



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. LC 136/2013

In the matter between:

AFRICAN STARS FOOTBALL CLUB

APPLICANT

and

BETUEL MBUENDE

FIRST RESPONDENT/COMPLAINANT

HARALD KAVARI N.O

SECOND RESPONDENT/COMPLAINANT

Neutral citation: *African Stars Football Club v Mbuende (LC 136/2013)[2014]*
NALCMD 47(26 November 2014)

Coram: ANGULA A.J

Heard: 20 October 2014

Delivered: 26 November 2014

Flynote: Labour Law – Application to set aside an arbitration award in terms of s 89 of the Act.

Labour law – Representation of a party at the Conciliation / arbitration proceedings.

Summary: Following dismissal by his employer, the first respondent referred the dispute to the Labour Commissioner for conciliation/arbitration. At the conciliation

proceedings the applicant was not represented by a legal practitioner but by a candidate legal practitioner in respect of whom an application for leave to be represented had not been filed. Notwithstanding objection by the representative of the applicant, the arbitrator allowed the first respondent to be represented by a person who was not a legal practitioner.

Held, that the arbitrator had no discretion to waive or condone the non-compliance with pre-emptory requirement of the Act and the Rules which requires that an application has to be made in the prescribed form seven days before the hearing for leave to allow a party to be represented at the forthcoming conciliation/arbitration proceedings. The arbitrator's decision to allow representation under those circumstances constitutes a gross irregularity.

Held further, that the arbitrator's decision to allow a person who was not a legal practitioner to represent a party to the proceedings while knowing that such person did not have a right to represent a party is *ultra vires* his power or that the arbitrator exceeded his power within the meaning of the provisions of s 89 (5) of the Act.

ORDER

1. The proceedings and the award by the second respondent of 22 July 2013 are set aside;
2. The matter is referred back to the Labour Commissioner to be dealt with *de novo* before a different arbitrator.

JUDGMENT

Angula, AJ:

Introduction

[1] This is an application by the applicant seeking an order to review and set aside the conciliation/arbitration proceedings and the second respondent's award on two grounds:

- 1.1 Firstly, that there was no proper referral of the dispute to the Office of the Labour Commissioner; and
- 1.2 Secondly, that the first respondent was represented without compliance with section 82(16) of the Labour Act 2007 (Act No. 11 of 2007) ('the Act') and with rule 25 of Rules Relating to the Conduct of the Conciliation and Arbitration Proceedings ('the Rules').

[2] At the commencement of these proceedings, I was informed by counsel for the parties that the first ground is a subject of a pending appeal in respect of conflicting judgments of this court and that I should therefore only deal with the second ground for review. Accordingly, this judgment shall only deal with the second ground namely whether the first respondent was properly represented at the hearing in compliance with the provisions of the Act and the rules.

Background

[3] The facts which gave rise to the dispute of representation of the first respondent appear from the affidavits and can briefly be summarised as follows:

- (a) The first respondent was dismissed by the applicant. Thereafter he referred the dispute to the Labour Commissioner's office for conciliation/arbitration alleging that he had been unfairly dismissed by the applicant. The referral form, LC21 was signed on behalf of the first respondent by his representative Mr Edwin Coetzee, a legal practitioner from Tjitemisa & Associate Legal Practitioners. The matter was heard on 24 June 2013 for

conciliation. The first respondent was represented by a Ms Celia Nyandoro from Tjitemisa & Associates Legal Practitioners and not by Mr. Coetzee who initially applied to represent the first respondent. The representative for the applicant objected to the first respondent being represented but the Second respondent ruled that the first applicant be represented by Ms Nyandoro. At the conciliation proceedings the representative for the applicant then made a settlement proposal which was subject to the applicant's board for approval. It was then agreed amongst the parties that should the settlement proposal not be accepted by the applicant's board, the matter would proceed to arbitration on 27 June 2013 at 14h00.

- (b) The settlement proposal was not accepted by the applicant's board and this fact was communicated to the Respondent and the Second respondent. When the arbitration proceedings commenced on the 27th June 2014 at 14h00, the representative for the applicant failed to be on time at 14h00, which was the time previously agreed for the commencement of the arbitration proceedings should the settlement proposal not be accepted by the applicant's board. The Second respondent relates in the award that he telephoned the applicant's representative who informed the Second respondent that he would be attending the proceedings. However when the representative of the applicant failed to arrive at the time which he undertook to the Second respondent over the telephone he would be arriving, the Second respondent commenced with the arbitration hearing in the absence of the representative of the applicant, in terms of rule 27(2)(b).

[4] The following facts are common cause between the parties:

- 4.1 On 9 April 2013 the First respondent filed and served an application for leave to be represented at the conciliation/arbitration proceedings by Mr Edwin Coetzee of Tjitemisa & Associates Legal Practitioners;

- 4.2 Mr Coetzee did not appear to represent the first respondent at either the conciliation or subsequent arbitration proceedings.
- 4.3 The first respondent was represented by Ms Nyandoro also from Tjitemisa & Associates Legal Practitioners at both the conciliation and subsequent arbitration proceedings.
- 4.4 At the time when Ms Nyandora represented the first respondent she was not a legal practitioner as defined in s 1(1) of the Act - she was candidate legal practitioner.
- 4.5 Ms Nyandoro did not at all file an application asking for leave to represent the first respondent and served such application on the Labour Commissioner and the applicant as required by the rules.
- 4.6 The second respondent inserted her reasons for permitting Ms Nyandoro to represent the first respondent on the application form which was filed by Mr Coetzee which reads:

'13 *State the reasons for permitting or refusing representation.*

The application for representation was permitted meaning I decided to allow representation. The Respondent is represented by a well experienced consultant, Mr Zirzow.

14 *Conditions, if any, on which representations is permitted:*

The condition was that since the one party (the respondent) is represented I would allow both representation. The two representatives, Mr Zirzow and Ms Nyandoro who appeared on behalf of the Applicant who assisted Mr Coetzee does not have automatic representation in terms of the law but was permitted by me as the conciliator/arbitrator" (my underlining for emphasis).

[6] The question for determination is whether the first respondent was represented at the conciliation and arbitration hearing in compliance with the provisions of the Act and the Rules.

[7] Counsel for the applicant submits firstly, that in view of the fact that Ms Nyandoro did not serve and file the application for leave to represent the first respondent seven days before the hearing on the first respondent and the Labour Commissioner respectively as required by the rules but was allowed by the second respondent to represent the first respondent, constitutes a gross irregularity. I agree. The second respondent has no discretion to waive or condone the non-compliance with the pre-emptory requirements of the Act and the rules that such conduct amounts to a gross irregularity.

[8] In my view the most destructive gross irregularity committed by the second respondent was his decision to allow Ms Nyandoro to represent the first respondent who was, even in his own words, [did] '*not have an automatic representation in terms of the law*'. I fail to understand how the second respondent could have thought that he had a discretion to allow Ms Nyandoro to represent the first respondent well knowing firstly that Ms Nyandoro had not applied for leave to represent the first respondent and secondly, while he was well aware that Ms Nyandoro did not have a right in terms of the law to represent a party to the conciliation/arbitration proceedings. I agree with the submission by Counsel for the applicant that the second respondent did not have a discretion under those circumstances to allow Ms Nyandoro to represent the first respondent and accordingly acted *ultra vires* the provision of s 86 (13) of the Act. In my view the second respondent exceeded his power as an arbitrator within the meaning of the provisions of s 89(5).

[9] Counsel for the first respondent submits that the applicant in his notice of motion is seeking for an order to set aside the *award* by the second respondent made on 22nd July 2013; that the applicant is not seeking for an order to set aside the second respondent's *decision* taken at the conciliation allowing the first

respondent to be represented by Ms Nyandoro, therefore, so goes the argument, the court cannot grant the order sought by the applicant as far as the issue of representation is concerned. This argument loses sight of the fact that the decision by the second respondent forms the basis of irregularity committed by the second respondent which taints the award. Section 89(4) provides that a party to a dispute who alleges that a *defect* occurred in the arbitration proceedings may apply for an order reviewing and setting aside the *award*. In other words the decision by the second respondent is the defect complained by the applicant. A party cannot apply to set aside a defect, which is the cause; a party has to apply to set aside the result, which is the award. This argument must thus fail.

[10] Counsel for the first respondent further submits that the second respondent did properly exercise his discretion. I have already found that the second respondent did not have a discretion to allow Ms Nyandoro to represent the first respondent and that he acted *ultra vires* to purport to have exercised a discretion which he did not have. Stated differently, the second respondent exceeded his power within the meaning of s 89(5).

[11] In the result, I make the following order:

1. The proceedings and the award by the second respondent of 22 July 2013 are set aside;
2. The matter is referred back to the Labour Commissioner to be dealt with *de novo* before a different arbitrator.

ANGULA A.J

APPEARANCE:

APPLICANT

Of

R Kandjella

Kopplinger Boltman

RESPONDENT

Of

EE Coetzee

Tjitemisa & Associates