contemplated by s 89(5) of the Labour Act 11 of 2007 or a vitiating irregularity.

ORDER

(b)

(c) The application is dismissed. No order as to costs is made.

JUDGMENT

SMUTS, J

(d) This is an application for the review of an arbitrator's award made in favour of the first respondent on 12 August 2013. This application is brought under s 89(4) of the Labour Act.[1] This sub-section empowers a party to a dispute who alleges a defect in any arbitration proceedings to apply to this court to review and set aside the award.

(e) A defect contemplated by s 89(4) is defined to mean the following in terms of s 89(5):

> "(5) A defect referred to in subsection (4) means-

[1]Act 11 of 2007.

(a) that the arbitrator-

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the arbitrator's power; or

(b) that the award has been improperly obtained."

The applicant's application

(f) A single review ground is raised in support of the applicant's brief application. The applicant refers to the first respondent's referral of dispute form LC21, which is attached to the founding affidavit. The applicant points out that it was signed by a certain Mr KK Humu, a labour consultant on 11 March 2013. The applicant takes the point that Mr Humu was not a person entitled under the Act or the rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ("the rules") to represent the first respondent in signing that form. As a consequence, the applicant contends that there was no proper dispute referred to the office of the Labour Commissioner. The applicant further contends that the Labour Commissioner or any arbitrator appointed under the Act would not be able to act in terms of the Act or the rules and that any proceedings or award flowing from such a referral would be a nullity. This is given this non-compliance with rule 5(1) read with s 86(12) of the Act by reason of the fact that the labour consultant was not a person entitled to sign the form or represent the first respondent in signing the form.

(g) The applicant accordingly in its notice of motion sought the setting aside of the award as a consequence. The award had ordered the reinstatement of the first respondent in the applicant's employ and directed that the applicant should pay him three months' salary upon reinstatement.

(h) In the notice of motion, the applicant also called upon the arbitrator to dispatch a record of the arbitration proceedings. The award itself was not attached to the founding papers. The only attachment was the referral form LC21 dated 11 March 2003.

(i) The first respondent opposed this application and filed an answering affidavit. In it, he acknowledges that he initially referred the dispute by way of the referral form attached to the founding affidavit. He states that after doing so, he was informed by the Office of the Labour Commissioner that the form was defective and that he needed to sign and complete another referral form. He duly signed another referral form dated 19 April 2013. It was attached to his answering affidavit. He further states that a certain Ms Theron served it upon the applicant on 19 April 2013. No proof of service was however attached to the affidavit.

(j) The first respondent further points out that the arbitration award made a clear reference to the referral of the dispute being on 19 April 2013 and not 11 March 2013. He accordingly submitted that the arbitrator had acted upon a valid referral form which had been signed by him. He further points out that the applicant would have been aware of this given the fact that this was referred to at the very outset of the arbitration award. In the very first sentence of the arbitration award, the following was stated:

> 'A dispute of unfair dismissal, unfair labour practice, unfair discrimination, refusal to bargain and severance package was reported to the Labour Commission by applicant on the 19th April 2013.'

(k) The applicant thereafter filed a supplementary affidavit which in the filing notice was also referred to as a replying affidavit. In this affidavit, the point was taken that the referral form LC21 dated 19 April 2013 had not been served upon the applicant. It was also pointed out that there was no form LC36 required by the rules to establish service of any notice or process in proceedings of that nature. The complaint was reiterated that the form served upon the applicant on 11 March 2013 was defective because it had not been signed by the first

respondent himself but by a labour consultant who represented him.

The parties' submissions

(l) When the matter was argued, Mr Dicks, who appeared for the applicant, submitted that a party is required to provide proof of delivery of a form LC21. He pointed out that the record provided by the Labour Commissioner's office did not include any proof of delivery (of the LC21 form dated 19 April 2013) as is required by the rules. He submitted that the first respondent had failed to prove delivery or service of the LC21 form dated 19 April 2013. He referred to rules 5 and 14 concerning the requirements relating to signature of a referral document and who could sign on behalf of a party in doing so. He submitted that these rules, given their wording and use of the term "must", are peremptory and that the failure to comply results in a nullity. In support of this argument he referred to two decisions of this court where sentiments of that nature were expressed in *Waterberg Wilderness Lodge v Uses and 27 Others*[2] and *Springbok Patrols (Pty) Ltd t/a Namibian Protection Services v Jacobs and Others.*[3] Mr Dicks referred to that the *Springbok Patrols* matter in which it was stated with reference to the earlier *Waterberg Wilderness Lodge* matter that:

> 'This court has held that this requirement is not a mere technicality and must be complied with. The rule is set out in peremptory terms.'

Mr Dicks pointed out that this was followed in a recent decision of this court in *Agribank of Namibia v Simana and Another*[4] in which Hoff, J held that the failure to comply with rule 5 results in an invalid referral of a dispute and that the award would be set aside for that reason alone as it would constitute a nullity, where the following was stated:

> 'I agree, in the view of the Springbok Patrol matter (*supra*) that the referral was an invalid referral and therefore a nullity.'

(m) Mr Dicks also referred to a decision of this court in *Purity Manganese*

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[2]LCA 16/2011, unreported 20 October 2011 at par 10-12.

[3]LCA 70/2012, unreported 31 May 2013 at par 7.

[4] (LC 32/2013) [2014] NALCND 5 (17 February 2014) at par 19 and 23.

(Pty) Ltd v Katjivena[5] where I expressed a contrary view. Mr Dicks pointed out that none of the preceding three judgments he had referred to had been followed in *Katjivena*. He thus submitted that it should not be followed.

(n) In the circumstances, he submitted that the first respondent's dispute had not been properly referred and that ensuing proceedings were invalid and constituted a nullity and should be set aside.

(o) Mr Dicks stated at the hearing that a further review ground raised in the supplementary affidavit with reference to correspondence directed to the arbitrator after the proceedings had been completed was not persisted with.

(p) Mr Rukoro, who appeared for the first respondent, submitted that by proceeding with the conciliation and thereafter the arbitration proceedings, the arbitrator and the applicant had accepted there had been proof of service of the further referral form dated 19 April 2013. He submitted that the Labour Commissioner's office had been satisfied that the dispute had been referred and thereafter moved to the next stage of the proceedings in appointing of the arbitrator to conciliate and arbitrate the dispute. He pointed out that the arbitrator had only been appointed after 19 April 2013, pursuant to that referral. He further pointed out that the arbitrator's award in its very first sentence, as is set out above, stated that the award was in respect of the referral of 19 April 2013. The applicant would already then have been alerted to that fact and that it would not have emerged only after the record having been provided and should have been addressed in the founding affidavit. He further pointed out that the applicant had been represented by a labour consultant throughout the arbitration proceedings and had participated in them and that it was thus not open to it to take the points raised in this application.

(q) **Statutory provisions and the relevant rules**

[5](LC 86/2012) [2014] NALCND 10 (26 February 2014).

(r) The relevant provisions in the Act as well as the rules are referred to in some detail in *Katjivena*. They bear repetition:

> '[12] Arbitration tribunals for the purpose of resolving labour disputes are established under s85 of the Act. These operate under the auspices of the Labour Commissioner and have jurisdiction to hear and determine disputes. Of relevance for present purposes is s86 of the Act which is entitled 'Resolving disputes by arbitration through Labour Commissioner.' Section 86 (1) contemplates the referral of disputes in writing to the Labour Commissioner or any labour office. Subsections (3) to (7) provide:
>
> > '(3) The party who refers the dispute in terms of subsection (1) must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute.
> >
> > (4) The Labour Commissioner must –
> >
> > (a) refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration;
> >
> > (b) determine the place, date and time of the arbitration hearing; and
> >
> > (c) inform the parties to the dispute of the details contemplated in paragraphs (a) and (b).
> >
> > (5) Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.
> >
> > (6) If the conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.
> >
> > (7) Subject to any rules promulgated in terms of this Act, the arbitrator –
> >
> > (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and
> >
> > (b) must deal with the substantial merits of the dispute with the minimum of the legal formalities.'

[12] The rules are in the form of regulations made by the Minister under his power to do so under s135 (2) (at) of the Act. Part 4 of the rules concern the arbitration of disputes. It commences with rule 14 headed, 'Referral of dispute arbitration.' The relevant portions of this rule are as follows:

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

(a) . . .

(b) Form LC21

(2) The referring party must –

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

[13] Rule 5 of these rules (referred to in rule 14) deals with the signing of documents in the following way:

'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 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 authorizing 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.'

[14] Form LC 21 is attached to the rules. It is entitled 'Referral of dispute for conciliation or arbitration.' It sets out a number items which are to be completed such as the full name of an applicant, physical address, postal address and other contact details. It also then requires an applicant to identify the nature of the dispute with reference to different possibilities posited on the form. An applicant must also complete an item setting out the date on which the dispute arose. At the end of section to be completed is a place for signature below which is stated as follows:

'Representative of the applicant (print name and sign).' Adjacent to this is the place for an applicant to complete 'position.' The date of the signing the form is to be completed and it is to be directed to the office of the Labour Commissioner and to the other parties to the dispute.' '

(s) In *Katjivena*, I had occasion to consider what I had said in *Springbok Patrols* in the context of the purpose of the rules requiring a party to sign the LC21 form. That was because I became concerned that an employer would be able to sit back at arbitration in the face of an unsigned form and then take that point on appeal, if the argument put forward by Mr Dicks were to be sound. That caused me to reconsider what was stated *Springbok Patrols*. I proceeded to consider the purpose of the provision (requiring that a party sign the referral form) and whether such a consequence would arise, applying principles applicable to the interpretation of statutory provisions.

(t) Mr Dicks' argument is founded upon an interpretation that the term "must" employed in rules 5 and 14 is peremptory and that any non-compliance would result in a nullity. I stressed in *Katjivena* that, whilst this term would indicate an intention on the part of a rule-giver that the provision would be mandatory or peremptory and that non-compliance may result in invalidity, that this would not be the end of the enquiry and would not necessarily arise. The mere labelling of provisions as peremptory or directory and ascribing consequences as a result has been characterised by the Supreme Court as an over simplification of the guidelines informing the interpretation of statutes developed over some considerable time.[6] I proceeded to refer to the helpful summary of the applicable principles in determining whether a term – in that matter "shall" – would have a mandatory meaning as restated in *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others.*[7] I do not propose to quote extensively from that judgment as the relevant portions are fully set out in the *Katjivena* matter. I concluded as follows:

> '[30] Applying the approach and guidelines so usefully summarized by Van Niekerk, J, I turn to the legislative purpose and context of the rules. The statutory context of these rules, as already set out, is the conciliation and determination of labour and employment disputes 'in a manner' which the arbitrator considers appropriate to determine the dispute fairly and quickly as is required by s86 (7) (a). Arbitrators are also enjoined by s86 (7) (b) to deal with

[6] *Rally for Democracy and Progress and others v Electoral Commission of Namibia and Others* 2010(2) NR 487 (SC) at par [36].

[7] 2013(1) NR 271 (HC) at par [22] – [28].

'the substantial merits of the dispute with the minimum of legal formalities.'

[31] The purpose of the rule requiring that referral documents are to be signed, as set out in rules 14 and 5, would to be ensure that a referral is authorized by a complainant. I enquired from Mr Dicks in argument whether the applicant's point would have been addressed if the third respondent had merely signed the referral form when the point was taken. He responded in the affirmative. That would in my view appear to be correct, given the fact that the requirement of the rules would then have been met, even though the referral document had not been signed when it had been delivered. The failure to sign can thus be cured in the course proceedings. This is because of the doctrine of ratification in the context of the purpose of the requirement. In view of the purpose of the requirement (of signature to the referral form), it would be for the office of the Labour Commissioner to reject a referral and avoid an unauthorized referral. In that instance, a referring party would then be required by that office to sign the form to ensure that the referral was authorized. But once a referring party participates in conciliation and thereafter in arbitration, without an objection to that participation, it would seem to me that the requirement of a signature had at that stage become redundant. This is because of the fact that the participation by the referring party has resulted in a ratification of the referral.

[32] I cannot accept that the rule giver could have intended by this rule that the failure to have signed a referral form can, after participation, result in an ensuing award being a nullity for that reason alone. There is support for this proposition in a judgment by a full bench in South Africa where there is also a requirement of a signature to a referral form for conciliation, mediation and arbitration. A contrary position had been taken previously by a single judge in an earlier matter, holding that the failure to have signed a referral form resulted in the CCMA in South Africa not having jurisdiction to proceed with conciliation, mediation and arbitration.'

(u) I found considerable support for this conclusion in a full bench judgment of the then Labour Appeal Court in South Africa in *ABC Telesales v Pasmans*[8] which had not been cited or referred to in argument in *Katjivena*, although a

[8](2001) 22 ILJ 624 (LAC).

case which it had overruled had been.[9] The court in *Telesales* considered a similarly worded provision. It was faced with the situation where an articled clerk in the employ of a firm of attorneys had signed a form on behalf of the litigant in that matter. This was not in compliance with the rule. The court considered the purpose of the rule in interpreting the consequence to be visited by non-compliance. It concluded that its purpose was to avoid unauthorised referrals. It further found that the referring party's participation in the conciliation process without objection would render the requirement of a signature redundant at that stage. It concluded that the rule-maker would not have intended that the rule apply once participation had occurred and, with it, the ratification of the referral.

(v) I enquired whether this full bench decision had been drawn to the attention of Hoff J when the *Agribank* matter was argued before him. I was informed by Mr Rukoro, who appeared in that matter, that it was not. I have no doubt that it would have held great sway with him, as it had with me. His judgment in the *Agribank* matter was handed down a few days before mine in *Katjivena*. I was not aware of it and it was not drawn to my attention by the parties in *Katjivena*. In his judgment, Hoff, J relies upon what was stated in *Springbok Patrols*. In *Katjivena*, I however concluded that certain of the remarks contained in *Springbok Patrols* should be qualified as a consequence of the conclusion I reached in *Katjivena*. I stressed that *Springbok Patrols* had been a case of a joint referral where parties had not signed or been identified and stressed that what was found in that matter should be confined to the facts of that case. I also pointed out that there was evidence in that matter that several employees who were supposed to form part of the group in whose name a joint a referral was made had distanced themselves from the referral.

(w) I also pointed out in *Katjivena* that the failure to sign would have been a matter for the Labour Commissioner to take up before participation commences (to require compliance with the provisions of rules 5 and 14) to ensure that the referral was authorised prior to it proceeding to conciliation and arbitration. But, if that office did not invoke the provisions of rules 5 and 14, then it may be for a

[9] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* (1998) 19 ILJ 327 (LC).

litigant to raise non-compliance with that rule prior to participation in conciliation and arbitration, as the case may be, so that non-compliance could be rectified to ensure the proceedings were authorised. But I stressed that once the Labour Commissioner had appointed a conciliator and arbitrator to conciliate and thereafter determine the dispute and had assumed jurisdiction to do so and once the parties have participated in those proceedings, then it would not in my view be open for the other protagonist in subsequent proceedings to take this point, as is sought in this review. That was the sole point raised in the review application. I was informed by Mr Dicks that there was no appeal noted against the award. It is open to parties to both review and appeal against an award.

(x) In this matter, it would appear that the office of the Labour Commissioner was alive to the non-compliance by the first respondent with Rules 5 and 14. The first respondent was then called upon by that office to rectify that procedural glitch. But in doing so, it did not require him to sign the same form, but to sign another referral form which was identical in every other respect with that served in March 2013. The only difference was that it was signed by the first respondent personally whilst the earlier form of March 2013 had been signed by a labour consultant on his behalf with the name of the labour consultant inserted upon it. In every other respect, it was identical.

(y) Mr Dicks correctly points out that it has not been proven that the newly signed form (of 19 April 2013) was served upon the applicant. The arbitrator accepted that the newly signed form constituted the referral which had given rise to her appointment as conciliator and arbitrator. It would appear that the office of the Labour Commissioner had considered that the signing of the LC21 form in identical terms (dated 19 April 2013) then constituted compliance with the rules but did not require that the signed form to be served upon the applicant.

(z) On the form, after providing the particulars of the first respondent, the relevant portion is in paragraph 9 entitled “nature of dispute”. Eleven different types of disputes are posited. A twelfth category is merely referred to as “other”. But it requires specification when invoked. A party referring a dispute is to provide a mark so as to indicate the nature of the dispute. In this instance, the

first respondent marked the following categories "unfair dismissal", "unfair discrimination", "unfair labour practice", "severance package" and "refusal to bargain". The next paragraph requires that the date on which the dispute arose is to be specified. On both form 30 November 2012 is inserted.

(aa) The exact same particularity appeared upon the earlier form signed by him. Nothing more, nothing less. The only difference was that the first respondent, in whose name (with full particulars supplied) the referral was made, had signed the form instead of his labour consultant.

(bb) After the appointment of the arbitrator and conciliator (which occurred on 22 April 2013), the parties were called upon to attend a conciliation meeting on 13 May 2013. It was then postponed to 25 June 2013. It is apparent from the transcribed record provided that conciliation did not result in the resolution of the dispute and the matter proceeded to arbitration. Those proceedings were recorded. Both parties were represented by labour consultants. The applicant was represented by a certain Mr Zirzow of an entity called Organisational Behaviour Training Services.

(cc) It is apparent from the transcribed record of the proceedings that there had been conciliation which had been unsuccessful which the arbitrator referred to in providing general background to the conduct of the arbitration proceedings before requesting the representatives of each of the respective parties to make opening statements. The first respondent's representative in his opening statement referred to the matter as being one of unfair dismissal, unfair discrimination and also referred to what he termed to be an unfair labour practice. He amplified upon these issues.

(dd) In his opening statement, the applicant's representative made it clear that he was aware that the dispute was essentially one of unfair dismissal and pointed to the circumstances which gave rise to what he termed had been the "automatic dismissal" of the first respondent by virtue of his conduct. The proceedings then unfolded essentially as an unfair dismissal complaint. The parties called their respective witnesses to testify on that issue and thereafter

made their submissions concerning it and the arbitrator thereafter handed down her award.

(ee) It is clear from the record that the applicant was under no illusion as to the nature of the dispute. Nor could it have been. It was common cause that the first respondent's services had been terminated by the applicant. The referral forms were entirely identical in specifying the dispute.

(ff) Mr Dicks contended that the first referral form was a nullity because it was not signed and submitted that for the arbitration to proceed on the second referral was a vitiating irregularity because it had not been served on the applicant.

(gg) I enquired from him what the position would have been if the first respondent had been called upon merely to subsequently sign the first form in addition to the labour consultant after service upon the applicant. Mr Dicks pointed out that this had not been the case but I understood him to accept that this could have rectified the shortcoming. He submitted that in this case his client's rights had been violated by proceeding upon a referral which had not been served upon it. I then enquired as to the prejudice which the applicant had sustained as a consequence of the failure to have signed the form or for the identical duly signed form not to have been served. Mr Dicks submitted that prejudice was not the issue. The issue was, he submitted, whether or not a vitiating irregularity had occurred. He submitted that this was the case and that his client's rights had in the process been violated.

(hh) I enquired as to the nature of his client's rights which had been violated. He pointed out that his client had the right to be served with a signed referral form and in the absence of such service, to have the proceedings set aside.

(ii) The nature of this "right" is of course purely procedural. It did not constitute a substantive right in any sense as is demonstrated by the facts of this case. It is akin to what was stated by Conradie J (as he then was) in *Merlin*

Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another[10] that a procedural right of this nature is no more than a "right" to take a point and to require a court not to turn a good point into a bad one. Mr Dicks would appear to operate from the assumption that a procedural defect of this nature could not be rectified. As was pointed out by Harms JA in *Smith v Kwanonqubela Town Council*[11] a party to litigation does not have the right to prevent the other from rectifying procedural defects. This was spelt out with reference to earlier decisions in his customary cogent manner as follows:

> '[14] Apart from the fact that no substantive right of a third party is affected by the ratification, the next question is if any vested right of Smith was affected or prejudiced. Kannemeyer J in South African Milling Co (Pty) Ltd v Reddy 1980 (3) SA 431 (SE) at 437F held that a respondent acquired 'a right to move for the dismissal of the application on the ground of lack of locus standi'. Goldstone J had difficulty with this because to him the so-called right is 'hardly what one would envisage as constituting a "vested right" '. (See Baeck & Co SA (Pty) Ltd v Van Zummeren and Another 1982 (2) SA 112 (W) at 119H.) Conradie J in Merlin Gerin agreed with Goldstone J, reasoning that the right involved is no more than the 'right' to take a point and to require a court not to turn a good point into a bad one. I am in general in agreement with the analysis and conclusion reached in Merlin Gerin. Apart from making perfectly good sense and being practical, it is legally sound. A party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise, one party would for instance not be entitled to amend a pleading, especially not after the filing of a valid exception. The ratification in the present instance did not affect any substantive rights of Smith.'

(jj) Upon the reasoning set out in *Katjivena*, I would find that the failure to have signed the initial form, in the face of the subsequent participation by the first respondent where that point was never taken and which would have amounted to a ratification, would not vitiate the proceedings. The fact that a form in otherwise identical terms had been signed by the first respondent upon the insistence of the office of the Labour Commissioner before the conciliator and

[10] 1994(1) SA 659 (C).

[11] 1999(4) SA 947 (SCA) par [14].

arbitrator was appointed, would in any event go some way to address that point. The fact that the signed form was not subsequently served upon applicant would in the circumstances of this matter where it was in every other respect identical to the original form served upon it, not in my view result in a vitiating irregularity of the arbitration proceedings which ensued thereafter. The applicant has for that matter thus not established a defect in the proceedings as contemplated by s 89(5) or any vitiating irregularity in this application.

(kk) It follows that the application is to be dismissed. No order as to costs is made.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	G Dicks Instructed by Köpplinger Boltman
FIRST RESPONDENT:	S Rukoro Instructed by Legal Aid