REPUBLIC OF NAMIBIA NOT REPORTABLE

IN THE LABOUR COURT OF NAMIBIA

JUDGMENT

Case no: LC 93/2012

In the matter between:

EMILIA RUBEN **1ST APPLICANT**

JOHANNA KAPIYA **2ND APPLICANT**

1.1.1.1.

And

ANGELINA HAGEN **1ST RESPONDENT**

NOVANAM LIMITED **2ND RESPONDENT**

Neutral citation: *Ruben v Hagen (LC 93/2012) [2014] NAHCMD 40 (2 October 2014)*

Coram: SMUTS, J

Heard: 24 September 2014

Delivered: 2 October 2014

Flynote: Application to review an arbitrator's award under s89 of Act 11 of 2007. The applicants failed to properly set out and establish review grounds contemplated under s89(5) of Act 11 of 2007. Application dismissed.

ORDER

The application is dismissed. No order as to costs.

JUDGMENT

SMUTS, J

(b) This is an application brought by the applicants under s89 (4) of the Labour Act , 2007[1] to review and set aside an award of an arbitrator of 21 June 2012 at Luderitz.

(c)

(d) The applicants are represented by Mr S. Rukoro. The arbitrator in the matter is cited as the first respondent. She did not oppose the application. The second respondent is represented by Mr R. Philander.

(e)

(f) The applicants were employed by the second respondent. On 13 September 2011 they each received a notice of termination of their services by way of retrenchment for economic reasons. The retrenchment was to be effective from 15 October 2011. The first applicant filed a grievance against the notice and a subsequent retrenchment notice was served with the retrenchment set for 15 December 2011.

(g) On 16 December 2011 the applicants brought an urgent application in this court seeking to interdict their retrenchment. That application was dismissed. The applicants subsequently and on 23 December 2011 referred the dispute to the office of the labour commissioner claiming illegal and

[1]Act 11 of 2007

unprocedural retrenchment. That dispute related to their retrenchments which the applicants contended were unfair.

(h)

(i) The first respondent was assigned as arbitrator in that dispute. It was initially set down for 10 February 2012 but eventually proceeded on 14 March 2012. In the meantime, the applicants, through a labour consultant, applies to the Labour Commissioner for the recusal of the first respondent. The affidavit in support of their application for recusal contained allegations of impropriety against the arbitrator.

(j)

(k) When the dispute proceeded on 14 March 2012, the applicants instead applied for the dismissal of their disputes. The transcript of those proceedings is annexed to the founding affidavit. The arbitrator questioned both applicants about the allegations in support of recusal and enquired whether either of them had ever appeared before her. Both denied that and they both disavowed the allegations in support of recusal saying that these statements had been inserted by their labour consultant, a certain S. Ekandjo, in their affidavit and they were not true. They were told he had written the affidavit but could not confirm it as the truth. The arbitrator then enquired whether the matter could continue before her. The applicants replied in the affirmative.

(l) The respondent's employee representing it at the hearing took the point that the referral was the same matter which had been dismissed by the Labour Court in December 2011. The first applicant stated that the cases were not identical. She was then afforded a break in proceedings. The arbitrator afforded the applicants a short break to consider their positions. Upon the resumption of the proceedings the applicants stated they did not intend to take their referrals any further. Then the arbitrator enquired as to whether they were withdrawing the referral. They stated that it would not be withdrawn and would rather be proceeding to the Labour Court. The arbitrator pointed out that the referral was made by them and would need to proceed further to the stage of finality.

(m)

(n) The applicants stated that their referrals had not been finalised within 30 days as the Act requires. The arbitrator pointed out that the applicants had not

attended at the commissioner's office when the matter was previously called on 12 February. The applicants then confirmed that they did not want to proceed with the matter. Upon a question by the arbitrator to the effect 'you dismiss the case at the arbitration forum', both applicants answered in the affirmative.

(o)

(p) When the arbitrator canvassed the issues with the second applicant, she indicated that she did not intend to proceed further with the referral but intended to take it to the Labour Commissioner. It was pointed out to her that arbitration proceedings emanate from a referral to the Labour Commissioner. The second applicant then reiterated that they intended to proceed to the Labour Court. The second applicant indicated that the referral should be dismissed and also said that the referral should be withdrawn.

(q) The arbitrator then make the following award:

'1. The case was heard on the 14 March 2012 in Luderitz in the Boardroom of Ministry of Labour and Social Welfare.

2. The case was made by the applicants for illegal and unprocedural retrenchment.

3. The applicants asked for a five minute adjournment to consult with their Labour consultant which was granted to them. After the five minute adjournment the applicants came back and asked that the case be dismissed

4. The arbitrator explained to the applicants what the consequences will be if they withdrew the case. The applicants stated that they understood what the arbitrator said but persisted to have the case withdrawn.

After applicants withdrew the case the case was withdrawn by the arbitrator.

Order

The above-mentioned case is dismissed.'

(r)

(s) Subsequent to this award, the applicants referred a dispute against the second respondent again at the office of the Labour Commissioner, again in respect of their retrenchments although this time using the label of an 'unfair

dismissal' to describe their dispute. The Labour Commissioner referred the matter again to the first respondent as arbitrator.

(t) The proceedings again came before the arbitrator on 21 June 2012. On that occasion, another application for recusal was brought. It was opposed by the second respondent. The matter was set down for 30 May 2012. The second respondent took the point that no grounds for the arbitrator's recusal were stated and referred to the fact that the same dispute had been previously referred and had been dismissed on 14 March 2012. The point was taken that the applicants did not apply for rescission of that award or appeal against it and that the matter was *res judicata* and that the further referral constituted an abuse.

(u)

(v) The transcript of the oral proceedings before the arbitrator was attached to the application. The second respondent's representative also referred to the prior application made to the Labour Court being dismissed, to the previsious referral which was withdrawn and dismissed and pointed out that the same facts namely the applicant's retrenchment, formed the basis of these proceedings.

(w) The applicants acknowledged that the same facts were involved in each of the proceedings, and particularly the prior dispute which had been referred and had been dismissed and withdrawn on 14 March 2012. They were also asked as to whether they had any complaint about arbitrator's conduct to which they explained that the complaints emanated from their labour consultant and explained that they did not have any complaint about the arbitrator, despite the strongly stated complaints raised in the recusal application. The arbitrator put it to the applicants that she regarded the prior referral as finalised and explained that the second respondent had sought a costs award against them on the grounds of the further referral constituting an abuse. The arbitrator proceeded to dismissed the referral. Her award, dated 21 June 2012 stated the following:

(x) '1. The case was made by the applicants for unfair dismissal.

2. The applicants and the respondent were present at the meeting.

3. The respondent stated that the case could not continue as it was the

same case that the applicants made at the Labour Court and it was dismissed in the court and the Labour Commissioner's office and the case number was SLU1/2012.

4. The respondent asked for cost as they stated that the case was frivolous and vexatious.

5. The respondent admitted that it was the same case that they made just under the different name. After listening to both the respondent and applicants I withdrew (sic) the case as it was the third time the case was made by the applicants by their own admission.'

(y) The applicants thereafter proceeded to bring an application to review and set aside the arbitrator's award of 21 June 2012. Their application was dated 2 July 2012.

(z) In the founding affidavit, the first applicant contended that the arbitrator was bound by Rule 20 which required that unless a dispute had been conciliated, the arbitrator must resolve it through conciliation before beginning with arbitration. It was contended that no fair and impartial arbitrator could have made such a ruling as it has been given in the matter whereas the arbitration itself on the merits had not occurred.

(aa) The first applicant also explained that she had been advised by her labour consultant that at the set down of the arbitration for 14 March 2012, it was her intention to raise a point relating to time prescription. This was not explained in either her affidavit or in the oral argument. The first applicant also took the point that even though the arbitrator's recusal was sought, she proceeded to adjudicate on the matter and issued her award of 21 June 2012.

(bb)

(cc) The first applicant concluded that the award was vitiated by gross irregularities and misuse of power. In explaining this, the first applicant stated that the arbitrator had exceeded her statutory authority and misdirected herself in ruling that the matter was registered three times without proof (of that) and

that the arbitrator had no statutory right to withdraw the matter from the arbitration roll and to decline to hear the matter and that the award should be set aside on review.

(dd)

(ee) The second respondent filed an answering affidavit referring to the factual background of the matter which I have set out already. The second respondent also disputed certain of the factual averments which were raised in support of the recusal application. The second respondent primarily took the point that the applicants had not made out a case in their founding affidavit to review and set aside the award under s89. The second respondent further contended that the principle of *res judicata* should apply and that the arbitrator was correct in her ruling that the application should be dismissed.

(ff) When the matter was argued, Mr Rukoro on behalf of the applicant submitted that the requisites for *res judicata* had not been met. Although the parties were the same and that essentially the same dispute was raised in both referrals, he pointed out that a final judgment had not been given on the merits of the matter and for that reason the defence of *res judicata* should not have been upheld. He accordingly submitted that the arbitrator was wrong to have done so. When he made that submission, I pointed out to him that if the applicants were dissatisfied as to the correctness of the ruling, then the applicants' remedy should have been an appeal. Whilst conceding that, he pointed out that the applicants were not legally represented at the time when the review application was drafted or in their referrals on the arbitration proceedings. Although the notice of motion in the review application was signed by the first applicant, this was care of a legal practitioner's address.

(gg) Mr Rukoro also submitted that the arbitrator exceeded her power under the Act in dismissing the referral. But this point is not properly raised in the founding affidavit. Even they were not represented, this application is confined to the review grounds raised in it. I also take into account that the applicants did not reply to the second respondent's answering affidavit. At that time the applicants were represented by a legal practitioner, Mr T Mbaeva, who had since withdrawn.

(hh) Mr Philander argued that the applicants' review did not fall within the ambit of s89. He submitted that even if the requisites for *res judicata* had not been met, the applicants had in the circumstances abandoned their right to proceed with their referrals. He submitted they had made an election and were bound by it and could not repeatedly proceed against their employer in referral the same dispute again and again. Although only two referrals had been made, the applicants had also unsuccessfully brought an application in the labour court in respect of precisely the same facts. He submitted that the applicants' conduct in the circumstances constituted an abuse and that the arbitrator was in any event entitled to dismiss the referral when it came up again on 30 May 2012.

(ii) The provisions of s89 confine reviews to instances where a defect has occurred in arbitration proceedings. A defect contemplated by s89(4) is defined in s89(5)(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) The award has been improperly obtained'

(jj) In the applicants' founding affidavit they do not spell out the precise respects in which the arbitrator is alleged to have committed misconduct, a gross irregularity or exceeded her powers, except in the sense as I have indicated above.

(kk) Applicants in review applications under s89 have an onus to establish one or more of the review grounds provided for in s89. An applicant, even when not represented, is required to make out a case for misconduct or an irregularity or exceeding powers by sufficiently explaining in what respects the arbitrator is alleged to have committed such misconduct or an irregularity or had exceeded her powers. This the applicants failed to do. Even after the answering affidavit had been provided, the applicants did not apply to supplement their review grounds in a replying affidavit and invite both respondents to deal with such

further grounds. This was at a time when they were represented.

(ll)

(mm) The thrust of Mr Rukoro's argument was that the arbitrator was wrong in finding that the requisites of *res judicata* were established. That is the language of an appeal and not of a review. I furthermore found it difficult to discern what applicant's case was from the founding affidavit. It is convoluted and does not set out review grounds with sufficient particularity to alert the first respondent whose decision making was sought to be set aside or the second respondent as the case which they had to meet.

(nn) As the applicants bear the onus to establish review grounds and failed to do so in their founding affidavit, it follows that the application for the review of the arbitrator's award of the 21 June 2012 cannot succeed and is to be dismissed.

(oo)

(pp) Even though the second respondent contended that the conduct of the applicants amounted to an abuse of process, it would seem to me that they were wrongly advised at different junctures by their labour consultant who also placed material in their affidavits in support of recusal and in their founding affidavit which should not have found their way into those affidavits. Although the labour consultant had not been placed upon terms, it would at first blush appear that the abuses can be ascribed to his ineptitude rather than to the applicants even though they had engaged him. I am therefore disinclined to find that their conduct was vexatious or frivolous in circumstances. I accordingly make no order as to costs.

(qq) The order I make is the following:

The application is dismissed. No order as to costs.

_____

D F SMUTS

Judge

APPEARANCES

APPLICANTS:	S. Rukoro
Instructed by:	Legal Aid
SECOND RESPONDENT:	R Philander
Instructed by:	LorentzAngula Inc.