REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 51/2016

In the matter between:

NEDBANK NAMIBIA LIMITED **APPELLANT**

and

JAYANTA MOODLEY **RESPONDENT**

Neutral citation: *Nedbank Namibia Limited v Moodley* (LCA 51/2016) [2017] NALCMD 11 (30 March 2017)

Coram: PARKER AJ
Heard: **10 March 2017**
Delivered: **30 March 2017**

Flynote: Labour law – Appeal – Against whole decision and order of arbitrator – Appellant contending referral to Labour Commissioner on Form LC21 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner was bad because Form LC21 was not duly completed although first respondent attached a summary of the dispute to that Form LC21 – Respondent subsequently submitted to Labour Commissioner duly completed Form LC21 without attaching a summary of the dispute – Court found that both the first and second

Forms LC21 indicate the nature of the dispute to be ‘Unfair Dismissal’ and appellant knew very well there was only one dispute of unfair dismissal existing between it and respondent and so the summary of dispute applied also to the duly completed Form LC21 – If appellant formed the view that the summary of the dispute could not apply to the duly completed Form LC21, appellant has the settled mind to pedantize the rules which are there to provide for the systematic, fair and expeditious resolution of labour disputes for the benefit of sound and harmonious labour relations in Namibia – Such pedantry is unjustifiable and grossly unreasonable and has no place in labour matters – Accordingly court confirmed arbitrator’s finding that respondent complied with the Labour Act 11 of 2007, s 86(3), and with the relevant Conciliation and Arbitration Rules, and arbitrator was entitled to entertain the referral – Consequently, court dismissed the appeal.

Summary: Labour law – Appeal – Against whole decision and order of arbitrator – Appellant contending referral to Labour Commissioner on Form LC21 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner was bad because Form LC21 was not duly completed although first respondent attached a summary of the dispute to that Form LC21 – Respondent subsequently submitted to Labour Commissioner duly completed Form LC21 without attaching a summary of the dispute – Court found that both the first and second Forms LC21 indicate the nature of the dispute to be ‘Unfair Dismissal’ and appellant knew very well there was only one dispute of unfair dismissal existing between it and respondent and so the summary of dispute applied also to the duly completed Form LC21 – Court found appellant’s view that there were two disputes and so the summary of the dispute attached to the first Form LC21 cannot apply to the duly completed Form LC21 to be unjustifiable and unreasonable pedantry which has no place in labour matters – Accordingly, court confirmed arbitrator’s finding that respondent complied with the Labour Act 11 of 2007, s 86(3), and with relevant rules of the Conciliation and Arbitration Rules, and arbitrator was entitled to entertain the referral – Consequently, court dismissed the appeal.

ORDER

(a) The appeal is dismissed.

(b) I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] Before us is an appeal instituted by appellant ('employer') against the whole decision and order of the arbitrator under Case NO. CRWK 371-2016. There are two questions of law which the court is called upon to determine. The respondent ('employee') opposes the appeal.

Questions 1 and 2:

1. Whether the Arbitrator erred in finding that the Respondent complied with Rules 11 and/or 14 of the Rules relating to the conduct of conciliation and arbitration proceedings before the Labour Commissioner ("the Rules") when referring his "referral" dated 1 April 2016 to the Offices of the Labour Commissioner, alternatively whether the referral was *lis pendens*, and, as a consequence, whether the Arbitrator had jurisdiction to entertain the "referral".

2. In the event that it is found that the "referral" which the Respondent referred, dated 1 April 2016, complied with Rules 11 and/or 14 of the Rules (which is denied), whether the Respondent complied sections 82(8) and or 86(3) of the Labour Act 11 of 2007 ("the Act"), read with Rules 6 and 7 of the Rules and whether the Arbitrator had jurisdiction to entertain the referral in the circumstances.

[2] Pursuant to s 86 of the Labour Act 11 of 2007, respondent referred a dispute to the Labour Commissioner on Form LC21. The date stamp of the office of the

Labour Commissioner on that Form LC21 indicates receipt of the referral as 10 March 2006. I shall from now on refer to this Form LC21 as 'the March 2016 Form LC21', where the context allows. The 'Instructions' on Form LC21 enjoins a party referring the dispute to attach a summary of the dispute to the Form.

[3] Furthermore, among other things, the Form requires the party to tick one or more of the entries under item 9 which is 'Nature of Dispute'. On the March 2016 LC21 we see that the respondent ticked 'Unfair Dismissal', indicating that that the dispute he has with the employer appellant is about unfair dismissal. In compliance with the aforementioned 'Instructions', the respondent attached a summary of the dispute to the March 2016 LC21.

[4] The only fly in the ointment is that the respondent did not complete item 10 of that Form LC21, which is 'Date on which the dispute arose' and the date on which he signed the Form LC21. Doubtless, the March 2016 LC21 is defective, not the dispute, as Mr Vlieghe, counsel for the appellant, said several times. A dispute cannot be defective.

[5] In the course of events, respondent completed a second Form LC21 ('the April 2016 Form LC21'); this time he completed the item on 'Date on which the dispute arose', and the form shows the date on which he signed the April 2016 Form LC21. Mr Vlieghe did not point to the court any rule of law which prevented respondent from correcting his error and submitting a new, properly completed Form LC21 on the same dispute. I hold that the respondent's action cannot be faulted.

[6] But that is not the end of the matter. The April 2016 LC21 does not have attached to it a summary of the dispute as required by Form LC21 and for that appellant says respondent has committed a statutory sin. It is this contention of appellant's that I now direct the enquiry.

[7] To start with; any reference to 'first dispute' and 'second dispute' is just a figment of the arbitrator's imagination; imagination which Mr Vlieghe also displayed in his rehearsal of the arbitrator's findings. Indeed, the arbitrator's use of the words 'first dispute' is unfortunate; and to say 'the first dispute' was 'undated and was

defective' is even bad: it is wrong in law, language and common sense. A dispute cannot be 'undated or defective'.

[8] To the credit of the arbitrator, the arbitrator corrects his/her wrong choice of words to describe the referral under the March 2016 Form LC21. It is Mr Vlieghe who persisted in the use of the words that are clearly wrong in law, language and common sense. Counsel says: (a) 'Respondent filed her second dispute …'; (b) The arbitrator 'does not have jurisdiction to entertain the second dispute'; and '… by filing two separate disputes'.

[9] I do not find that respondent referred two disparate disputes to the Labour Commissioner. I have intimated previously that on both the March 2016 Form LC21 and the April 2016 Form LC21 it is 'Unfair dismissal' that respondent ticked in item 9 which indicates 'Nature of dispute'. And as I have found previously, the appellant was at all material times in possession of the March 2016 Form LC21, accompanied by a summary of the dispute, and the April 2016 Form LC21, duly completed.

[10] I find that there was no good reason for the appellant to form the view that just because two completed Forms LC21 were served on appellant, then without more, respondent had referred two disparate disputes to the Labour Commissioner. As I say, the entries in item 9 of the two forms debunks this view. I cannot see by what imagination – legal or non-legal – appellant could have formed the view that respondent referred two disputes of 'unfair dismissal' on the same facts to the Labour Commissioner. I find appellant's view, with respect, to be devoid of the minutest of reason. How could it have been possible – it may be asked – for a reasonable employer of the size of the appellant to labour under the view that it had dismissed the same employee twice for the same misconduct for appellant to form the view that the summary of the dispute that accompanied the March 2016 Form LC21 could not apply to the April 2016 Form LC21. As Mr Phatela, counsel for the respondent, submitted, it was clear to the appellant that the dispute it had with respondent was about the latter's unfair dismissal. It would have been a different consideration if what was ticked under item 9 of the March 2016 Form LC21 is 'Unfair Dismissal', and what was ticked under item 9 of the April 2016 Form LC21 is 'Severance Package'.

[11] I do not find anything – nothing at all – on the papers which could have reasonably given the appellant reason to form the view that respondent had referred two disparate unfair dismissal disputes with appellant to the Labour Commissioner, when the appellant knew very well that it did not dismiss the respondent, rehired him, and dismissed him again. I conclude that appellant's view that two unfair dismissal disputes were referred to the Labour Commissioner and so the summary of dispute could not apply to the April 2016 From LC21 is superlatively unreasonable: appellant cannot build any case on such gross unreasonableness, I should say.

[12] If the appellant formed the view that the summary of the dispute which the appellant attached to the March 2016 Form LC21 could not apply to the duly completed April 2016 Form LC21, then, I am afraid, appellant has a settled mind to pedantize the rules which are there to provide for the systematic, fair and expeditious resolution of labour disputes for the benefit of sound and harmonious labour relations in the country. And I for one am not prepared to reward appellant for its unjustifiable and grossly unreasonable pedantry. Such pedantry has no place in labour matters.

[13] For the aforegoing reasoning, I conclude that respondent complied with rule 14(1)*(b)* and (2)*(a)* of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ('the Conciliation and Arbitration Rules').

[14] As to rule 14*(b)*; the appellant says Form LG 36 (in respect of 'Proof of Service of Documents') is defective for an array of reasons. To start with; one should not lose sight of the fact that the rules, being subordinate legislation, should be read as subservient to the enabling Act, that is, the Labour Act; and the overriding provision in that regard is contained in s 86(3) of the Labour Act. In terms of these provisions, the person whom a party who refers the dispute must satisfy that a copy of the referral has been served on all other parties to the dispute is the Labour Commissioner; not the court, not the arbitrator, and not any other person. Similarly, in terms of rule 7(1) of the Conciliation and Arbitration Rules it is to the Labour Commissioner that a party must prove 'that a document was served in terms of these rules by providing the Labour Commissioner with an executed Form LG 36'.

[15] As Mr Phatela submitted, if the appellant was aggrieved by the Labour Commissioner being satisfied in his discretion under s 86(3) and being satisfied of proof presented to him in terms of rule 7(1) of the Conciliation and Arbitration Rules, appellant should have instituted proceedings to review the Labour Commissioner's exercise of discretion in terms of the Act and the Rules. It is not for this court to question the Labour Commissioner's exercise of discretion when there is no review application before the court challenging his decision and when, *a fortiori*, the Labour Commissioner is not even a party to the instant proceedings.

[16] Based on these reasons, I am satisfied that respondent complied also with s 86(3) of the Labour Act and with rules 6 and 7 of the Conciliation and Arbitration Rules. It follows that on the facts and in the circumstances of the matter, the arbitrator had jurisdiction to entertain the referral.

[17] In all this one should not lose sight of the fact that the Labour Commissioner did not act on the referral in terms of the March 2016 Form LC21. He waited until he had before him the April 2016 Form LC21. I mention this to reject Mr Vlieghe's submission that upon receipt of the March 2016 LC21 which was defective the Labour Commissioner had become *functus officio* and so he could not have acted on the April 2016 Form LC21. With the greatest deference to Mr Vlieghe, this submission has not a phantom of merit. '*Functus officio*' means simply having discharged his duty: the term should not be elevated to some esoteric principle applied mechanically. The Labour Commissioner did not discharge his duty upon the March 2016 Form LC21 referral; and so, he was not precluded from discharging his statutory duty in respect of the 16 April 2016 Form LC21 to which the summary of the dispute applied.

[18] Based on these reasons I hold that the arbitrator did not err on the law in finding that respondent complied with rules 6, 7 and 14 of the Conciliation and Arbitration Rules and s 86(3) of the Labour Act. Consequently, I hold that the arbitrator had jurisdiction to entertain the referral that the Labour Commissioner made to her and was accordingly entitled to attempt to resolve the dispute involving unfair dismissal, within the meaning of s 86(4)*(a)* of the Labour Act.

[19] Based on these reasons and conclusions, I make the following order:

(a) The appeal is dismissed.

(b) I make no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPELLANT:	S Vlieghe Of Koep & Partners, Windhoek
RESPONDENT:	T C Phatela Instructed by Murorua, Kurtz & Kasper Inc., Windhoek