

**REPORTABLE**

CASE NO: SA 17/2014

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**NICOLAUS SIMANA**

**Appellant**

And

**AGRIBANK OF NAMIBIA**

**Respondent**

**Coram:** SHIVUTE CJ, DAMASEB DCJ and MAINGA JA

**Heard:** 18 March 2016

**Delivered:** 15 July 2016

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**APPEAL JUDGMENT**

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DAMASEB DCJ (SHIVUTE CJ and MAINGA JA concurring):

Introduction

*The proceedings before the arbitrator*

[1] In the arbitration proceedings which concerned an unfair dismissal, and conducted under s 86 of the Labour Act 11 of 2007 (the Labour Act), the appellant, Mr Nicolaus Simana, was the complainant and Agribank the respondent. In this judgment the parties will be referred to as 'appellant' and 'Agribank' respectively. The appeal to the Supreme Court is with the leave of the Labour Court. The respondent did not oppose the appeal.

[2] The appellant, an employee of Agribank, during 2011 failed to report to work for the period 15 August 2011 to 28 September 2011. He was then charged with misconduct and found guilty for absence from work without leave or valid reason and for the abuse of sick leave. His dismissal was communicated to him by letter dated 03 November 2011. On 07 November 2011 the appellant appealed against the dismissal and on 15 November 2011 his internal appeal was dismissed.

[3] The appellant then referred a dispute to the Labour Commissioner under s 86 of the Labour Act who referred the matter to arbitration. The arbitrator ruled that the appellant was unfairly dismissed on the ground that the chairperson of the internal disciplinary hearing did not comply with Agribank's policy requiring that an employee found guilty of misconduct be allowed to make representations before a penalty is meted out. Agribank was ordered by the arbitrator to reinstate the appellant with full benefits as well as back-pay.

*The proceedings before the Labour Court*

[4] Agribank took the arbitrator's award on appeal to the Labour Court. During those proceedings Agribank belatedly and just before the hearing of the appeal raised a point in *limine* that the proceedings before the arbitrator were a nullity on account of the alleged failure by the appellant to comply with rule 5 of the Rules Pertaining to the Conduct of Conciliation and Arbitration before the Labour Commissioner issued by the Minister of Labour under a 135 of the Labour Act (the arbitration rules). The point in *limine* reads as follows:

'[The arbitrator] erred in law in failing to give any consideration at all to the fact that the non-compliance with rule 5 rendered the referral a nullity.'

[5] The appellant, in turn, had also raised a point in *limine* that there was no valid appeal before the Labour Court as the respondent had allegedly not brought the appeal in the form required by the arbitration rules. That point in *limine* was also raised in the present appeal.

[6] The court *a quo* upheld Agribank's point in *limine* and took the view that it was not necessary to determine the point in *limine* taken by the appellant. In essence, the court *a quo* held that the proceedings before the arbitrator were a nullity because the LC 21 referral document had not been executed according to the requirements of rule 5 of the Arbitration Rules.

[7] Rule 5 of the arbitration rules reads as follows:

'5. Signing of documents

(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 this Act or these rules 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 the documents on their behalf.

(3) A statement authorising the employee referred to in sub-rule (2) to sign documents must be signed by each employee and be attached to the referral document together with a legible list of their full names and addresses.'

[8] It is common cause that in the court a *quo*, the point in *limine* taken by Agribank implicated sub-rule (1) only as the matter was not a joint referral.

Context of the respondent's point in *limine*

[9] When on 22 May 2012 the appellant referred the dispute to the Labour Commissioner, he simultaneously requested representation as contemplated by s 86(12) of the Labour Act. Subsection (12) states that a party may not be represented at arbitration proceedings except in the circumstances stated in subsection (13).

[10] Section 86(13) states that:

- 'An arbitrator may permit –
- (a) a legal practitioner to represent a party to a dispute in arbitration proceedings if –
    - (i) the parties to the dispute agree; or
    - (ii) at the request of a party to a dispute, the arbitrator is satisfied that –
      - (aa) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and
      - (bb) the other party to the dispute will not be prejudiced; or
  - (b) any other individual to represent a party to a dispute in arbitration proceedings if-
    - (i) the parties to the dispute agree; or
    - (ii) at the request of a party to a dispute, the arbitrator is, subject to subsection (14) satisfied that -

(aa) representation by that individual will facilitate the effective resolution of the dispute or the attainment of the objectives of this Act.’

[11] The appellant’s referral was signed by a representative of the appellant on 22 May 2012 which is the same date that the Labour Commissioner became seized with the dispute. The learned judge *a quo* found that the signing of the referral document by the representative was done at a stage when the representative was not entitled and had no right or authority to appear on behalf of the appellant.

[12] In support of its conclusion, the court *a quo* relied on *Waterberg Wilderness Lodge v Mensia Uses & 27 others* (LCA 16/2011) [2011] NALCMD 322 (20 October 2011) and *Springbok Patrols (Pty) Ltd v Jacobs & others* (LCA 702/2012) [2013] NALCMD 17 (31 May 2013). Both those judgments are authority for the proposition that non-compliance with rule 5(2) and (3) would result in a referral being a nullity and the setting aside of a resultant arbitration award.

[13] In the case before us, the court *a quo* held that although *Springbok Patrols* was concerned with rules 5(2) and (3) (while the present matter implicated rule 5(1)), the same legal principle applies, namely, that non-compliance with the provisions of rule 5 is fatal to a complainant’s case.

## The Appeal

### *Appellant's principal argument on appeal*

[14] Mr Hinda appeared for the appellant on appeal. The gravamen of Mr Hinda's argument is that the record demonstrates amply that rule 5(1) was complied with and that the cases relied on by the court *a quo* in support of its conclusion are clearly distinguishable as they were concerned with joint referrals. He further submitted that the court *a quo* ought to have followed prior decisions of the Labour Court which, in circumstances similar to the present, found referrals to be rule-compliant.<sup>1</sup>

### Analysis: non-compliance argument

[15] What is clear from *Springbok Patrols* and *Waterberg Wilderness* is that non-compliance with rule 5(2) and (3) would result in an invalid referral of a dispute and the setting aside of an arbitration award granted on its strength. In *Springbok Patrols*, a case involving a joint referral, the referral was not accompanied by an attachment setting out the names of the individual complainants and, in addition, some of the purported complainants had in correspondence disputed the authority of the Trade Union representative who purported to act on their behalf. *Waterberg Wilderness* also involved a joint referral. The particulars of the first applicant were provided on a form that was not signed but an inscription '*Mensia Uses plus others*' was inserted. The accompanying summary contained a handwritten list reflecting the complainants' names

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<sup>1</sup>*Purity Manganese (Pty) Ltd v Katjivena & others* (LC 86/2012) [2014] NALCMD 10 (26 February 2014); *Auto Exec CC v van Wyk* (LC 150/2013) [2014] NALCMD 16 (16 April 2014) and *Gariseb & others v Transnamib Holding Ltd* (LC 3/2010) [2012] NALCMD 28 (1 January 2012).

and numbers. The Labour Court found that only one complainant (a Ms Uses) had properly lodged her referral and that there was no proper dispute lodged in respect of the other complainants. The other complainants had failed to comply with rule 5(3) because they had not signed a statement authorising Ms Uses to sign the documents on their behalf. The court was at pains to add that those omissions could be rectified by the other 27 respondents referring a dispute and applying for condonation for the late filing of their referral.

[16] In *Gariseb & others v Transnamib Holding Ltd* (LC 3/10) [2012] NALC 28 (1 January 2012), a referral signed by an authorised labour consultant was at issue. The court summed up the matter as follows:

‘The referral document LC 21 which was annexed to the applicant’s affidavit indicates that the representative of the applicants is Namel Conciliation and Arbitration Consultants. From the affidavit of Mr Gariseb it is clear that the applicants were represented by a Labour Consultant at the initial Conciliation meeting. Since the referral document “Form LC 21” was not signed by Mr Gariseb on behalf of the other applicants, but by the Labour Consultant I do not find anything irregular about that. The referral document is thus substantially in accordance with the provisions of the Conciliation Rules.’

[17] *Auto Exec CC v Johan van Wyk* (LC 150/2013 [2014] NALCMD 16 (16 April 2014) related to a review of an arbitrator’s award on the ground that the referral form (LC 21) had not been signed by the referring party. Just as in the case before us, that point was first taken after the arbitration had been completed. It turned out that the referring party had signed another referral form, whose terms were identical to the original form, at the instance of the Labour Commissioner. However, the latter form had

not been served on the applicant. The court followed *Purity Manganese (Pty) Ltd v Katjivena & others* (LC 86/2011) [2014] NALCMD 10 (26 February 2014) in holding that the rule maker had not intended that proceedings would result in a nullity where the referral form had not been signed and when the parties had participated in the proceedings. This is because the participation amounted to a ratification of the unsigned form. The court made reference to *Katjivena* and said:

'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 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'.

### Law to facts

[18] There was no issue raised by Agribank either before or during the arbitration about non-compliance with rule 5(1) and the arbitrator had assumed jurisdiction, heard the parties and determined the matter. It is therefore not without justification that the appellant says that the point in *limine* was taken opportunistically and in an attempt to avoid implementation of the arbitrator's award in favour of the appellant.



[19] Even if one accepts that there was non-compliance, there clearly was no prejudice suffered by Agribank. It is implied in the point in *limine* that it was competent for the arbitrator to *mero motu* raise the issue of compliance with rule 5(1). Although absence of jurisdiction can be raised *mero motu* by a tribunal, in the present case the issue could only arise if the rule maker intended that non-compliance be visited with a nullity. The Labour Court correctly concluded in *Auto Exec CC* that it was not the case in respect of rule 5(1).

[20] The court *a quo* erred in concluding that the appellant's representative was not authorised to sign the referral when he did. That goes against the record. The record shows that not only was the referral signed by the authorised representative of the appellant, but Agribank was notified of the appellant's election to be represented during the conciliation and arbitration. The referral was accompanied by Form LC 29 which is a request for representation as contemplated by the Labour Act. Besides, the parties had agreed in writing to be represented during the conciliation and arbitration as contemplated by s 86(13).

[21] As was correctly submitted by Mr Hinda on behalf of the appellant, the parties had agreed representation and the necessary Forms (LC 21 and LC 29) were completed and delivered to the respondent as per the arbitration rules. The point in *limine* taken by Agribank was therefore bad and should have been disallowed by the court *a quo*.

[22] In the light of the conclusion that rule 5(1) had been complied with, and that the court *a quo* misdirected itself in holding otherwise, I do not find it necessary to decide the point in *limine* raised by the appellant in this court.

[23] I see no reason why the appellant should not be awarded his costs in the appeal.

Order

[24] I therefore make the following order:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and is substituted with the following order:  
  
‘The respondent’s point in *limine* is dismissed.’
3. Costs are awarded to the appellant, to include the costs of one instructing and one instructed counsel.

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DAMASEB DCJ

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SHIVUTE CJ

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**MAINGA JA**

APPEARANCES

APPELLANT:

G S Hinda (with him G L Kasper)

Instructed by Murorua & Associates