CASE NO.: A 227/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EPHRAIM KATATU KASUTO **APPLICANT**

and

J H JOUBERT **1ST RESPONDENT**
SIEGFRIED TJIJAHURA **2ND RESPONDENT**

CORAM: **MULLER J**

Heard on: 4 March 2011

Delivered on: 29 March 2011

JUDGMENT

MULLER, J.: [1] This is an application by the applicant to obtain the following relief:

> *"1. Calling upon the first and second respondents to show cause why the Arbitratration proceedings and the Arbitratraton award given by the First Respondent on 30 June 2008 should not be reviewed and corrected or set aside.*

2. *Cost of this Application, as against the First Respondent only if he opposes this Application then and in that event the First Respondent and the Second Respondent jointly and severally pays the cost the one paying the other to be absolved.*
3. *Further and/or Alternative relief."*

[2] The basis on which the application is brought is that there was no **written** arbitration agreement between the parties as required by section 1 of the Arbitration Act, no. 42 of 1965 (the Act) which is applicable to Namibia. That section contains a definitions clause. An arbitration agreement is defined as follows"

> *"**arbitration agreement** means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not."*

(My emphasis)

[3] Mr Ueitele, who appeared for the applicant in this matter, confines himself to two contentions of which the main one is that there was never a written arbitration agreement as required in terms of the Act. Mr Stolze, appearing for the second respondent, submitted that there was in fact a written agreement in

respect of which the first respondent acted as an arbitrator and made an award. Both counsel submitted written heads of arguments.

[4] It is common cause that there was never a written document in which dispute was referred to the first respondent for arbitration. Mr Stolze based his argument thereon that it is not required in terms of the case law that an arbitration agreement should be signed. He further submitted that the matter was preceded by litigation in court and at a court hearing the matter was removed from the roll because the parties had arrived at an agreement to arbitrate the dispute between them. His last contention was that the correspondence between the parties makes it clear that there was in fact an agreement to refer the matter to arbitration before the first respondent, but that the applicant irregularly withdrew from that arbitration because of an irrelevant reason. I shall deal with these contentions hereinafter.

[5] Mr Stolze's argument, namely that a signed agreement is not necessary to provide jurisdiction to the arbitrator to arbitrate the matter, as long as it is evident that there was an agreement to arbitrate, is based on what MacArthur J found in the case of *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (WLD). In that case MacArthur J had to consider whether the agreement between the parties was a written arbitration agreement as required by the Act. With reference to other legislation where specific requirements are to be found requiring that the agreement should be in writing **and signed** by the parties, the provision in arbitration Act differs to the extent that it only requires a

written agreement. The learned judge came to a conclusion that it was not necessary in that case for the parties to sign a written agreement and that it is enough if they have adopted and acted on it. (*Fassler*, *supra*, 828H). I was not referred to, neither could I find an other authority on this specific point.

[6] It is evident that the arbitration agreement in this matter was neither in writing, nor signed.

[7] Although the issue that was dealt with in *Vidavsky v Body Corporate of Sunhill Villas* of 2005 (5) SA 200 (SCA) is not the same as the issue to be decided here, Heher JA, with reference to several other decided cases, dealt with what an arbitration is and whether the legal consequence of the absence of jurisdiction makes it a nullity or merely voidable. In [14] at 207 B-F the learned judge of appeal said the following:

> *"An arbitration is, of course, a quasi-judicial proceedings: Estate Milne v Donohoe Investments (Pty) Ltd and Others 1967(2) SA 359 (A) at 373H. The precepts which govern the procedure in judicial proceedings apply to an arbitration: Shippel v Morkel and Another 1977 (1) SA 429 (C) at 434 A-E. The authorities are clear that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside. They are collected in Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961 (4) SA 415 (T). See also S v Absalom 1989 (3) SA*

154 (A) at 164 E-G. Lack of jurisdiction in arbitration proceedings renders an award invalid: Dickenson & Brown v Fisher's Executors 1915 AD 166 at 175; Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd 1992 (3) SA 825 (W) at 829 B-C. The same consequence applies to proceedings in which a summons has not been served (with which, it seems to me, the absence of notice of proceedings can be equated): see the Virginia Cheese case at 423 E-F and Dada v Dada 1977 (2) SA 287 (T) at 288 C-F and the authorities there cited. Absence of proper notice in arbitration proceedings has always been treated as a fatal flaw. See eg Newman v Booty NO (1901) 18 SC 116 (11 CTR 176); Hostshousen v Rademan's Executors and Others 1918 GWLD 19 at 23; Burns & Co v Burne (1922) 43 NLR 461; Sapiero and Another v Lipschitz and Others 1920 CPD 483 at 486; Field v Grahms-town Municipality 1928 EDL 135."

[8] In respect of Mr Stolze's reliance on the proceedings in court as having constituted a written agreement of arbitration, I had regard to the typed record of what occurred during that hearing. It is common cause that after the submissions by the counsel for both parties, the presiding judge removed the matter from the roll. On the typed version of what happened, it appears that both parties, who were legally represented, were at *ad idem* that the matter should not proceed because the parties had come to an agreement to postpone it and refer it to arbitration before first respondent. In this regard Mr Stolze, who also represented the respondents at that stage said:

> *"**Mr Stolze** my Lord, the parties has come to an agreement with regards to this matter that this matter be postponed and referred to Mr Jan Joubert for arbitration. Both parties had agreed to the appointment of Mr Jan Joubert as arbitrator. Mr Jan Joubert has accepted the appointment as arbitrator."*

After conferring with his apponent, Mr Stolze requested the court to remove the matter from the roll, which was done. This happened on 3 April 2007. It is common cause that the matter was eventually considered by the first respondent who describe, himself as "arbitrator" and who, in the absence of the applicant, proceeded with the arbitration and made an award, which the applicant now wants to set aside.

[9] It is evident from the record of the court proceedings of 3 April 2007 that the defended action was removed from the roll at the request of the applicant after it was indicated that the parties had come to an agreement to refer the matter to arbitration before the first respondent. That, however, does not constitute a written agreement to arbitrate in terms of the Act. It merely illustrates an intention to refer the matter to arbitration. It might even have been agreed that the matter shall be referred to arbitration, but what is lacking is the required written agreement describing the disputes which have to be arbitrated upon.

[10] The last contention by Mr Stolze why is should be regarded that there was a written arbitration agreement, is also based on the *Fassler* case, *supra*, namely

where the learned judge relied on the correspondence between the parties to constitute a written agreement. McArthur J said the following at 828 I in the *Fassler* case:

> *"In the present case there is little doubt that, having regard to all the correspondence between the parties, there was an agreement in writing."*

However, the application was dismissed on the basis that the learned judge could not decide the dispute on the papers.

[11] The type of correspondence between the parties in this case differs dramatically from the correspondence in the *Fassler* case, which led the learned judge to conclude that there was in fact a written agreement. It is clear from the particulars in the *Fassler* case that despite the correspondence between them, both parties participated in the arbitration by attending a preliminary hearing and further mediation. A dispute ensued to the effect that the matter could not have been resolved the papers, particularly whether a specific expert should have become involved at that stage. It is also reported that the arbitration, as well as the payment of the costs of the arbitration, came to an end on the specific date. Only when the costs order had to be enforced, one party refused to be bound by it on the basis that the expert was not afforded the opportunity to make representations. To sum it up, it appears that arbitration proceedings commenced with both parties participating therein. In this matter certain correspondence had been exchanged between the parties and it appears that they went so far as to agree on the first respondent to arbitrate the matter.

However, before the arbitration commenced a certain event intervened, namely that certain alleged unprofessional conduct of the applicant, who was their lawyer, had apparently been referred by the respondents to the Law Society of Namibia. Although this issue has in my opinion nothing to do with the matter at hand, it apparently led thereto that the applicant was no longer interested in participating in the arbitration process and made his view clear in writing on more than one occasion. Although he refers to a letter, which Mr Stolze also relied, namely that he does not regard himself further bound to the agreement, it does not provide an answer to the issue at hand which is whether there was a written agreement as required in terms Act. Consequently, I cannot decide in favour of the respondents that the correspondence constituted a written agreement in this matter.

[12] In my view, the requirement that there must be a written arbitration agreement is precisely to avoid as situation as what is currently in dispute, namely whether the parties did in fact agree to arbitrate the dispute(s) between them and to define such dispute(s). Once the parties have so agreed, they cannot backtrack. S 28 of the Act provides that unless the arbitration agreement provides otherwise, an award shall be final and binding on all the parties.

[14] To summarise, I am not persuaded by the arguments submitted by Mr Stolze that there was in fact a written agreement as required by the Act on which

the first respondent could arbitrate. In the light thereof it is not necessary to deal with any other contentions.

[13] In the result the following orders are made:

1) The arbitration award made the by first respondent on 30 June 2008 is set aside;
2) The second respondent is ordered to pay the costs of this application.

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MULLER, J

ON BEHALF OF THE APPLICANT: **MR UEITELE**

INSTRUCTED BY: **UEITELE & HANS LEGAL PRACTITIONERS**

ON BEHALF OF THE RESPONDENTS: **MR STOLZE**

INSTRUCTED BY: **CHRIS BRANDT ATTORNEYS**