

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

Case no: LCA 21/2014

In the matter between:

WINDHOEK TOOL CENTRE CC**APPELLANT**

And

ANDREAS NATANGWE PITT**FIRST RESPONDENT****KELVIN KAARIMUJE****SECOND RESPONDENT****ELVIS KANDOVAZU****THIRD RESPONDENT****EMMA NIKANOR****FOURTH RESPONDENT**

Neutral citation: *Windhoek Tool Centre CC v Pitt* (LCA 21/2014) [2015] NALCMD
2 (22 January 2015)

Coram: PARKER AJ**Heard:** 31 October 2014**Delivered:** 22 January 2015

Flynote: Labour law – Conciliation – Notice of conciliation meeting delivered to parties – On day of conciliation meeting appellants having failed to appear at meeting conciliator proceeded to conduct arbitration and made an award – Court held that a conciliator has discretion under s 83(2)(b) of the Labour Act No. 11 of 2007 to determine the matter in the absence of the party other than the party who referred the dispute to the Labour Commissioner who fails to attend the meeting – But a conciliator has no power to turn a conciliation meeting into arbitration

proceedings or dovetail an arbitration proceeding with a conciliation meeting at which no determination is made and make an award in terms of s 83(2)(b) of the Labour Act – Court held further that the clause ‘determine the matter if the other party fails to attend conciliation meeting’ in s 83(2)(b) of Act No. 11 of 2007 means determine the matter by conciliation; nothing more, nothing less – Court found that by failing to determine the matter by conciliation the conciliator acted ultra vires s 83(2)(b) of Act – Consequently, the court concluded that the conciliator is wrong and she misdirected herself very seriously on the law and is such a kind that can lead to the conclusion that there has been a failure of justice and which the court cannot overlook – Consequently, the arbitration award was set aside.

Summary: Labour law – Conciliation – Notice of conciliation meeting delivered to parties – On day of conciliation meeting **appellants** having failed to appear at meeting conciliator proceeded to conduct arbitration and made an award – The appellant failed to attend the conciliation meeting – Conciliator proceeded to conduct arbitration and make an award without determining the matter by conciliation in the circumstances as required by s 83(2)(b) of the Labour Act – Court found that by so acting the conciliator acted ultra vires s 83(2)(b) of the Act – Court held that in any case a conciliator cannot make an award that is enforceable under the Act – Court concluded that the conciliator misdirected herself very seriously on the law – And it is such a misdirection that can lead to the conclusion that there has been a failure of justice and which the court cannot overlook – Consequently, the appeal succeeded and the arbitration award was set aside.

ORDER

- (a) The arbitration award in case no CRWK 49-14, dated 7 April 2014 is set aside.
- (b) I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] This appeal is instituted by the appellant, represented by Mr Barnard, in terms of 'Amended notice of Appeal in Terms of Section 89(1) of the Labour Act, 2007'. The appeal is on questions of law, and grounds of appeal are as set out in para 3 of the notice. The appellant appeals 'against the entire arbitration award' dated 7 April 2014, made in an arbitration held on 6 March 2014 in case no. CRWK 49-14.

[2] I note that Mr Barnard, on behalf of the appellant, abandoned grounds 2 and 3; and so the appeal proceeded on grounds 1 and 4 only. For ease reference, I set out, hereunder, grounds 1 and 4:

Ground 1

The arbitrator proceeded into arbitration immediately after the conciliation, without notice to that effect to the appellant.

Ground 4

The arbitrator incorrectly and without grounds in law made a costs order against the appellant.

[3] As I have said previously, the appellant appeared at the hearing of the appeal by counsel. I am satisfied that the application for a hearing date and the notice of set down were served on the respondents in terms of the Labour Court Rules ('the rules'). Despite all this, the respondents did not appear in person or by counsel for the hearing of the appeal, and no explanation was placed before the court as to the reasons why there was no appearance by the respondents. As is the practice in the court, the court instructed the court orderly to announce three times the names of the respondents through the corridors of the court up to the temporary main gate. The orderly reported that there had been no response. Based on these considerations I decided to hear the appeal.

[4] Ground 1 relates to the arbitrator proceeding with arbitration on 6 March 2014 without notice that the proceeding would entail arbitration proceedings, and the arbitrator not granting a postponement to enable the appellant to attend. The arbitrator qua conciliator had given notice to the appellant (respondent then) and the

respondents (applicants then) that the matter was set down for 'conciliation (meeting) hearing' before Ms Emma Nikanor at 09h00 on 6 March 2014 in the offices of the Labour Commissioner.

[5] It is crucial to note that as far as the Labour Act 11 of 2007 and the rules are concerned, 6 March 2014 was for conciliation only: the notice says so in clear and unambiguous terms. In this regard, in terms of s 83(2)(b) of the Labour Act a conciliator has discretion to determine the matter if the other party to the dispute fails to attend the conciliation meeting, as in the present matter. But the conciliator has no power under s 83(2)(b) of the Labour Act to turn a conciliation meeting into an arbitration proceeding without more on the day a conciliation meeting is set down by notice to take place; neither has a conciliator the power on a day set down for a conciliation meeting to dovetail arbitration proceedings with such conciliation meeting, where the conciliator has not determined the matter by conciliation, and make an arbitration award.

[6] In this regard, it should be understood that the clause 'determine the matter if the other party to the dispute fails to attend a conciliation meeting' provided for in s 83(2)(b) of the Labour Act, as is in the instant matter, means 'determine the matter' by conciliation in the absence of such party; nothing more, nothing less. In the instant case, on the record it is not clear what the conciliator did about the conciliation she was seized with. That is to say; there is nothing on the record tending to establish that the appellants (ie 'the other party', to use the words of s 83(2)(b) of the Labour Act) having failed to attend the conciliation meeting the conciliator 'determined' the matter by conciliation as provided for in s 83(2)(b) of the Labour Act. Indeed, the arbitration award that was made is completely silent as to whether the conciliator-cum-arbitrator determined by conciliation the matter as was expected of her under s 83(2)(b) of the Labour Act.

[7] Following upon her refusal to determine the matter by conciliation – as was expected of her by the Act – the conciliator metamorphosed the conciliation meeting into arbitration proceeding and metamorphosed herself into an arbitrator and proceeded to conduct an arbitration and make an award – all in one day, 6 March 2014, and all in the absence of the appellant. I find that the conciliator acted ultra vires the Labour Act, particularly s 83(2)(b) of the Act. That being the case, I conclude that the conciliator-cum-arbitrator was wrong. She misdirected herself very

seriously on the law, and it is such a kind of misdirection that can lead to the conclusion that there has been a failure of justice and which the court cannot overlook. It follows that the so-called arbitration award is tainted and it cannot be allowed to stand. In any case, even if the conciliator had determined the matter by conciliation she could not, as Mr Barnard submitted, have made an award contemplated in Part C of Chapter 9 of the Labour Act. See *Classic Engines CC v Nghikofa* 2013 (3) NR 659, paras 6 and 7.

[8] Based on these reasons and conclusions it serves no purpose to consider ground 4. The conclusions I have reached on ground 1 is dispositive of the appeal. In my judgment, therefore, the appeal succeeds; whereupon I make the following order:

- (a) The arbitration award in case no CRWK 49-14, dated 7 April 2014 is set aside.
- (b) I make no order as to costs.

C Parker
Acting Judge

APPEARANCES

APPELLANT: P C I Barnard
Instructed by Mueller Legal Practitioners, Windhoek

RESPONDENTS: No appearance