

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-REV-2021/00298

In the matter between:

AGRICULTURAL BANK OF NAMIBIA

APPLICANT

and

LABOUR COMMISSIONER

FIRST RESPONDENT

IMMANUEL HEITA

SECOND RESPONDENT

BEATA KAPOLO

THIRD RESPONDENT

Neutral citation: *Agricultural Bank of Namibia v Labour Commissioner* (HC-MD-LAB-MOT-REV-2021/00298) [2022] NALCMD 62 (21 October 2022)

Coram: USIKU J

Heard: 23 June 2022

Delivered: 21 October 2022

Flynote: Labour law – Arbitrator’s award – Review of – Arbitrator’s refusal to permit legal representation under s 86(13) of the Labour Act 11 of 2007 in arbitration proceedings – Arbitrator’s reasons for refusal being that ‘the applicant is not represented’ – Arbitrator’s reason indicated he had not applied his mind to the requirements of s 86(13) – Arbitration’s refusal set aside – The court grants legal representation and remit the matter back to the arbitrator for further conduct.

Summary: The third respondent referred a labour dispute to the Labour Commissioner. The matter was referred to conciliation and later to arbitration. The applicant applied to be represented by a legal practitioner. The arbitrator refused the application on the basis that the third respondent was not legally represented. The court set the arbitrator's refusal aside and found that the matter is one of the cases in which it would be justified to permit legal representation. Furthermore the court permitted legal representation and remitted the matter back to the arbitrator for further conduct.

ORDER

1. The decision by the second respondent dated 24 November 2021 refusing applicant's request for legal representation at the arbitration proceedings between the applicant and the third respondent, is hereby set aside.
 2. The applicant is entitled to legal representation and the applicant is hereby permitted to have legal representation in the arbitration proceedings before the second respondent in case number CRWK791-21.
 3. I make no order as to costs.
 4. The matter is removed from the roll and regarded finalized.
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JUDGMENT

USIKU J:

Introduction

[1] This is an application to review the decision by an arbitrator (the second respondent) refusing to permit the applicant to be represented by a legal practitioner in arbitration proceedings concerning a dispute between the applicant and the third respondent.

[2] In the notice of motion the applicant prays for an order in the following terms:

- (a) that the decision by the second respondent dated 24 November 2021 not to grant legal representation to the applicant, be reviewed and set aside;
- (b) that the matter be remitted back to the Labour Commissioner for adjudication by the arbitrator;
- (c) such further and/or alternative relief as the court may deem fit.

[3] The third respondent, Ms Beata Kapolo, was employed by the applicant as a Manager for Human Resources. During 2017 she was charged with a count of gross negligence. During 2018, she was found guilty of gross negligence and the chairperson of the disciplinary hearing recommended dismissal as the appropriate sanction.

[4] On 8 August 2018, the third respondent noted an internal appeal against the outcome of the disciplinary proceedings. On 31 October 2019, the chairperson of the appeal proceedings dismissed the appeal.

[5] On 1 November 2019, the applicant served the third respondent with a notice of termination of employment effective from 1 December 2019.

[6] On 26 March 2020, the third respondent referred a dispute of unfair dismissal to the Labour Commissioner for conciliation and arbitration. The conciliation was not successful. The arbitration commenced on 15 February 2021 and is still pending. The applicant still has one further witness to call. The third respondent has not yet commenced leading evidence on her case.

[7] Both the applicant and the third respondent were initially represented by legal practitioners during the disciplinary hearing and the initial stages of arbitration proceedings. However, the third respondent lost her legal representation during arbitration proceedings.

[8] During August 2021, the third respondent referred a further dispute of unfair labour practice and non-payment of remuneration, to the Labour Commissioner for conciliation and arbitration. Again on 20 September 2021 the third respondent referred another dispute of unilateral change of terms and conditions; unfair labour

practice and non-payment of remuneration, to the Labour Commissioner, for conciliation and arbitration.

[9] On 3 November 2021, the applicant submitted a request for legal representation at conciliation and arbitration, in respect of the dispute-referrals made by the third respondent during August 2021 and September 2021. The applicant attached a statement to the request for legal representation, in support of its request for representation. The statement sets out the grounds upon which the request for legal representation is sought. In summary it is asserted in the statement that legal representation is required because the matter is complex and that the third respondent will not be prejudiced. The reasons why it is averred that the matter is complex and that the third respondent would not be prejudiced, are also set out.

[10] On 24 November 2021, the second respondent declined the request for legal representation and provided the reasons for the refusal as: 'representation not granted. Reason being that the applicant is not represented.'

[11] During December 2021, the applicant took the above stated decision on review in the present application. The review application is opposed by the third respondent.

The review application

Applicant's position

[12] The applicant states in the founding affidavit that, upon the request for legal representation being delivered, the third respondent did not file an answer. The reason for the ruling by the second respondent refusing representation is based upon the statement that the third respondent is not represented. The applicant submits that, it is not clear how this was conveyed to the arbitrator by the third respondent.

[13] The applicant further avers that the second respondent is the appointed arbitrator in both the first arbitration which is pending and the current dispute. The second respondent is aware, the applicant submits, that the matter is complex and could not have disregarded the facts and the statement made by the applicant in

support of the request for representation and simply relied on the assumption that the third respondent is not represented.

[14] At the hearing of the review application the applicant indicated it was seeking further relief that:

- (a) this court decides the issue that the applicant be allowed legal representation and not refer the matter back to the second respondent; and
- (b) the third respondent be ordered to pay the costs of this review application including costs of one instructing and instructed counsel.

[15] On the above issues, the applicant submits that the court is in as good a position to make the decision on legal representation. The arbitrator did not apply his mind to the applicable legal principles, though he seemed to appreciate the applicable legal principles and there is no indication that he will do so upon a re-evaluation of the evidence. The applicant contends that it will not be fair if it is refused legal representation, as its officials are no match to the third respondent in the present arbitration.

[16] On the issue of costs, the applicant contends that the third respondent opposed the review application without disclosing any defence to the review relief sought. Instead, argues the applicant, the third respondent raised many irrelevant contentions and arguments in the voluminous papers that she filed. The applicant thus prays that a costs order be granted against the third respondent.

Third respondent's position

[17] In her answering affidavit, the third respondent asserted that she tried to have a legal practitioner to represent her however, legal representation proved unaffordable. She submits that there is no evidence placed on record that the matter before the arbitrator is complex.

[18] The third respondent submits further that, in the event that this court allows the applicant to be legally represented, such legal practitioners should not be the present applicant's legal practitioners of record.

[19] At the hearing of the application, the third respondent raised a point *in limine* to the effect that the applicant has not complied with rule 4(2)¹, in that it did not file a Board resolution authorising the deponent to the applicant's founding affidavit and the legal practitioner of the applicant to represent it. The third respondent therefore submits that the review application is not properly before court and should be struck from the roll.

Analysis

[20] I shall first deal with the point *in limine* raised by the third respondent.

[21] Rule 4² provides as follows:

'Representation of parties

(1) A party to any proceedings before the court may appear in person or be represented by a legal practitioner admitted to practise as such in Namibia in terms of the Legal Practitioners Act, 1995 (Act 15 of 1995).

(2) Where the party is a company or other body corporate or a trade union or an employers' organisation it may be represented by one of its directors or other officers or office bearers or officials, as the case may be, provided that a resolution of the company or other body corporate, trade union or employers' organization authorising such person to represent it is filed with the registrar of the time that an application is filed or the appeal is lodged or, if that is not possible, at least five days before the hearing of the matter.'

[22] It is common cause that the applicant in the present matter is a company, the applicant in the present proceedings is represented by a legal practitioner and not by one of its directors or other officials. I am therefore of the opinion that the point *in limine* raised by the third respondent has no merit and stands to be dismissed.

[23] I now turn to the merits of the application. A request for legal representation in labour matters is governed by the provision of s 86(13)(a) of the Labour Act³ ('the Act'). The section provides as follows:

'(13) An arbitrator may permit –

¹ Labour Court Rules: Labour Act (2007 Act 11 of 2007).

² Labour Court Rules: Labour Act 2007 (Act 11 of 2007).

³ Act 11 of 2007.

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

[24] The applicant contends that the second respondent did not consider the two issues stipulated in s 86(13)(a), but relied on irrelevant considerations and then refused the application for legal representation. The applicant therefore submits that the second respondent committed a gross irregularity and that the applicant be granted the relief it prays for.

[25] In support of its contention, the applicant cites the case of *Nedbank Namibia Limited v Arendorf and Others (LCA 1 of 2015) [2017] NALCMD 9 (16 March 2017)*. In that matter, an arbitrator refused a request for legal representation on the basis that the opposing party was not legally represented. The court observed that, from the reasons provided by the arbitrator, it was clear that he had not properly applied his mind to the requirements of s 86(13)(a). He had not considered the complexity of the matter and did not entertain the question of prejudice. The court therefore held that the applicant had made out a case for the relief sought and set aside the arbitrator's refusal of the request for legal representation.

[26] I am of the view that the facts of the *Nedbank Namibia Ltd v Arendorf's* matter are similar to the facts in the present matter. It appears apparent to me that the second respondent in the present matter did not apply his mind to the requirements of s 86(13)(a). That conclusion is obvious from the reasons furnished by the second respondent for refusing legal representation.

[27] On the facts of the present matter, I am satisfied that the applicant has made out a case for the review and setting aside of the second respondent's refusal.

[28] I now turn to the issue of whether the consideration of legal representation should be referred back to the arbitrator for decision or this court should decide the issue. The applicant contends that the court is in as good a position to make the

decision and invites the court to do so. The third respondent's position appears to be that this court determines the whole dispute between the parties.

[29] From the contents of the request for legal presentation, a copy of which is before this court, the following issues appear as apparent:

- (a) the case before that arbitrator emanates from the matter in which the third respondent claims to have been unfairly dismissed from the applicant's employment;
- (b) the dispute of unfair dismissal was consolidated with a dispute regarding non-payment of annual leave;
- (c) the consolidated matter and the recently-referred disputes of unfair labour practice and non-payment of remuneration are intertwined;
- (d) the matter before the arbitrator is complex;
- (e) the third respondent would not be prejudiced in the event that legal representation is granted; and,
- (f) the legal representation would aid in the presentation of evidence and the adjudication of the matter before the arbitrator.

[30] In addition to the above issues, the following issues appear to be common cause or to be issues not in dispute, namely:

- (a) the applicant has been legally represented all along during the disciplinary and arbitration proceedings;
- (b) the third respondent was also legally represented during disciplinary hearing and arbitration proceedings except during the later stages of the arbitration hearing of the pending matter; and,
- (c) the pending arbitration proceedings have been protracted.

[31] On the strength of the papers before court, I am satisfied that the present matter is one of the cases in which it would be justified to permit legal representation. Given my foregoing finding, I believe that they are good reasons in the circumstances, for this court to exercise its discretion in favour of the applicant and grant the application for legal representation and not refer the issue of legal representation back to the arbitrator.

[32] In regard to the third respondents request that this court determines the main dispute between the parties, such request cannot be entertained. The main dispute is pending for determination before the arbitrator and there are no good reasons for this court to usurp the functions of the arbitrator, in the circumstances.

[33] Insofar as the issue of costs is concerned, I am not persuaded that the third respondent has acted in a frivolous or vexatious manner in defending the proceedings, to justify the granting of a costs order. I shall therefore not order costs against her.

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

1. The decision by the second respondent dated 24 November 2021 refusing applicant's request for legal representation at the arbitration proceedings between the applicant and the third respondent, is hereby set aside.
2. The applicant is entitled to legal representation and the applicant is hereby permitted to have legal representation in the arbitration proceedings before the second respondent in case number CRWK791-21.
3. I make no order as to costs.
4. The matter is removed from the roll and regarded finalized.

B USIKU
Judge

APPEARANCES

APPLICANT: PCI Barnard
Instructed by Köpplinger Boltman,
Windhoek

THIRD RESPONDENT: B Kapolo
Self-Represented, Windhoek