REPUBLIC OF NAMIBIA

NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 70/2012

In the matter between:

1.1.1.1. **SPRINGBOK PATROLS (PTY) LTD t/a NAMIBIA**
1.1.1.2. **PROTECTION SERVICES**
APPELLANT

and

NDAMONOGHENDA JACOBS & OTHERS **1ST TO 24TH RESPONDENTS**
A HAGEN N.O. **25TH RESPONDENT**
SIMON HAUKONGO **26TH RESPONDENT**

Neutral citation: Springbok Patrols (Pty) Ltd v Jacobs & Others (LCA702/2012) [2013] NALCMD 17 (2013)

Coram: SMUTS, J
Heard: 24 May 2013
Delivered: 31 May 2013

Flynote: Appeal in terms of s 89 of Act 11 of 2007. Non-compliance with rule 5 of rules relating to the conduct of conciliation and arbitration. Not one of

the applicants signed a joint referral. No accompanying statement was attached authorising the union signatory. This non-compliance vitiated the proceedings. Proceedings also defective and irregular because applicants not required to prove their claims under oath and the arbitrator misconceiving the nature of the onus in respect of the claims.

ORDER

(b) The appeal succeeds and arbitrator's award is set aside.

JUDGMENT

SMUTS, J

(c) This is an appeal in terms of s 89 of the Labour Act, 11 of 2007 (the Act) against a ruling of an arbitrator made on 20 August 2012 at Luderitz. In the award, the arbitrator ruled that the appellant is to pay the first to 24th respondents varying amounts set out in the award.

(d) The appellant has inexplicably cited arbitrator and the employees' union representative as respondents in this appeal – as 25th and 26th respondents respectively. None of the cited respondents however opposes this appeal. In this judgment, I refer to the employees and whose favour the award was made as the respondents and refer to the arbitrator with reference to her capacity as such.

(e)

(f) According to the record dispatched by the arbitrator, the respondents' claim set out in the referral form was for an unfair labour practice and over deduction. Only the first respondent is referred to by name on the form. It refers to her and 23 unidentified others as applicants. The form was not signed by anyone of the respondents but only by a union representative, Mr Simeon

Haukongo. He also purported to represent the respondents at the arbitration hearing according to the record. The referral form did not contain any attachment in which the names of the other respondents were set out or the nature of their claim or even the amounts claimed by the different respondents.

(g)

(h) The matter was set down for 20 July 2012 in Luderitz. Shortly before the date of hearing, a letter dated 17 July 2012 was sent to the office of the Labour Commissioner for the attention of the arbitrator. It was signed by a number of signatories and stated that they were not part of the dispute and distanced themselves from it and disputed that Mr Haukongo had the necessary authority of employees. It went so far as to accuse Mr Haukongo of proceeding with the claim on a fraudulent basis and requested that the dispute be dismissed with an order of costs against his union. An attachment to the letter contains 23 names together with signatures of those employees in which they expressly distance themselves from the dispute. Surprisingly, this letter is not even referred to in the award or in the course of the proceedings even though it has formed part of the record of the proceedings provided by the arbitrator.

(i) It is also apparent from the transcribed proceedings that the respondents took certain preliminary points against the complaint. It was represented by its Human Resource Manager, Mr Somseb. There is however no reference in the record to the nature of the preliminary points themselves or how they were dealt with except a very brief and oblique reference to their dismissal by the arbitrator. This is one of several extremely unsatisfactory features of this arbitration. According to the notice of appeal, the preliminary points include the lapsing of the dispute by virtue of being raised beyond the time periods provided for in the Act for the referral of disputes. The notice of appeal also refers to res judicata being raised as a defence. In the appellant's legal representatives certificate relating to the record, it is pointed out by him that the record is not complete by virtue of the failure to have included that portion which dealt with the preliminary points. Nonetheless the appellant raised the dismissal of those points as a ground of appeal. In the heads of argument on behalf of the appellant, Mr Boltman, who appeared for the appellant it was stated the appellant would no longer rely upon the grounds relating to the preliminary points. That concession

was correctly made.

(j)

(k) When I pointed out to Mr Boltman this court would ordinarily be precluded from hearing appeals if the record were to be incomplete in material respects, he invited me to deal with the appeal on the other grounds raised against the award of the arbitrator. He submitted that these grounds would result in the setting aside of the award and could be dealt with on the record provided by the arbitrator. In view of the fact that the other grounds of appeal raised against the award do in fact result in the setting aside of that award, I was prepared to hear argument on the appeal despite the incomplete record. Ordinarily, it would be incumbent upon an appellant seeking to rely upon a ground of appeal which does not appear from the record to ensure that a complete record is filed even if this were to result in an application to compel an arbitrator to file a proper and complete record. Given the fact that other material irregularities appeared from the record provided by the arbitrator which vitiate those proceedings, I was thus prepared to hear full argument on the other grounds of appeal raised in the notice of appeal.

(l) The first ground of appeal raised is that there was no proper referral of dispute to the office of the Labour Commissioner by reason of fact that rule 5 of the rules relating to the conduct of conciliation on arbitration had not been complied with. This rule requires that a party must sign the referral and that if proceedings are instituted jointly, a statement authorising an employee to sign the document must be signed by each employee. This statement is to attached to the referral document together with a legible list of their full names and addresses. This court has held that this requirement is not a mere technicality and must be complied with[1]. The rule is set out in peremptory terms. In this instance, the referral was not even signed by any employee but by a union official. There was also not a statement attached to it by the employees (1st to 24th respondents) authorising Mr Haukongo to proceed with the claim on their behalf. The fact that this is not a mere technicality is reinforced by the facts of this case. Included as part of the record is the letter signed by several employees distancing themselves from the referral. Furthermore several of

[1] *Waterberg Wildness Lodge v Uses and 27 Others*, LCA 16/2011 unreported 20 October 2011.

those in whose favour the award was made were not even present at the proceedings.

(m) The failure to have complied with Rule 5 on the facts of this specific complaint where there was not even an attachment to the referral setting out the names of the individual applicants and where it was questioned in correspondence forming part of the record that the union representative in fact acted on behalf of all of them is entirely fatal to the matter. It follows that there had not been a valid referral of the dispute and that the award must be set aside for this reason alone.

(n) As I have already indicated, there were however other unsatisfactory features of the arbitration proceedings to which I shall briefly refer. Although some of the respondents in whose favour the award was given were present, not one of them gave evidence as to their complaint of “over deduction”. This complaint was not properly set out in any sense. It was also placed in dispute by the respondents’ representative, Mr Somseb at the hearing. It was then for the respondents to each prove the claim of over deduction of amounts from their salaries or wages. This did not occur.

(o)

(p) Only one applicant, the first respondent, was sworn in. But she gave absolutely no evidence as to her claim. After she was sworn in and stated that she was an employee of the appellant, the arbitrator then proceeded to engage the union representative further on hers and the other claims. A schedule setting out the claimed amounts with reference to the names of each of the 24 respondents was then handed in. This schedule was not confirmed by anyone of the individual respondents themselves – not even by the first respondent who had been sworn in. Quite how the arbitrator could consider that the union representative could give evidence in the matter when the amounts and extent of the deductions had been placed in issue is not explained in the award.

(q)

(r) The arbitrator, in her award, acknowledges that the appellant’s representative did not agree with the respondents’ claims. Yet no evidence was led as to the extent or nature of the claims themselves. Despite this, the

arbitrator proceeded to make her award in favour of each of the respondents and even in favour of those who were not present without any evidence before her authorising the bringing of referral.

(s)

(t) This court has made it clear that where parties seek to claim an amounts owing to them under the Act, they must not only plead how those amounts arise but also lead evidence and prove those amounts, thus substantiating the exact extent of the claim[2]. The arbitrator however took a contrary view and operated from the assumption that it was for the respondent to disprove the entirely unspecified claims of the respondents. Not only that they not establish any claim in the court by way of evidence, but this approach is also flawed and places the appellant as employer with an evidential burden which is entirely incorrect. The onus of proof of the claims as well as the duty to adduce evidence on them rested with the respondents as employees in this matter.

(u) A further disturbing feature of the arbitration proceedings is the fact that the arbitrator seemed to consider that the mere say so by representatives of the parties in the opening statements and in the course of proceedings equated to evidence. This court has previously on more than one occasion[3] referred to a misdirection of this nature which constitutes an irregularity on the part of an arbitrator. Yet this practice seems to continue.

(v)

(w) I have referred to these feather unsatisfactory features of this arbitration even though there was an invalid referral which vitiated the award. I have done so in the hope that the office of the Labour Commissioner will impress upon arbitrators the need to heed the judgments of this court in order to avoid recurring flaws encountered in appeals against awards of arbitrators.

(x)

(y) In the result, the appeal succeeds and arbitrator's award is set aside.

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[2]*Fisheries Observer Agency v Namibia Public Workers Union and Another* LC 12/2011 unreported 28/05/2012.

[3]*Ok Furniture (Pty) Ltd v Araeb & Another* LCA 38/2008, unreported 4 November 2011.

(z)

(aa)

(bb) _____

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D SMUTS

Judge

APPEARANCES

APPELLANT:	J Boltman
	Instructed by Köpplinger Legal Practitioners