

REPUBLIC OF NAMIBIA



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

CASE NO: HC-MD-LAB-MOT-REV-2020/00267

In the matter between:

EDWARDT XOAGUB

APPLICANT

and

**EAGLE NIGHT WATCH SECURITY
MAXINE KRÖHNE
LABOUR COMMISSIONER**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral Citation: *Xoagub v Eagle Night Watch Security CC* (HC-MD-LAB-MOT-REV-2020/00267) [2022] NALCMD 51 (16 September 2022)

CORAM: UEITELE J
Heard: 17 January 2022
Order 28 January 2022
Reasons: 16 September 2022

Flynote – Review Proceedings – When review may be brought – The procedure followed must have been flawed or irregular – Rule 28(5) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner – Requirements thereof – Answering Affidavit filed in support of the application must

comply with the general requirements of the Regulations promulgated in terms of the Justices of the Peace and Commissioner of Oaths Act, 1963 (Act No. 16 of 1963) – Requirements of the Regulations promulgated in terms of the Justices of the Peace and Commissioner of Oaths Act restated.

Summary: The applicant, by notice of motion, commenced proceedings in this Court in terms of which he, amongst other orders, sought an order reviewing and setting aside the ruling issued by the second respondent on the 14th day of October 2020, dismissing his application for her recusal from arbitrating a dispute of unfair dismissal which he referred to the Labour Commissioner.

The applicant set out various grounds upon which the ruling of the second respondent ought to be reviewed and set aside, *inter alia*, the manner in which the conciliation meeting was conducted, and the first respondent's failure to file Form LC 39 together with a proper answering affidavit.

Second and third respondents withdrew their opposition and indicated that they will abide by the Court's decision. The review application is opposed only by the first respondent.

Held that an affidavit is a written statement made under oath. It therefore follows that, the answering affidavit accompanied by Form LC 39 must satisfy the general requirements for affidavits as contained in the Regulations promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act.

Held further that by taking into consideration allegations made in a document not compliant with the general requirements for affidavits as contained in the Regulations promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, the second respondent committed a fatal irregularity.

ORDER

1 The proceedings before the Arbitrator, Ms Maxine Kröhne, which resulted in her making a ruling on 14 October 2020 in terms of which she dismissed the applicant's application for her to recuse herself from arbitrating the dispute of unfair dismissal between Mr Edwardt Xoagub and Eagle Night Watch Security Close Corporation are reviewed and set aside.

2 No order as to costs is made.

3 The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE J:

Introduction and background

[1] The applicant in this matter is a certain Mr Edwardt Xoagub. The first respondent is Eagle Night Watch Security Close Corporation, the second respondent is a certain Ms Maxine Kröhne, who is an arbitrator, appointed as such in terms of s 85(3) of the Labour Act 11 of 2007,¹ and the third respondent is the Labour Commissioner appointed as such in terms of s 120 of the Labour Act. I will for convenience refer to the parties by their names.

[2] On 09 November 2020, Mr Xoagub, by notice of motion, commenced proceedings in this Court in terms of which he, amongst other orders, sought an order reviewing and setting aside the ruling issued by Ms Kröhne on 14 October 2020, dismissing his application for her (Ms Kröhne) to recuse herself from

¹ The Labour Act, 2007 (Act 11 of 2007).

arbitrating a dispute of unfair dismissal which he (Mr Xoagub) referred to the Labour Commissioner.

[3] The brief background to Mr Xoagub's application is this, on 22 March 2019, Eagle Night Watch Security CC appointed Mr Xoagub as its Quality Control Manager. On 03 October 2019, following a disciplinary process, Eagle Night Watch Security CC dismissed Mr Xoagub from its employment. Mr Xoagub was aggrieved by his dismissal and filed a complaint of unfair dismissal with the office of the Labour Commissioner in Swakopmund. The Labour Commissioner designated Ms Kröhne to conciliate and arbitrate the dispute.

[4] From the pleadings it appears that the dispute was set down for conciliation before Ms Kröhne. From the pleadings, it furthermore appears that, Mr Xoagub was not pleased with the manner in which the conciliation meeting was conducted. As a result of his displeasure Mr Xoagub, in terms of rule 28 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, applied for Ms Kröhne to recuse herself from arbitrating the dispute of unfair dismissal between him and Eagle Night Watch Security CC.

[5] Mr Xoagub, filed his application for Ms Kröhne's recusal on Form LC 38 on 14 September 2020. A representative of Eagle Night Watch Security CC on 16 September 2020 simply filed a document titled "*Supporting Affidavit*" and after Mr Xoagub filed what he termed his replying affidavit on 18 September 2020, the matter proceeded for hearing. From the record, it is not clear as to when the application for recusal was heard, but what is clear is that Ms Kröhne handed down her ruling on 14 October 2020. In her ruling, Ms Kröhne refused to recuse herself.

[6] Mr Xoagub, aggrieved by the ruling of Ms Kröhne, on 20 November 2020, commenced these proceedings. I will proceed to set out the grounds on which Mr Xoagub is seeking the ruling of Ms Kröhne to be reviewed and set aside.

Grounds on which Mr Xoagub seeks the ruling of the arbitrator to be reviewed and set aside

[7] Mr Xoagub alleges, in his affidavit in support of his application to have the ruling of 14 October 2020 reviewed and set aside, that the conciliation meeting was littered with defects as contemplated in s 89(4) of the Labour Act, thus warranting this Court to review and set aside the recusal application proceedings. He further alleges that the defects were that:

(a) Ms Kröhne created the overall perception that she is not a neutral and impartial adjudicator, because she displayed a very bad and intimidating behaviour towards him during the conciliation process and it was evidently clear that Ms Kröhne and Ms Charis Britz (the representative of Eagle Night Watch Security CC at the conciliation meeting) knew each other and they were former colleagues at the General Employers Association of Namibia;

(b) during the conciliation meeting Ms Kröhne told him in an untoward manner that he must get himself a lawyer. Mr Xoagub contends that the remark that 'he must get himself a lawyer' was a clear indication to him that he will not receive a fair hearing;

(c) during the conciliation meeting Ms Kröhne allegedly shot down his claim for reinstatement and compensation for loss of income, without the merits of his claim having been fully canvassed before her. Her statement that she will not order his reinstatement or order that he be paid compensation for loss of income was an indication of how she felt about the matter and how she will rule, stated Mr Xoagub;

(d) he learned from reliable sources that Ms Kröhne and a certain Mr Bart Koopman (the sole member of Eagle Night Watch Security CC) have family ties; and that;

(e) the answering affidavit filed in opposition to his application for recusal of Ms Kröhne did not meet the requirements set out under rule 28(5), because Eagle Night Watch Security CC did not file Form LC 39. Mr Xoagub thus contends that Ms Kröhne ought to have disregarded the purported affidavit filed on behalf of Eagle Nigh Watch Security.

[8] Initially, Ms Kröhne and the Labour Commissioner indicated that they will oppose the application to have the recusal proceedings reviewed and set aside, but later withdrew their opposition and indicated that they will abide by the court's decision.

[9] Eagle Night Watch Security CC opposed the application. The affidavit opposing the review application was deposed to by a certain Mr Bartholomeus Koopman, the managing member of Eagle Night Watch Security CC. In the opposing affidavit Mr Koopman simply denies the allegations made by Mr Xoagub and puts Mr Xoagub to the proof of the allegations he makes.

[10] In view of the background of this matter, I am of the view that the issue in this case is whether the arbitrator (Ms Kröhne) acted lawfully when she refused to recuse herself from arbitrating the dispute of unfair dismissal between Mr Xoagub and Eagle Night Watch Security CC (in other words did Ms Kröhne make her decision in breach of procedural fairness), and, if not, what remedies can properly be granted to Mr Xoagub.

Discussion

[11] I find it appropriate to, before I consider the merits and demerits of Mr Xoagub's application, make certain observations on the law relating to the review of decisions or proceedings of persons or administrative bodies or inferior courts, or tribunals as I understand it. One of the decisions to which I turn for guidance is the English case of *Chief Constable of the North Wales Police v Evans*,² where Lord Brightman said:

'I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case. Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.'

² *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155.

[12] In this Court Hoff AJ (as he then was) in the case of *Ellen Louw v The Chairperson of the District Labour Court and JP Snyman & (Namibia) (Pty) Ltd*,³ said the following:

'Where the reason [i.e. to have a judgement, order or ruling set aside] is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial it is appropriate to bring the case on review. The ... distinction depends therefore on whether it is the result only or rather the method of the trial which is to be attacked. The giving of a judgment not justified by the evidence would be a matter of appeal and not review upon this test.

The second main distinction between procedure on appeal and procedure on review is that in the case of the former, the matter is usually a question of argument on the record alone, whereas in review the irregularity generally does not appear from the record. In an appeal the parties are bound by the four corners of the record, whereas in a review it is competent for the parties to travel outside the record to bring extrinsic evidence to prove the irregularity or illegality.'

[13] Having said that, I now return to the complaint in this matter. Mr Xoagub's complaint with respect to his application for the arbitrator to recuse herself is directed at the manner in which the arbitrator conducted the hearing. His complaints include the complaint that the Eagle Night Watch Security CC did not file its notice to oppose as directed by rule 28(5) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, on Form LC 39. He further complained that the affidavit filed on behalf of Eagle Night Watch Security CC was not an affidavit at all and the arbitrator thus committed an irregularity when she relied on that affidavit to make her finding and dismissed his application for her recusal.

[14] At the hearing of this application, Mr Rittman who appeared for Eagle Night Watch Security CC, simply argued that most of Mr Xoagub's contentions as to why the arbitrator's ruling of 14 October 2020 must be set aside are based on

³ *Ellen Louw v The Chairperson of the District Labour Court and JP Snyman & (Namibia) (Pty) Ltd* Case No LCA 27/1998 at page 11 (unreported).

perception and suspicions. He argued that Mr Xoagub's use of the of words like '*she is not a neutral and impartial adjudicator*', '*it was evidently clear that he will not have a fair hearing*', '*the arbitrator made a finding without having a clue as to what the dispute was about*' and '*reasonable suspicion of perceived biasness and partiality*' justify their contention.

[15] The impression I got from Mr Rittman's submission was that he did not appreciate the fact that Mr Xoagub's complaint was not so much about the correctness of the arbitrator's decision, but that Mr Xoagub's complaint was about the procedure followed by the arbitrator in arriving at the decision not to recuse herself from arbitrating the dispute of unfair dismissal between him and Eagle Night Watch Security CC. The question that needs to be answered is therefore whether the procedure followed by the arbitrator was flawed or irregular.

[16] Rule 28 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner in material terms provides that:

'28. Manner in which applications may be brought

(1) This rule applies to-

(a) an application for postponement, condonation, substitution, variation or rescission;

(b) an application for class certification; and

(c) any other application for preliminary or interlocutory relief, such as an application for consolidation or joinder.

(2) An application must be brought on Form LC 38 and on notice to all persons who have an interest in the matter, except in the case of an application for class certification.

(3) ...

(5) Except as otherwise provided in these rules, any party that wishes to

oppose the application must serve and file its opposition to the application on Form LC 39, together with an answering affidavit within seven days from the day on which the application was served on that party.’

[17] It is clear that rule 28(5) requires any person that wishes to oppose an application to serve and file its opposition to the application on Form LC 39, together with an answering affidavit within seven days from the day on which the application was served on that party.

[18] An affidavit is a statement made under oath. It follows that the answering affidavit must satisfy the general requirements for affidavits as contained in the Regulations,⁴ (“the Regulations”) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (“Justices of the Peace and Commissioners of Oaths Act”). In terms of the Regulations, the oath or affirmation is administered by a commissioner of oaths.⁵ Before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the deponent:

- (a) Whether he knows and understands the contents of the declaration;
- (b) Whether he has any objection to taking the prescribed oath; and
- (c) Whether he considers the prescribed oath to be binding on his conscience.⁶

[19] If the deponent answers these questions in the affirmative, the commissioner of oaths must administer the oath.⁷ The deponent is required to sign the statement in the presence of the commissioner of oaths,⁸ and if unable to write, he or she must affix his mark in the presence of the commissioner of oaths at the

⁴ Promulgated in *Government Gazette* 3619, Government Notice R1258 of 21 July 1972.

⁵ Regulations 1(1) and 1(2) read with Regulation 2(1).

⁶ Regulation 2(1).

⁷ If the deponent merely confirms the contents of his or her declaration, but objects to taking the oath or does not consider the oath to be binding on his or her conscience, the commissioner of oaths administers the affirmation.

⁸ Regulation 3(1).

foot of the statement.⁹ In terms of regulation 4(1), the commissioner of oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows:

‘Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration.’

[20] The commissioner of oaths is, thereafter, required to sign the declaration, print his or her full name and business address below his or her signature, and state his or her designation and the area for which he or she holds his or her appointment or his or her office if he or she has been appointed *ex officio*.

[21] Subject to whether there has been substantial compliance with the regulations, the court has a discretion to refuse an affidavit which does not comply with the regulations. Should a commissioner of oaths not certify that an answering affidavit in any application had been sworn to or affirmed, the court will be reluctant to apply the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*,¹⁰ also known as the “presumption of regularity”, for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the commissioner of oaths.

[22] I pause here to state that the question of whether or not compliance with the regulations is fatal was discussed in the matter of *Tsamkxao Oma v Minister of Land Reform*,¹¹ where Masuku J held that the provisions of the regulations are merely directory and not peremptory and therefore, the court has a discretion as to how it deals with the matter.

[23] The learned judge continued and said, it was stated in *S v Munn*,¹² that:

⁹ This is subject to the proviso that, should the commissioner of oaths have any doubt as to the deponent’s inability to write, he should require that such inability be certified at the foot of the declaration by some other trustworthy person.

¹⁰ Acts are presumed to have been lawfully done until proof to the contrary is produced.

¹¹ *Tsamkxao Oma v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2018/00093) [2020] NAHCMD 162 (7 May 2020) (unreported).

¹² *S v Munn* 973 (3) SA 734 (NC) at 737H.

'Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence, where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above.'

[24] He continued and stated that in *S v Msibi*,¹³ it was held that:

'In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been substantial compliance with the requirements.'

[25] The learned judge continued further and said that:

'A reading of the case law suggests inexorably that the non-compliance by the commissioner of oaths with the provisions of the Regulations, can be condoned by the court sitting, provided of course that some reasonable explanation for the non-compliance has been tendered by the defaulting party.'

[26] I have indicated earlier in this judgment that it is a basic requirement of an affidavit that it must be signed by the deponent in the presence of the commissioner of oaths.¹⁴ However, the document purporting to be the answering affidavit which was filed in the application for the recusal of the arbitrator cannot be said to comply with the requirements of the regulations, because that document simply provides as follows:

'Signed on this 16 day of September 2020.

Signed

Date

Sworn to at Windhoek on this 16th day of September 2020

¹³ *S v Msibi* 1974 (4) SA 821 (TPD).

¹⁴ Regulation 3(1).

Before me

[27] The deponent to the document simply affixes a signature, his or her full names are not set out below his or her signature. It is further clear that the person before whom the document was signed did not as required under Regulation 2(1) ask the deponent whether, (a) he or she knows and understands the contents of the declaration, (b) he or she has any objection to taking the prescribed oath, and (c) he or she considers the prescribed oath to be binding on his or her conscience. The person before whom the document was signed furthermore does not as required under regulation 4(1) certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration.

[28] The situation is compounded by the fact that the identity, in the form of, the full names and address of the person before whom the document is deposed to is not revealed, all that is attached is a Police Stamp. So it is not clear whether the person before whom the document was signed and 'sworn to' is commissioner of oaths or not.

[29] The Court must not be placed in a situation where it is required to speculate as to whether the deponent had, in fact, sworn to and signed the affidavit in the presence of the commissioner of oaths. Simply put, the Court must not be called upon to speculate on the question of whether the affidavit, in opposition to an application, is an affidavit or not. Accordingly, on the face of it, the Eagle Night Watch Security CC's affidavit is inherently irregular. Therefore I find that it does not constitute an affidavit as contemplated in rule 28(5) of the Rules Relating to the Conduct of Conciliation and Arbitration before The Labour Commissioner.

[30] Having reached the conclusion that the document which was filed in support of the opposition to Mr Xoagub's application does not constitute an affidavit as contemplated in rule 28(5) of the Rules Relating to the Conduct of Conciliation and Arbitration before The Labour Commissioner, it follows that the arbitrator did not have evidence before her to contradict the allegation made by Mr Xoagub. Her taking into consideration the allegations by Ms Charis Britz on behalf of Eagle

Night Watch Security CC was a fatal irregularity warranting the setting aside of the proceedings which led the arbitrator to reach the decision which she reached on 14 October 2020.

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

- 1 The proceedings before the Arbitrator Ms Maxine Kröhne which resulted in her making a ruling on 14 October 2020 in terms of which she dismissed the applicant's application for her to recuse herself from arbitrating the dispute of unfair dismissal between Mr Edwardt Xoagub and Eagle Night Watch Security Close Corporation are reviewed and set aside.
- 2 No order as to costs is made.
- 3 The matter is regarded as finalised and is removed from the roll.

SFI UEITELE
Judge

APPEARANCES:

APPLICANT:

Edwardt Xoagub (in person)

FIRST RESPONDENT:

W Rittman

Rittman Law Chambers

SECOND & THIRD RESPONDENTS

No appearance