

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO.: LC 52/2015

In the matter between:

**PAUL GOAGOSEB**

**APPLICANT**

And

**EVANGELICAL LUTHERN CHURCH**

**IN THE REPUBLIC OF NAMIBIA**

**1<sup>ST</sup> RESPONDENT**

**KLEOFAS GEINGOB**

**2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Goagoseb v Evangelical Lutheran Church in the Republic of Namibia* (LC 52/2015) [2016] NALCMD 36 (23 September 2016)

**CORAM:** VAN WYK, AJ

**Heard:** 30 June 2016

**Delivered:** 23 September 2016

**Flynote:** Labour Law - *Rule 20 (1) and (2) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act 11 of 2007, (the Act)* – conciliation phase includes opportunity to consider settlement - s 86 (5) of the Act – arbitrator have a duty to attempt to resolve the dispute through conciliation before arbitration – Motion procedure - affidavits of the parties constitute both pleadings and evidence – a party stands or falls on its papers.

**Summary:** Applicant seeking an order to declare an alleged settlement agreement concluded at an alleged conciliation meeting valid and enforceable, and to make it an order of court. The alleged settlement was not made an award at the meeting.

*Held* that the meeting held on 2 July 2014 was a conciliation meeting and competently resulted in a settlement agreement; second respondent acted in accordance with his duty in s 86 (5) of the Act.

*Held* that the pleadings are lacking material facts to support the grounds challenging the validity of the alleged settlement agreement; the facts necessary to prove the same is contained in documentation that are not before the court.

*Held* that the document attached as 'PG4' to the founding affidavit is a valid settlement agreement between applicant and the first respondent, and a competent outflow of conciliation proceedings.

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## ORDER

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1. The settlement agreement between applicant and the first respondent, dated 2 July 2014, is valid and enforceable.
  2. The settlement agreement is made an order of court.
  3. There is no order as to costs.
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## JUDGMENT

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VAN WYK, AJ:

### **Background**

[1] In this matter, the applicant was an employee of the first respondent and was found guilty of misconduct in a disciplinary hearing on 12 December 2013. He filed an appeal and was informed of the outcome on 2 March 2014.

[2] Applicant referred a dispute to the Office of the Labour Commissioner, which was set down for conciliation and arbitration proceedings on 12 June 2014 in Windhoek. The matter did not proceed on that day, but eventually proceeded on 2 July 2014 in Otjiwarongo.

[3] First respondent in his answering affidavit found it necessary to mention that two notices of conciliation were issued. A notice was issued on Form LC 28 by the Labour Commissioner on 26 May 2014, calling on the applicant and first respondent for a

conciliation meeting or an arbitration hearing at 09h00 at the Office of the Labour Commissioner, Khomasdal, Windhoek, to be held on 12 June 2014. This notice was attached to the answering affidavit as 'ELCRN 1'. For ease of reference this notice of set down is called the June-notice.

[4] According to deponent of the answering affidavit, Bishop Ernst //Gamxamub, the June-notice was the only notice of set down received by the first respondent, and he added that second respondent transferred the matter to Otjiwarongo without further notice to the first respondent. He gave no explanation in the answering affidavit, how the first respondent eventually became aware of the meeting that took place on 2 July 2014 in Otjiwarongo.

[5] In his founding affidavit, the applicant only referred to a second notice of set down, dated 10 June 2014, marked and attached to the founding affidavit as 'PG3'. This notice set the matter down for a conciliation meeting or arbitration hearing on 2 July 2014, at 09h00 at the Office of the Labour Commissioner in Otjiwarongo, hereinafter called the 'Otjiwarongo meeting'. This notice is called the July-notice.

[6] The applicant did not mention the June-notice in his founding affidavit. Both applicant and two representatives of the first respondent attended the Otjiwarongo meeting. It is common cause that the representatives of first respondent, at various stages of the Otjiwarongo meeting, contacted the deponent of the answering affidavit to confirm their instructions for participation in negotiations during the meeting.

[7] First respondent in the answering affidavit and during argument in court, mentioned the fact that there were two notices of set down, but without taking the point to any meaningful length to become a concrete attack on the case of the applicant.

[8] Applicant did not explain the June-notice in its founding affidavit. They merely commenced their submissions on the proceedings arising from the July-notice.

[9] First respondent did not advance any explanation for their attendance at the Otjiwarongo meeting, in light of the allegation that they did not receive the July-notice. I cannot, but accept the submission of Mr De Beer that the applicant cannot account for the fact whether the first respondent duly received the July-notice or not. First respondent was present, applicant can only assume they were duly called upon to attend, in terms of the same notice that applicant received to attend. I therefore cannot draw any negative inference against the case of the applicant from the respondent's submissions regarding the two notices.

[10] In the premises, the applicant is now seeking an order to declare that the alleged settlement agreement concluded at the Otjiwarongo meeting is valid and enforceable, and to make it an order of court. The applicant submitted that the second respondent was competent to make the settlement an award, since the parties so expressed their desire in the handwritten clause of the document. This administrative function was however not concluded at the meeting by the second respondent. If that had been done, the applicant would have been entitled to apply, in terms of s 87 (1) (b), of the Act, that the award be made an order of this court.

[11] Three legal points crystalized from the answering affidavit and were accordingly argued in court by counsel for first respondent, Mr Elago. First respondent placed in dispute whether a conciliation took place, which resulted in the alleged settlement agreement. Secondly, the first respondent claimed that the document signed and attached as 'PG4' to the founding affidavit was not executed with the necessary authority. Finally, it is contended that the representatives of the first respondent who executed the document, did so under duress. The allegation is that they were coerced or induced to sign the alleged settlement agreement.

#### **Did a Conciliation Meeting take place?**

[12] Mr. De Beer, counsel for the applicant made submissions to counter the claim in the answering affidavit that no conciliation took place. He explained the matter as

follows. The very nature of the conciliation process is that if it is conducted successfully, it will result in a consensus between the parties. Second respondent had a statutory duty to facilitate conciliation and to attempt to move the parties to a possible consensus. The conciliation phase includes the opportunity to consider settlement in terms of *rule 20 (1) and (2) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner*.<sup>1</sup>

[13] The Act, structured this process as follows: Section 86 (5) of the Act provides:

‘Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.’

[14] The heading of Form LC 28 also clearly denotes the process for which the parties are called upon to attend: - ‘conciliation meeting or arbitration hearing’. The notices issued by the second respondent in terms of s 86 (4) of the Act, was indeed the correct notices. If s 86 (4) and (5) are read together, it indeed provides the necessary context why a settlement agreement could have been a competent outcome of the Otjiwarongo meeting.

[15] In the founding affidavit the applicant describes the process of the conciliation and specifically the manner in which the representatives of the first respondent obtained instructions at various stages of the process from Bishop //Gamxamub. First respondent confirmed this telephonic consultation during the meeting in the answering affidavit.

[16] Based on the above, it is my finding that the process did constitute a facilitation of resolving the dispute by the second respondent, within the provisions of s 86 (5). I therefore reject the argument that no conciliation process took place. The Otjiwarongo meeting was intended to be a conciliation meeting and if conciliation failed, arbitration of the dispute was to follow. The meeting ended before the stage of arbitration and resulted in the production of the document marked ‘PG4’ in the founding affidavit.

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<sup>1</sup> Labour Act 11 of 2007

### **Lack of Authority and Coercion**

[17] I proceed to deal with the remaining two legal points regarding a lack of authority to enter into any settlement agreement and the issue of coercion to enter into the alleged settlement agreement.

[18] The alleged settlement agreement, 'PG4' is not very neatly typed document. It is clearly a template with handwritten terms inserted. It was signed by both parties and accordingly witnessed by two signatories. Be that as it may, the undisputed facts relating to the origin of this document is the following. A meeting took place in Otjiwarongo, at the Office of the Labour Commissioner, the representatives of the first respondent took telephonic instructions during the meeting from Bishop //Gamuxab, returned into the meeting and signed the document.

[19] The deponent to the answering affidavit dealt with these attacks on the validity of the alleged settlement agreement as follows:

'I deny that there was an agreement owing to the lack of authority for the signatory to execute the agreement. I do not wish to reiterate what I have indicated in the founding papers of case number LC 114/14 suffice to state that the signatory was induced to sign the agreement. Annexure PG4 is the very basis for launching the application which was struck from the roll. I submit that a consolidation of the two applications will be sought to enable the court to determine the two matters fully and arrive at a just and fair determination of the matters.'

[20] Further to the above, the deponent continues:

'I admit that in the application brought by the first respondent, the grounds relied upon are that there was not consensus owing to the fact that the representatives of the 1<sup>st</sup> respondent were coerced into signing the purported agreement. The full facts are contained in my affidavit that I attached the notice motion.'

[21] In respect of both grounds challenging the validity of the alleged settlement agreement, the pleadings lack substantial facts to support the contentions made. The first respondent relies on reasons provided in the founding papers filed under case number LC 114/14, whilst that a different matter and not before this court. In the premises, this court is confronted with a situation where certain facts are alleged regarding the validity and voidability of the settlement agreement, but the facts necessary to prove the allegations are contained in documentation that are not part of the papers in this matter.

### **The Law – a party stands or falls by its pleadings**

[22] It is trite law,<sup>2</sup> that the affidavits of the parties in motion proceedings constitute both pleadings and the evidence. This rule is based on the principle that a party stands or falls by his affidavits.<sup>3</sup> It emanates from the procedural requirement of motion proceedings that the parties should set out the cause of action and the very basis of its opposition to the application in the affidavits. In other words, relief sought has to be found in the evidence supported by the facts set as out in the papers.<sup>4</sup>

[23] In the answering affidavit, the first respondent relies on the facts more fully in his founding affidavit in an application to the Labour Court under case number LC 114/14. It refers to the application done by the first respondent that preceded the application currently before me.<sup>5</sup> This application was struck from the roll on 11 March 2015. It was never re-enrolled. An interlocutory application was filed for the consolidation of cases LC 114/14 and LC 52/2015, but same was also struck from the roll on 14 August 2015.

[24] I am thus faced with a situation where the answering affidavit is relying on facts that are not before this court. In terms of the legal principles stated above, I am

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<sup>2</sup> *South African Poultry Association v The Ministry of Trade and Industry* (A 94/2014) [2014] NAHCMD 331 (07 November 2014) Para 38

<sup>3</sup> *Kleynhaans v van der Westhuizen* NO 1970 (1) SA 565 (O) at 568E) (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 645H)

<sup>4</sup> *Kleynhaans supra*

<sup>5</sup> Case number: LC 114/14



constraint to make a finding on the allegations of lack of authority and coercion in the pleadings, as the evidence for such allegations are not before me.

[25] The deponent failed to explain how he arrived at the conclusion that there was a lack of authority, considering the fact that the two representatives of the first respondent participated in the conciliation meeting, they consulted the deponent to the answering affidavit telephonically and subsequent thereto, signed the agreement.

[26] In terms of s 86 (12) of the Act, it is competent for first respondent to have delegated representation at the conciliation meeting. The section allows representation, and if two representatives arrive at a conciliation meeting, participate in the proceedings, telephonically confirm their mandates and thereafter sign a document, it is my considered view that the first respondent must explain their lack of authority in evidence before the court, before a finding can be made that the document lacks the necessary authority. In the absence of an explanation, the facts in common cause clearly point toward a valid settlement agreement signed at the Otjiwarongo meeting.

[27] Clearly, the deponent of the answering affidavit assumed that the interlocutory application for the consolidation of the two matters would be granted and that consolidation will cure the lack of evidence in his answering affidavit in the instant case. The interlocutory application for consolidation of the two matters was struck from the roll<sup>6</sup> and was never re-enrolled. Hence the case of the first respondent, regardless of its merits, is not before me for consideration.

[28] In the premises, I find that the document attached as 'PG4' to the founding affidavit is a valid settlement agreement between applicant and the first respondent. It is a competent outflow of conciliation proceedings. There is no evidence before this court proving invalidity or voidability.

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<sup>6</sup> Page 4 of bundle of court orders and joint case management orders

[29] Based on the above reasoning, I make the following order:

1. The settlement agreement between applicant and the first respondent dated 2 July 2014 is valid and enforceable.
2. The settlement agreement is made an order of court.
3. There is no order as to costs.

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L VAN WYK  
Acting Judge

## APPEARANCES

APPLICANT: PJ De Beer  
DE BEER LAW CHAMBERS

FIRST RESPONDENT: PS Elago  
TJOMBE ELAGO LAW FIRM INCORPORATED

SECOND RESPONDENT: No appearance