



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 32/2013

In the matter between:

AGRIBANK OF NAMIBIA**APPELLANT**

and

NICOLAUS SIMANA**1ST RESPONDENT****HAROLDT KAVARI N.O.****2ND RESPONDENT**

Neutral citation: *Agribank of Namibia v Simana* (LCA 32/2013 [2014] NALCMD 5
(17 February 2014))

Coram: HOFF J
Heard: 08 November 2013
Delivered: 07 February 2014
Reasons: 17 February 2014

Summary: Conciliation and Arbitration – non compliance with Rule 5 of the rules relating to conciliation and arbitration – Rule 14(2)(b) – referral document must be signed in accordance with Rule 5 – In terms of Rule 5 the document must be signed by a party or person entitled to represent that party in proceedings.

Section 86(12) of Act 7 of 2011 prescribes categories of persons who may automatically appear in arbitration proceedings – legal practitioner is excluded –

Legal practitioner may only appear in arbitration proceedings if provisions of s 86(13) of the Act had been complied with – prior to this legal practitioner is not entitled to appear on behalf of a party or to sign a referral document – Referral document signed in these circumstances by legal practitioner not a valid referral of dispute and a nullity and arbitration proceedings following such referral likewise a nullity – Consequently any award by arbitrator a nullity.

ORDER

- (a) The point raised *in limine* that the referral document was not signed in accordance with Rule 5 of the Rules pertaining to conciliation and arbitration and that such a referral was therefore a nullity, is upheld.
- (b) The point raised *in limine* that there was no valid appeal noted against the arbitrator's award in that contrary to Rule 23 of the Rules relating to the conduct of conciliation and arbitration the appellant did not complete Form 11 and Form LC 41 has, due to the finding in paragraph 1, become academic.
- (c) It follows from paragraph 1 that the arbitration proceedings before the second respondent were a nullity and consequently, the award granted in favour of the first respondent was likewise a nullity.

JUDGMENT

HOFF J:

[1] This court on 07 February 2014, subsequent to the hearing of argument on points *in limine* on 8 November 2013, gave the following ruling:

- (a) The point raised *in limine* that the referral document was not signed in accordance with Rule 5 of the Rules pertaining to conciliation and arbitration and that such a referral was therefore a nullity, is upheld.

- (b) The point raised *in limine* that there was no valid appeal noted against the arbitrator's award in that contrary to Rule 23 of the Rules relating to the conduct of conciliation and arbitration the appellant did not complete Form 11 and Form LC 41 has, due to the finding in paragraph 1, become academic.

- (c) It follows from paragraph 1 that the arbitration proceedings before the second respondent were a nullity and consequently, the award granted in favour of the first respondent was likewise a nullity.

[2] This court indicated that reasons would be provided during the course of next week. These are the reasons.

[3] The parties agreed to address this court only on two points *in limine* namely:

- (a) That the referral document was not signed in accordance with Rule 5 of the rules pertaining to conciliation and arbitration and that such referral was therefor a nullity.

- (b) That there was no valid appeal noted against the arbitrators award in that contrary to Rule 23 of these rules relating to the conduct of conciliation and arbitration the appellant did not complete Form 11 and Form LC 41.

[4] Mr Hinda who appears on behalf of the first respondent submitted that this court first decide the point *in limine* raise by the first respondent (point (b)) supra before considering the point raised by the appellant (point (a)) supra.

[5] Should this court uphold point (b), in my view it follows that the arbitration award must be complied with by the appellant.

[6] Should this court uphold point (a) on the otherhand as submitted by Mr Rukoro, who appears on behalf of the appellant, the referral may be regarded as a nullity as well as all subsequent proceedings.

[7] The question remains that in the event of this court finding in favour of point (b) should this court refrain from also considering point (a)? I do not think so. I shall however decide the points raised *in limine* in the sequence they occurred and shall therefore first consider point (a).

[8] Before I deal with the first point *in limine* I shall briefly refer to the background leading up to this appeal. The first respondent was dismissed by the appellant after a disciplinary hearing on 3 November 2011. The subsequent appeal by the first respondent was unsuccessful. Efforts in early 2012 to settle the matter also proved unsuccessful. On 22 May 2012 the first respondent in terms of the provisions of s 82(7) and s 86(1) referred the dispute to conciliation or arbitration, simultaneously requesting for legal representation during conciliation or arbitration.

[9] On 31 May 2012 the Labour Commissioner designated the second respondent as arbitrator and set the matter down for hearing on 28 June 2012. It is not clear from the record what transpired on 28 June 2012, but on 9 July 2012 the parties signed an agreement to the effect that the legal representative of the first respondent during the arbitration proceedings would be Mr Otniel Podewitz and the appellant would be represented by Mr SR Philander. The arbitration proceedings were concluded on 19 March 2013.

[10] I must at this stage emphasise that in terms of the provisions of the Labour Act (Act 11 of 2007) the Labour Commissioner is obliged to refer a dispute for conciliation. If conciliation fails thereafter the dispute is referred for arbitration. This sequence is underscored by the provisions of s 86(5) of the Act which provides that 'unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration'. It does not appear from the record that this sequence was followed.

First point *in limine*

[11] Rule 14(1)(b) of the Rules Relating to Conciliation and Arbitration provides that a party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed form (Form LC 21) which is called 'the referral document'.

[12] Rule 14(2)(a) provides that the referral document must be signed by a party in accordance with Rule 5. Rule 5 provides 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 ... by more than one employee, the employees may mandate one of their number of sign documents on their behalf.
- (3) A statement authorising the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document ..., together with a legible list of their full names and addresses.'

[13] Mr Rukoro submitted that in terms of s 5(1) the referral document must be signed by a party (complainant) or by another person who is *entitled* to sign such document.

[14] It was submitted by Mr Rukoro that there are in terms of the provisions of s 86(12) of the Act specified categories of individuals who have an automatic right to appear in arbitration proceedings.

[15] Section 86(12) provides as follows:

'In any arbitration proceedings a party to a dispute may appear in person, if the party is an individual, or be represented, *only by* -

- (a) an office bearer or official of that party's registered trade union or of a registered employer's organisation;
 - (b) if the party is an employee, a co-employee; or
 - (c) if the party is a juristic person, an employee of that person,
- but a person who is a legal practitioner must not appear on behalf of a party except in the circumstances referred to in subsection (13).

(Emphasis provided).

Subsection 13 provides as follows:

'An arbitrator may permit -

- (a) a legal practitioner to represent a party to a dispute in arbitration proceedings if -
 - (i) if 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.'

[16] The parties to the dispute agreed on 9 July 2013 to be legally represented during the arbitration proceedings. The referral document was signed by the legal representative of the first respondent on 22 May 2012 at a stage when he was not *entitled* or had no right or authority to appear on behalf of the first respondent. It is common cause that first respondent himself did not sign the referral document.

[17] The provisions of s 86(12) are unambiguous in so far as they govern the appearance of legal practitioners in arbitration proceedings.

[18] This court in *Springbok Patrols (Pty) Ltd v Jacobs & Others* NALCMD 17 [2013] delivered by Smuts J on 31 May 2013 stated the following at paragraph 7 when dealing with the non-compliance with Rule 5:

‘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 the fact that Rule 5 of the rules relating to the conduct of conciliation or arbitration had been complied with. This rule requires that a party must sign the referral and if proceedings are instituted jointly, a statement authorising an employee to sign the document must be signed by each employee ... This court has held that this requirement is not a mere technicality and must be complied with. The rule is set out in *peremptory terms*.’

(See also *Waterberg Wilderness Lodge and Menesia Uses and 27 Others* case LCA 16/2011 unreported, delivered on 20 October 2011).

[19] It was held in para 8 in *Springbok Patrols* that failure to comply with Rule 5 did not constitute a valid referral of the dispute and that the award had to be set aside for that reason alone.

[20] Mr Hinda who appeared on behalf of the first respondent submitted that the *Springbok Patrols* matter is distinguishable from the present matter on the facts and on the applicable legal provisions. Mr Hinda also submitted that appellant did not raise the point *in limine* regarding the non-compliance of Rule 5 during the arbitration proceedings and by raising such point now is a belated attempt not to comply with the arbitration award given in favour of the first respondent. This point *in limine* was first raised in appellant’s heads of argument.

[21] I agree that the *Springbok Patrols* case is distinguishable since the provisions of Rule 5(2) & (3) were considered in that case whereas the present matter concerns the provisions of Rule 5(1), but in my view the same legal principle applies, namely, that the non-compliance with the provisions of Rule 5 is fatal to a party’s case.

[22] Mr Rukoro, submitted that the referral to arbitrator was a nullity and that a litigant may at any stage alert a court of law to such a nullity.

[23] I agree, in view of the *Springbok Patrol* matter (supra), that the referral was an invalid referral and therefore a nullity. It follows that the arbitration proceedings were a nullity, and this court may not perpetuate a nullity by providing the arbitration proceedings with legal force. No legal consequences can flow from a nullity and therefore no valid pronouncements could have been made by the arbitrator.

[24] This court was referred to the case of *Johannes Gariseb & 32 Others and TransNamib Holdings Ltd* LC 3/2010, heard on 20 September 2010 where Ueitele J interpreted Rule 5(1) and concluded that Rule 5(1) 'does authorize a representative of the complainants to sign the Form LC 21 on behalf of the thirty three applicants.' In the *Johannes Gariseb* matter the main issue during conciliation proceedings was whether a settlement agreement signed between the parties was a binding agreement.

[25] On perusing the judgment on the interpretation of Rule 5(1) it became clear that the court in *Johannes Gariseb* at that stage did not have the benefit of considering an argument similar to the argument presented by Mr Rukoro in this matter.

Second point *in limine*

[26] In view of the finding in respect of the point in limine raised by the appellant, the point in limine raised by the first respondent has become academic.

E P B HOFF

Judge

APPEARANCES

APPELLANT:

S Rukoro

Instructed by Conradie & Damaseb, Windhoek

FIRST RESPONDENT:

G Hinda

Instructed by Murorua & Associates, Windhoek

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