REPORTABLE

CASE NO: LC 86/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

PURITY MANGANESE (PTY) LTD **APPELLANT**

and

FABIOLA KATJIVENA **1st RESPONDENT**
THE LABOUR COMMISSIONER **2ND RESPONDENT**
SAMUEL UUSHONA **3RD RESPONDENT**

Neutral citation: *Purity Manganese (Pty) Ltd v Katjivena (LC 86/2012) [2014] NALCMD 10 (26 February 2014)*

CORAM: **SMUTS, J**

Heard on: 23 January 2014

Delivered on: 26 February 2014

Flynote: The third respondent did not sign the referral form (LC 21) referring his labour dispute to the office of the Labour Commissioner. The applicant took this point at the commencement of the arbitration proceedings but after conciliation had been completed. The arbitrator dismissed the point. The applicant sought to set aside the award by reason of the third respondent's failure to have signed the referral form. It alleged that the term 'must' in the applicable rules resulted in the proceedings being a nullity. The court rejected that approach and dismissed the application with reference to the rule giver's intention in making those rules and because the third respondent's participation in conciliation and thereafter in the arbitration amounted to a ratification of the referral.

ORDER

The application is dismissed. There is no order as to costs.

JUDGMENT

SMUTS, J [1] At issue in this application to review and set aside an award of an arbitrator made under s 89 of the Labour Act[1] is whether the failure on a part of the referring party to sign the referral notice renders the ensuing arbitration proceedings and the award invalid and a nullity and liable to be set aside.

[2] This question for decision arises in the following way. The third respondent was an employee of the applicant. He was dismissed on 4 May 2010 by the applicant after disciplinary process which had commenced in March 2010. The third respondent referred the dispute concerning his dismissal to the office of the Labour Commissioner (second respondent in this application). The matter proceeded to conciliation. It remained unresolved at the end of conciliation and then proceeded to arbitration before the first respondent who had also conducted or chaired the conciliation process.

[3] On 8 June 2011 the applicant received the arbitration award dated 6 June 2011. In terms of the award, the third respondent was found to be unfairly dismissed and he was reinstated in his employment with the applicant which was also ordered to make a payment, equivalent to six months pay, for the period following his dismissal to reinstatement on 1 July 2011.

The referral

[1] Act 7 of 2011.

[4] In May 2010, the third respondent had referred the dispute of unfair dismissal to the office of the Labour Commissioner by delivering a completed form LC 21 and summary of the dispute. The LC 21 form was however not signed by the third respondent himself. The form itself does not provide for the signature of the referring party but his or her representative. ('Representative of the applicant.') This despite the wording of the rule to which I refer below. The third respondent's legal practitioner's name was inserted on the form where provision is made for the printed name and signature of a representative of a referring party. The referral form was accompanied by a request for legal representation at conciliation or arbitration in terms of s86 (13) of the Act together with a motivating statement in support of the request for representation.

[5] The Labour Commissioner referred the dispute to the first respondent as arbitrator. As the dispute had not been conciliated, the arbitrator was required under s86 (5) to attempt to resolve the dispute through conciliation before proceeding with the arbitration. The matter was postponed on a few occasions and conciliation took place on 24 January 2011 without success. There were a few further delays and the arbitration eventually proceeded on 6 April 2011 and closing arguments were submitted on 15 April 2011.

[6] Both parties were legally represented at the arbitration proceedings.

[7] At the commencement of the arbitration proceedings, the applicant's legal representative, took the point that the third respondent had not signed the referral form in accordance with rule 5 of the rules relating to the conduct of conciliation and arbitration (the rules) and further stated that neither the third respondent nor his legal representative actually signed the form. Only the third respondent's legal practitioner's name was printed at the place for the signature on the form by the representative of an applicant.

[8] The point was thus taken that the institution of the referral was irregular and that any further proceedings were irregular. The arbitrator responded by directing that the

proceedings should continue and stated that the point had only been raised in the middle of the proceedings. The arbitrator meant by this[2] that although the point was taken at the commencement of the arbitration, it had not been raised during conciliation which had by then concluded.

[9] The record shows that the arbitrator did not permit any argument on the issue although she invited a response to the point from the third respondent's representative after making the ruling. She was of the view that the failure to have signed the form did not 'make an impact on the outcome of the procedures or on the case itself.'

[10] The applicant then timeously proceeded with an application to review and set aside her award on the basis of this irregularity. In the notice motion, the applicant also seeks an order for this court to substitute its finding for that of the first respondent by holding that the dismissal was fair. Quite how the second aspect would follow from the first is not clear to me. This was not persisted with in argument by Mr G Dicks who appeared on behalf of the applicant in this application. He submitted that the award should be set aside.

[11] The question thus arises as to whether the failure on the part of the third respondent to have signed the referral form LC 21 constituted a vitiating irregularity and resulted in the proceedings being a nullity, as was submitted by Mr Dicks. He did so with reference to the rules relating to the conduct of conciliation and arbitration before the Labour Commissioner (the rules). Before referring to the rules, their statutory context is first to be considered.

[12] Arbitration tribunals for the purpose of resolving labour disputes are established under s85 of the Act. These operate under the auspices of the Labour Commissioner and have jurisdiction to hear and determine disputes. Of relevance for present purposes is s86 of the Act which is entitled 'Resolving disputes by arbitration through Labour Commissioner.' Section 86 (1) contemplates the referral of disputes in writing to the Labour Commissioner or any labour office. Subsections (3) to (7) provide:

[2] As is stated in the award.

'(3) The party who refers the dispute in terms of subsection (1) must satisfy the Labour Commissioner that a copy of the referral has been served on all other parties to the dispute.

(4) The Labour Commissioner must –

(a) refer the dispute to an arbitrator to attempt to resolve the dispute through arbitration;

(b) determine the place, date and time of the arbitration hearing; and

(c) inform the parties to the dispute of the details contemplated in paragraphs (a) and (b).

(5) Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.

(6) If the conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.

(7) Subject to any rules promulgated in terms of this Act, the arbitrator –

(a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; and

(b) must deal with the substantial merits of the dispute with the minimum of the legal formalities.'

[12] The rules are in the form of regulations made by the Minister under his power to do so under s135 (2) (at) of the Act. Part 4 of the rules concern the arbitration of disputes. It commences with rule 14 headed, 'Referral of dispute arbitration.' The relevant portions of this rule are as follows:

'14(1) A party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed –

(a) . . .

(b) Form LC21

(2) The referring party must –

(a) sign the referral document in accordance with rule 5.'

[13] Rule 5 of these rules (referred to in rule 14) deals with the signing of documents in the following way:

> '5. (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 the Act or these 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 documents on their behalf.
>
> (3) A statement authorizing the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document or opposition, together with a legible list of their full names and address.'

[14] Form LC 21 is attached to the rules. It is entitled 'Referral of dispute for conciliation or arbitration.' It sets out a number items which are to be completed such as the full name of an applicant, physical address, postal address and other contact details. It also then requires an applicant to identify the nature of the dispute with reference to different possibilities posited on the form. An applicant must also complete an item setting out the date on which the disputes arose. At the end of section to be completed is a place for signature below which is stated as follows:

> 'Representative of the applicant (print name and sign).' Adjacent to this is the place for an applicant to complete 'position.' The date of the signing the form is to be completed and it is to be directed to the office of the Labour Commissioner and to the other parties to the dispute.'

[15] Mr Dicks takes the point that the third respondent's legal representative, whose name was inserted on the LC 21 form, was not entitled in terms of the Act or the rules to represent the third respondent at that stage, namely when the form was completed and lodged with the Labour Commissioner's office. Mr Dicks points out that the form was thus not completed as is required by the rules, namely by a party. He also submitted that not only must the party complete the form but the referring party must also sign the form itself. It would appear from the form that the name of the legal practitioner's firm

was merely inserted and that there was furthermore no signature provided by the legal practitioner himself.

[16] Mr Dicks argued that the use of the term 'must' in rules 14 and 5 meant that the requirement was peremptory. He submitted that it follows from this construction that any failure to comply with those rules would be visited with invalidity and a nullity. He referred to the judgment of this court in *Springbok Patrol (Pty) Ltd t/a Namibia Protection Services v Jacobs and Others,*[3] which had in turn referred to an earlier judgment of this court,[4] in finding with reference to the requirement of referring parties to sign referral documents in the context of joint referrals:

> 'This court has held that this requirement is not only a technicality and must be complied with. The rule is set out in peremptory firms. In this instance, the referral was not even signed by any employee but by a union official.'

[17] In the *Springbok Patrol* matter there was not a statement attached to the referral by the employees. Nor was there an attachment to the referral setting out the names of the individual applicants. Indeed, there was evidence that several employees who were supposed to form part of the group had distanced themselves from the referral which a union representative had sought to bring on their behalf. The court concluded that there had not been a valid referral of the dispute in those circumstances.

[18] In the *Waterberg Wilderness Lodge* matter, the referral also purported to be of a joint nature. In that instance, only the particulars of the first applicant were provided on the form which was not signed but where an inscription 'Menesia Uses plus others' was inserted. In the attached summary, the dispute is referred to under a heading Menesia Uses plus 27 others and indicates that the intention was to lodge a joint referral. It did however have a handwritten list entitled 'complainants names and numbers' attached to it. The court found that Ms Uses properly lodged her referral but that there was no proper dispute in respect of the other complaints because they had not complied with the provisions of rule 5(1) by failing to sign form LC 21 themselves. Nor did they comply

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[3] LCA 70/2012, unreported, 31 May 2013.

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

with rule 5(3) because they had not signed a statement authorizing Ms Uses to sign the documents on their behalf. But the court indicated 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.

[19] Mr Dicks pointed out that rule 10 empower arbitrators to condone non-compliance only in respect of referral documents or applications being delivered outside the applicable time period prescribed in the Act or in those rules. There is a further more general power of condonation vested in arbitrators in rule 33. That rule has the heading 'Condonation for failure to comply with rules.' But the rule itself only refers to time periods. It provides as follows:

> 'The Labour Commissioner, conciliator or arbitrator may, on good cause shown, condone any failure to comply with the time frames in these rules.'

[20] Mr Dicks rightly pointed out that the rules thus do not empower an arbitrator to condone anything more than the failure to comply with time periods. He submitted that it would not be competent for an arbitrator to condone the failure to have signed a referral form as there was no power in the rules accorded to arbitrators to do so. He correctly submitted that arbitration tribunals, having been created by the Act, would only have those powers expressly vested in them by the Act and the rules, where the rules are authorized by the Act to confer powers upon them. Mr Dicks also pointed out that there had in any event been no application for condonation before the arbitrator and that she had not dealt with the matter on that basis.

[21] It would appear to me that the rule giver had intended to provide for a general power of condonation for non compliance with the rules. This is by virtue of the heading of rule 33. But the terms of the rule however confine the power to condone to time periods prescribed in the rules. Upon a consideration of the rules, it would be clear that in most instances condonation would need to be sought in respect of the time periods provided for and not in respect of other requirements such as the requirement in question in this matter, namely the signing of the referral form. The failure to provide for the power of condonation in respect of this item could have very harsh and unjust

consequences if a point of this nature is taken especially on appeal or in a review application where a complainant's referral has resulted in success in an award. This would appear to have been an omission on the part of the drafter of the rules. The usual approach of the courts where there has been *casus omissus* in a text which does not cater for an eventuality (such as a power for condonation in respect of non-compliance with rules not containing time periods), is that a court would generally refuse to fill a gap which the legislature has created. It would be for the legislature to address the issue by way of amending legislation or in this instance by amending the rules.[5]

[22] But this is not the only inadequacy or anomaly in the rules. The form LC 21 attached to the rules (the referral form provides for a signature for an applicant's representative and not an applicant himself or herself. Yet the rules (rule 14 read with rule 5) provide in peremptory terms that a party must sign a referral. This inaccurately prepared form is an invitation to confusion – and grave potential prejudice if a court were to find that the failure by a party to sign the form rendered it a nullity. The Act[6] precludes legal representation in conciliation on arbitration proceedings except where an arbitrator has granted permission for such representation where the parties agree or on special circumstances being shown. A legal representative would thus not be permitted to represent a party until and unless an application under s86 (13) to do so were to be successful. That could only happen after a referral form has already been submitted and an application for legal representation has been successfully made.

[23] Section 86 (12) of the Act however permits representation by union or employer's organization. But this subsection refers to representation in arbitration proceedings in the context of appearances and not in respect of the preceding referrals. Even if an applicant's representative on form LC 21 refers to a representative under s86 (12) (which is by no means clear because of the wording of s86 (12)), this does not clear up the massive potential confusion created by the ineptly drafted form. Instead of facilitating matters, its serves to create confusion and potential prejudice to unrepresented applicants.

[5] Joubert (ed) *The Law of South Africa first reissue* vol 25 part 1 at p380.

[6] In s86 (13)

[24] Mr Dicks argued that the usual consequence of failing to comply with a rule cast in peremptory terms is invalidity. He accordingly submitted that the failure on the part of the applicant to have signed the form in conflict with the clear terms of rules 14 and 5 has resulted in the referral being a nullity and that the award made by the arbitrator should be set aside as a consequence. He stressed that the applicant had taken this very point at the commencement of the arbitration proceedings, as I have already set out. But the arbitrator stated that it was in the middle of the proceedings and dismissed the point. Mr Dicks further pointed out that the arbitrator furthermore did not permit argument in this issue. This is also apparent from the record. She only permitted the third respondent's representative to say something about it after she had already made her ruling. The arbitrator would appear to have considered that this point was taken at a late stage in that the parties had already participated in conciliation proceedings initiated by the referral form where the arbitrator was involved as conciliator.

[25] Although the arbitrator did not afford the parties the opportunity to fully address the issue once it was raised and dealt with the point in a summary manner, the question arises as to whether this failure is a vitiating irregularity in those proceedings and resulted in a failure to justice.

[26] Whilst the use of the term 'must' may indicate an intention on the part of the lawgiver or rule giver that a provision is mandatory or peremptory and that non-compliance may result in invalidity,[7] this is not the end of the enquiry and may not necessarily arise. The labeling of provisions as peremptory or directory and ascribing consequences by virtue of that labeling exercise has, with respect, been correctly characterized by the Supreme Court[8] as an 'oversimplification of the semantic and jurisprudential guidelines pragmatically developed by the courts and distilled in a long line of judgments to differentiate between – what they are conveniently labeled as – peremptory and directory provisions.'

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[7] *Schierhout v Minister of Justice* 1926 AD 99 at 110.

[8] In Rally for Democracy v Electoral Commission 2010 (2) NR 487 (SC) at par [36].

[27] A very helpful survey and summary of applicable principles in considering whether a term (such as 'shall' in that case) is to have a mandatory meaning in the sense of a failure to comply would result in a nullity is to be found in the recent matter of *Kanguatjivi and Others v Shivoro Business and Estate Consultancy and Others*.[9]

> '[22] In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at 513F – 514A the Supreme Court contrasted (and disapproved of) the earlier inflexible approach on statutory time limits as expressed in *Hercules Town Council v Dalla* 1936 TPD 229 at 240 ('. . . the provisions with respect to time are always obligatory, unless a power of extending the time is given to the Court') with '. . . later, more moderated approaches adopted or endorsed by the courts (including the High Court which held that the modern approach manifests a tendency to incline towards flexibility)' (*DTA of Namibia and Another v Swapo Party of Namibia and Others* 2005 NR 1 (HC) at 11C). In this regard the Supreme Court approved of the following extract from *Volschenk v Volschenk* 1946 TPD 486 at 490:
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> > "I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity."
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> See also *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* 1978 (1) SA 1027 (SWA) at 1038A – B.
>
> [23] In considering the question raised it is not helpful to focus merely on whether the requirements of s 35 are peremptory or directory. Although these are useful labels to use as part of the discussion (*Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H), the true enquiry is whether the legislature intended the distribution of any assets in terms of the liquidation and distribution account to be valid or invalid where the period for inspection is shorter than 21 days. (Cf*Ex parte Oosthuysen* 1995 (2) SA 694 (T) at 695I). It should be remembered that —

[9] 2013 (1) NR 271 (HC) at par [22] – [25].

> "It is well established that the Legislature's intention in this regard is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (*Nkisimane* (supra at 434A); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A)).' [*Oosthuysen* supra at 696A.]"

[24] This principle was expanded in *Swart v Smuts* 1971 (1) SA 819 (A), when Corbett AJA (as he then was) said the following at 829E – F:

In general an act which is performed contrary to a statutory provision is regarded as a nullity, but this is not a fixed or inflexible rule. Thorough consideration of the wording of the statute and of its purpose and meaning can lead to the conclusion that the Legislature had no intention of nullity.' [My translation from the Afrikaans.]

[25] In *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 328A – B the court expressed the issue in this helpful way:

> ". . . what must first be ascertained are the objects of the relative provisions. Imperative provisions, merely because they are imperative will not, by implication, be held to require exact compliance with them where substantial compliance with them will achieve all the objects aimed at."

[28] Van Niekerk, J in that matter also referred to a summary of guidelines on the issue approved of by the full bench:

'[27] In *DTA of Namibia and Another v Swapo Party of Namibia and Others* supra at 9H – 10D the full bench noted with approval the following stated in *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) when Herbstein J summarised what the full bench considered 'certain useful, though not exhaustive, guidelines' when he said at 451:

> "In *Sutter v Scheepers* (1932 AD 165 at pp. 173, 174), Wessels JA suggested certain tests, not as comprehensive but as useful guides to enable a Court to arrive at that real intention. I would summarise them as follows:
>
> (1) The word shall when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
>
> (2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases."

[29] Van Niekerk concluded her thorough survey as follows:

'[28] In *Sayers v Khan* 2002 (5) SA 688 (C) the following was stated at 692A – G (the passage at 692A – D was recently applied in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* supra at 516I):

"The jurisprudential guidelines relevant to the present case as articulated by the South African Courts (particularly in cases such as *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) and *Sutter v Scheepers* 1932 AD 165 at 173 and 174) are usefully summarised by Devenish (opcit at 231 – 4) as follows:

"If, on weighing up the ambit and aims of a provision, nullity would lead to injustice, fraud, inconvenience, ineffectiveness or immorality and provided there is no express statement that the act would be void if the relevant prohibition or prescription is not complied with, there is a presumption in favour of validity. . . . Also where 'greater inconvenience would result from the invalidation of the illegal act than would flow from the doing of the act which the law forbids', the courts will invariably be reluctant — unless there is some other more compelling argument — to invalidate the act. Effectiveness and morality are inter alia also considerations that the courts could use in the process of evaluation, in order to decide whether to invalidate an act in conflict with statutory prescription.

(ii) The history and background of the legislation may provide some indication of legislative intent in this regard.

(iii) The presence of a penal sanction may, under certain circumstances, be supportive of a peremptory interpretation, since it can be reasoned that the penalty indicates the importance attached by the legislature to compliance. However, the courts act with circumspection in these circumstances. . . .

(iv) Where the validity of the act, despite disregard of the prescription, would frustrate or seriously inhibit the object of the legislation, there is obviously a presumption in favour of nullity. This is a fundamental jurisprudential consideration and therefore it outweighs contrary semantic indications.'"

[30] Applying the approach and guidelines so usefully summarized by Van Niekerk, J, I turn to the legislative purpose and context of the rules. The statutory context of these rules, as already set out, is the conciliation and determination of labour and employment disputes 'in a manner' which the arbitrator considers appropriate to determine the dispute fairly and quickly as is required by s86 (7) (a). Arbitrators are also enjoined by s86 (7) (b) to deal with 'the substantial merits of the dispute with the minimum of legal formalities.'

[31] The purpose of the rule requiring that referral documents are to be signed, as set out in rules 14 and 5, would to be ensure that a referral is authorized by a complainant. I enquired from Mr Dicks in argument whether the applicant's point would have been addressed if the third respondent had merely signed the referral form when the point was taken. He responded in the affirmative. That would in my view appear to be correct, given the fact that the requirement of the rules would then have been met, even though the referral document had not been signed when it had been delivered. The failure to sign can thus be cured in the course proceedings. This is because of the doctrine of ratification in the context of the purpose of the requirement. In view of the purpose of the requirement (of signature to the referral form), it would be for the office of the Labour Commissioner to reject a referral and avoid an unauthorized referral. In that instance, a referring party would then be required by that office to sign the form to ensure that the referral was authorized. But once a referring party participates in conciliation and

thereafter in arbitration, without an objection to that participation, it would seem to me that the requirement of a signature had at that stage become redundant. This is because of the fact that the participation by the referring party has resulted in a ratification of the referral.

[32] I cannot accept that the rule giver could have intended by this rule that the failure to have signed a referral form can, after participation, result in an ensuing award being a nullity for that reason alone. There is support for this proposition in a judgment by a full bench in South Africa where there is also a requirement of a signature to a referral form for conciliation, mediation and arbitration.[10] A contrary position had been taken previously by a single judge in an earlier matter, holding that the failure to have signed a referral form resulted in the CCMA in South Africa not having jurisdiction to proceed with conciliation, mediation and arbitration.[11]

[33] The full bench in *ABC Tesesales v Pasmans*[12] after referring to a similar requirement in South Africa, however overruled that earlier decision:

> 'It appears that the form concerned was filled in by the firm of attorneys acting on behalf of Pasmans and that an articled clerk in its employ signed the form as the 'Party referring the dispute.' This I am prepared to assume, amounted to non-compliance with rule 5.1. It is quite clear that after the dispute had been referred for conciliation Pasmans and ABC participated in the conciliation process and, thereafter, both participated in the proceedings before the commissioner.
>
> The court's duty in interpreting legislation is, of course, always to establish the intention of the lawmaker, there is no difficulty in discerning the intention of the words in rule 5.1 at the stage when form 7.11 is handed to the CCMA. At that stage the intention is clearly to provide for the CCMA to reject the form by reason of its not having been signed by the referring party. In this way the possibility of an authorized referral is avoided. However, the referring party's participation in the conciliation process without objection renders the requirement of her signature redundant at the stage. It follows that the rule-maker could

[10] See *ABC Telesales v Pasmans* (2001) 22 ILJ 624 (LAC); CF *Rustenberg Platinum Mines v CCMA and Others* (1998) 19 ILJ 327 (LC).
[11] *Rustenberg Platinum Mines Ltd v CCMA and Others* (1998) 19 ILJ 327 (LC).
[12] Supra at 626F-627E.

> not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral. This approach, it seems to me, gives effect to a purposive interpretation of the rule in accordance with the approach approved of by this court in *Business South Africa v Congress of South African Trade Unions and Another* (1997) 18 ILJ 474 (LAC) at 479A-B and in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (2) (1997) 18 ILJ 671 (LAC) at 675G-H.
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> It follows that with respect the Labour Court in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* (1998) 19 ILJ 327 (LC); [1997] 11 BLLR 1475 (LC) erred in deciding in effect at 1479H-I that a referral which was not signed by the referring party himself remained invalid beyond the stage of conciliation.'

[34] The arbitrator considered that the process, which had been commenced by the referral form, had reached an advanced stage when the arbitration started. This is because there had been conciliation (which also requires a signed referral form in rule 13) which had immediately preceded the arbitration and which had also been chaired by her. The applicant and the third respondent had participated in the preceding conciliation. It would appear that there be no point taken as to the failure on the part of the third respondent to have signed the referral form during conciliation. The point was then taken, after conciliation had been contemplated (and failed) and the arbitration had got under way. By that time, the referral – necessary for conciliation – had been ratified.

[35] It thus seems to me on the facts of this matter that there had been ratification on the part of the third respondent of his failure to have signed the referral which had been in writing. It would seem to me that once parties have participated in proceedings which are the consequence of the submission and delivery of a referral form, then it would not be open to the other protagonist to take the point of the failure to have signed form because the question of authority would then not arise. The position may be different in cases joint referrals where parties have not signed or identified as was found in *Springbok Patrols* which is to be confined to the facts of that case and is also to be qualified by the views expressed in this judgment. It would in my view be a point for the office of the Labour Commissioner to take up before participation commences and for that office to require compliance with the provisions of rules 5 and 14 for the matter to

proceed in conciliation and arbitration. If that office does not invoke these provisions, and reject a referral it may then be for the protagonist to raise non-compliance with that rule prior to participation in conciliation and arbitration as the case may be, so that non-compliance can be rectified then. But once the Labour Commissioner has appointed a conciliator and arbitrator to conciliate and thereafter determine the dispute and who has assumed jurisdiction to do so, and once the parties have participated in those proceedings, then it would not in my view be open to the other protagonist in the proceedings to take this point.

[36] This conclusion is re-inforced by examples which readily come to mind. If Mr Dicks' point is sound, then an employer would be able to sit back at arbitration proceedings in the face of an unsigned form and take the point on appeal, given the fact that, in accordance with his argument, a nullity would result. But he stressed that the facts of this matter are different because the applicant had taken the point at the commencement of the arbitration proceedings. Although the arbitrator did not fully articulate reasons for the dismissal of that preliminary point in this way, it would seem to me that it was rejected on the basis that the applicant had already participated without objection in conciliation proceedings (which also required a signed referral form) and it was thus not open to it to take the point at a later that stage. There seems to me to be much substance in that approach. I can find no fault with it, even if it were not articulated in the way. This is akin to instances where parties are precluded in the High Court Rules from applying to set aside proceedings as irregular if that party has already taken further steps in those proceedings.

[36] I accordingly conclude that, despite the language used by the rule giver, the failure to have signed the referral form in this instance where there had already been participation in conciliation, would not result in the award being a nullity. I thus decline to grant the application to review and set aside the award which was confined to this ground only.

[37] The order I accordingly make is:

The application is dismissed. There is no order as to costs.

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DF SMUTS

Judge

PPEARANCES

APPLICANT:	G Dicks Instructed by GF Köpplinger Legal Practitioners
RESPONDENT:	JN Tjitemisa Instructed by Tjitemisa & Associates