



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2017/00020

In the matter between:

DEON PATRICK VAN WYK

APPELLANT

and

**AFRICAN DELI (PTY) LTD
GERTRUDE USIKU**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *van Wyk v African Deli (Pty) Ltd* (HC-MD-LAB-APP-AAA-2017/00020) [2018] NALCMD 36 (12 December 2018)

Coram: ANGULA DJP

Heard: 27 July 2018

Delivered: 12 December 2018

Flynote: Labour practice – Appeal against an arbitration award – Form LC21 (the referral Form) – Compliance with the requirements of the Act and the Rules regarding the completion of Form LC21 – Form LC21 must be signed by person who has authority in terms of sections 82 and/or 86(12) of the Labour Act, 11 of 2007 ('the Act'), to sign the form – LC21 form must be signed by the party referring the matter to arbitration and that this requirement is not a mere technicality.

ORDER

1. The appeal is dismissed.
2. There is no order as to costs.
3. The arbitrator's order is varied to read:

The matter is struck from the roll.

4. The matter is removed from the roll and considered finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an appeal against a ruling made by the arbitrator (the second respondent) in which she upheld three points *in limine* raised by African Deli, the first respondent. The appeal is opposed by the first respondent. Arbitrators do not normally oppose appeals filed against their awards because it is considered inappropriate for an arbiter judicial to defend his or her decision unless in cases where allegations of an arbiter's impropriety, bias or such conduct are levelled against him or her.

Brief background

[2] The appellant was employed by the respondent as a production manager as from 13 September 2016 until 10 April 2017 when his contract was terminated. According to the appellant, his contract of employment was terminated on the grounds of incapacity due to poor health which resulted him in applying, what was considered by the respondent to be, excessive sick leave. Furthermore, that since the company was new, there were no alternative positions, which the appellant could occupy, without a reduction on his monthly salary. The further ground of termination was that the appellant had failed to disclose his health condition at the time he was recruited and that had the respondent known of his ill-health, it might have avoided recruiting him.

[3] The appellant, thereafter on 27 April 2017 lodged a dispute with the Office of the Labour Commissioner alleging: unfair dismissal, unfair labour practice, unfair discrimination as well as unilateral change of terms of employment.

[4] The matter was set down for conciliation on 5 July 2017 at the Office of the Labour Commissioner at Walvis Bay. It would appear that at the commencement of the proceedings, the appellant applied for representation by his labour consultant, certain Ms Rossouw. It appeared later that she initially also assisted the appellant when he compiled the necessary papers to lodge his dispute. The application for representation was opposed by the respondent on the ground *inter alia* that Ms Rossouw was not an office bearer or official of the appellant's trade union or an admitted legal practitioner. In terms of the Labour Act, No. 11 of 2007 ('the Act'), those are the only persons who may represent a person at an arbitration proceedings. The objection was correctly upheld by the arbitrator. I say 'correctly' because initially the refusal for representation formed one of the grounds of appeal but was abandoned mid-way during the appeal process.

Arbitration proceedings

[5] At the arbitration hearing, the respondent raised three points *in limine*. Firstly, that the appellant's referral form (LC21) was contrary to the rules relating to the Conduct of Conciliation and Arbitration ('the rules') in that the form was signed by the appellant's representative, Ms Rossouw, who had no authority in terms of sections

82 and/or 86(12) of the Act, to sign the form. The second point is that no summary of dispute was attached to the referral form received by the respondent, as prescribed by the rules. The third point was that no grounds for the alleged unfair labour practices were stated by the appellant, as required by section 50 of the Act and that in this connection, the respondent had failed to exhaust internal remedies as prescribed by section 50 (right to appeal the respondent's decision) before referring the matter to the Labour Commissioner.

[6] The points in *limine* were upheld by the arbitrator. She ruled that: The referral form served on the respondent and arbitrator was defective in that Ms Rossouw who signed the form did not sign the form as required by Rule 5; that the appellant did not prove that the documents had been served in accordance with the provisions of Rule 7(b); that the referral form, did not contain information on the steps that the appellant had taken to attempt to resolve or settle the dispute before he referred the matter to the Labour Commissioner; and finally that the proof of service of the form referred as form LC36 was incomplete and the date stamp by the police who commissioned the signature by the appellant was tampered with and 'thus a nullity in the absence of a signature of the Official who wrote in pen on the said stamp'.

[7] The arbitrator then dismissed the appellant's claim 'in its totality'. This appeal is directed against the foregoing ruling by the arbitrator.

Grounds of appeal

[8] The appellant's first ground of appeal is that the arbitrator erred in law when she dismissed the appellant's claim on the basis that the form LC21 was defective in terms of Rule 5.

[9] It is common cause that there were two LC21 forms: that form one was signed by Ms Rossouw and the other was signed by the appellant himself. It is conceded on behalf of the appellant that the LC21 signed by Ms Rossouw is invalid. However it is submitted on behalf of the appellant that the form signed by the appellant can be regarded as duly signed in terms of the rules and thus valid. It is argued rather strangely submitted that in so far as the arbitrator found that the referral form was

signed by Ms Rossouw that was wrong because the form was signed by the appellant. The court is of the view that this was an unnecessary argumentative submission which did not assist the court.

[10] Counsel for the appellant referred the court to *Negonga & Another v Secretary to Cabinet & Others*¹ where it was held that a Court of appeal will only interfere with an award if the arbitrator exercises his or her discretion wrongly on the invocation of applicable principles to the facts. On the basis of this statement, it is contented that the arbitrator in the instant matter, exercised her discretion wrongly in the application of applicable principles when she found that the appellant did not comply with the rule's requirements when LC21 was filed.

[11] In opposition to the appellant's above ground of appeal, it is argued on behalf of the respondent that the appellant failed to comply with Rule 5, 6 and 7 of the Conciliation and Arbitration rules, in that: he did not sign the LC21 form; that the form was not properly served; and lastly that no summary of dispute between the parties, was attached to the form as prescribed by the rules.

[12] In consideration of the respondent's aforementioned points *in limine*, the arbitrator found that the appellant could not prove that 'he followed the instruction on Form LC21 by including information containing information on the steps that have been taken to resolve or settle such dispute'. Rule 14 provides, when a party decides to refer the dispute to arbitration, he or she must complete the referral form in accordance with rule 5. Rule 5 in turn provides that 'a document that a party must sign in terms of the Act or these rules may be signed by the party or the person entitled in terms of the Act or these rules to represent that party in the proceedings'. I should mention that it was because of the provisions of this rule that Ms Rossouw could not represent the appellant.

[13] The provisions of rule 5(1) have been interpreted by in this Court on several occasions². The principle emanating from all these cases is that the LC21 form must

¹ 2016 [13] NR 870.

² *Waterberg Wilderness v Menesia Uses and 27 Others* (unreported case) Case No. LCA 16/2010 delivered on 20 October 2011; *Springbok Patrols (Pty) Ltd v Jacobs* (LCA 702/2012) [2013] NALCMD 17 (2013) and *Purity Manganese (Pty) Ltd v Katjivena* (LC 86/2012) [2014] NALCMD 10 (26 February 2014).

be signed by the party referring the matter to arbitration and that this requirement is not a mere technicality.

[14] The record shows that LC21 form which was before the arbitrator was completed by Ms Rossouw and was unsigned³. This form contains fax machine details dated 27 April 2017 at 16h59, which corresponds with the appellant's version that the form was served on the respondents. As mentioned earlier, it has been conceded on behalf of the respondent that the appellant is not relying for his claim, on that form ostensibly signed on his behalf by Ms Rossouw.

[15] As regards, the LC21 form which was completed and signed by the appellant himself, the arbitrator found that the appellant did not fax through all the relevant documents as required by rule 14 and by not attaching written proof that the referral document had been served on the respondents and/or the arbitrator. No proof of fax transmission was produced. In respect of the service on LC21, the arbitrator found that the return of service being form LC36, was incomplete and that the date stamp of the police officer who commissioned the signing of the document had been tampered with and thus a nullity. I should mention that *ex facie* Form LC36, the date stamp appears to have been tampered with. The arbitrator cannot be faulted in this finding.

[16] In my view, based on the foregoing findings by the arbitrator, she did not err in law when she concluded that LC21 as signed by the appellant did not comply with the relevant provisions of the rules referred to.

[17] Rule 6 requires a party to the arbitration proceedings to serve the other party. The appellant was required to attach a summary of the dispute stating the subject matter, the facts and circumstances that gave rise to the dispute as well as the steps taken to resolve the matter to LC21 form. The record⁴ reflects a summary of the dispute, but no proof that same was served on the respondent.

[18] Rule 7(1) requires the person to whom a party refers the dispute, to satisfy the Labour Commissioner that a copy of the referral has been served on all other parties

³ Appeal record page 134.

⁴ Appeal record page 74-76.

to the dispute. Proof in terms of the Act is executed in terms of form LG36. On page 69 of the record, there is a page 2 of form LC36. Page 1 of this form which constitutes the affidavit of service is missing from the record.

[19] What is clear from the record is that form LC36 is incomplete and therefore defective. On mere a perusal of the record, this court is unable to agree with the ground of appeal that the arbitrator erred in law when she found that there was no proof that the appellant served the summary of dispute on the respondent.

[20] Significantly, the arbitrator mentioned that the appellant did not provide an explanation in respect of the alleged defects even though he was afforded an opportunity to do so. According to the arbitrator all what the appellant stated was that he was not the one who prepared the documents, but Ms Rossouw.

[21] As regards the reference to the matter of *Negonga and Another* (supra) on basis of which counsel for the appellant submitted that the arbitrator applied her discretion wrongly when she decided that appellant did not comply with the requirements when Form LC21 was filed, is in my view the submission is wrong. The arbitrator did not exercise any discretion. What the arbitrator did was that she made a factual finding. The facts of this matter are in any event distinguishable from the facts in the *Negonga* matter. The argument is misplaced and cannot be sustained.

[22] I next move to consider the argument advanced on behalf of the appellant, namely that once the parties have participated in the proceedings which were the consequence of delivery of the referral form LC21, it would not be open to the other protagonist to take the point of failure to have signed the referral form because the question of authority would not arise. Reliance for this submission is based on the matters of *Methealth Administrators Namibia (Pty) Ltd v Matuze & Others*⁵ and *Simana v Agri Bank of Namibia*⁶.

[23] In my judgment the argument has no basis if considered in the context of the facts of this case. The two judgments relied on are completely distinguishable for the facts of the present matter. I say that for the reason that in those two matters the

⁵ 2015 [3] NR 870

⁶ 2016 [4] NR 913.

respondents attempted to raise objections or points *in limine* after they had already participated in the proceedings. The points *in limine* in the present matter were raised right at the commencement of the proceedings. The issue of representation of the appellant by Ms Rossouw was dealt with right at the beginning and the point was conceded that she was not authorised to represent the appellant in terms of the provisions of the Act and rules. In respect of the referral form which was also signed by Ms Rossouw that has also been conceded to be invalid because it was not competent for Ms Rossouw, to have signed it. As regards the referral form that was signed by the appellant himself, the two points relating to the fact that it was unsigned and that it had not been properly served and that in any event the purported return of service was defective, were upheld, without any evidence led.

[24] Finally, in both matters I relied upon the parties had participated in the conciliation, whilst in the present matter there is no evidence on record that any conciliation took place before the points *in limine* were raised. It follows therefore that the arguments stand to be rejected.

[25] This court is of the view that because of the fact that the points *in limine* were upheld and the arbitrator did not consider the merits, under those circumstances, the proper order should have been for the arbitrator to have struck the matter from the roll and not to dismiss it. The order therefore stands to be correct and set aside and substituted with a correct order.

[26] In light of the above, I make the following order:

1. The appeal is dismissed.
2. There is no order as to costs.
3. The arbitrator's order is varied to read:

The matter is struck from the roll.

4. The matter is removed from the roll and considered finalized.

H Angula
Deputy-Judge President

APPEARANCES

APPELLANT:

S HORN

Of de Klerk Horn & Coetzee Inc., Windhoek

FIRST RESPONDENT:

B DE JAGER

Instructed by Delpport Legal Practitioners, Windhoek