REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

HC-MD-LAB-APP-AAA-2020/00064

In the matter between:

PETRUS MWATANGWE FESTUS **APPELLANT**

and

BANK WINDHOEK LTD **1ST RESPONDENT**
THE LABOUR COMMISSIONER **2ND RESPONDENT**
MAIBA BESTER SINVULA **3RD RESPONDENT**

Neutral Citation: *Festus v Bank Windhoek Ltd* (HC-MD-LAB-APP-AAA-2020/00064 [2022] NALCMD 7 (28 February 2022).

CORAM: MASUKU J

Heard: 7 February 2022
Delivered: 28 February 2022

Flynote: Labour Law – jurisdiction of court where there is non-compliance with s 89 of the Labour Act – Practice – the importance of filing a notice of motion and consequences of not doing so – service of process in labour matters - what constitutes a notice of appeal according to s89, read with, the rules of Court and the arbitration and conciliation rules?

Summary: The appellant was dismissed by the respondent, Bank Windhoek Ltd. He however failed to file a notice of appeal within the prescribed time period. He therefor applied for condonation for the late filing of same. The respondent took issue and argued that the court does not have jurisdiction to hear and determine the application for condonation for the reason that the appellant in any event failed to file a rule-compliant notice of appeal.

Held: that although the appellant did not fully comply with the service required by the rules, it was, however apparent that the respondents did become aware of the application and in the light of the result reached, the issue of service would not play a decisive role in the determination of the matter.

Held that: the requirement for an applicant to file a notice of motion is not an idle, inconsequential or pedantic requirement designed to irritate an applicant. It serves the purpose of delineating the nature, scope and character of the relief sought from the court.

Held further that: a respondent, who wishes to raise a point of law, such as the lack of jurisdiction, must state the basis or bases of the contention in the notice to raise points of law. It is improper and unfair to the applicant and the court for the particulars of the contention of lack of jurisdiction to appear for the first time in heads of argument.

Held: that a party is entitled, in terms rule 6(9)(b)(ii) of the court's rules, to file a notice to raise points of law. In that event, the failure to file an answering affidavit is not fatal to the proceedings, neither is it necessary.

Held that: that the failure by an appellant to file a rule-compliant notice of appeal means that there is no proper notice of appeal before court to speak of. In the instant case, because there was not rule-compliant notice of appeal, the court did not have the jurisdiction to entertain the application for condonation filed by the appellant.

The point of law of absence of jurisdiction was thus upheld, with no order as to costs.

ORDER

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1. The Respondent's point of law of absence of jurisdiction is upheld.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] The issue submitted for determination in this matter is the sustainability of a notice issued by the 1st respondent in terms of rule 9(b) (ii) of the rules of this court, namely that this court lacks jurisdiction to hear and determine this matter.

Background

[2] The facts giving rise to the above question can be summarised as follows: the appellant, Mr Petrus Mwatangwe Festus, an adult Namibian male, was employed by the 1st respondent, Bank Windhoek Ltd as a senior credit officer at its Katima Mulilo branch. This was from September 2011.

[3] I will, for ease of reference, address Mr. Festus as the 'appellant' and Bank Windhoek Ltd, as 'the respondent'. I do the latter in acknowledgment of the fact that the other respondents, namely, the Labour Commissioner and the arbitrator, cited as the 2nd and 3rd respondents, respectively, have not opposed the proceedings. This effectively leaves the Bank Windhoek Ltd, as the only party to oppose the relief sought.

[4] On 1 August 2018, the appellant was charged with misconduct, it being alleged that he had perpetrated a fraud on 8 May 2018. He was subjected to an internal disciplinary hearing, which resulted in his summary dismissal. His appeal in terms of the respondent's internal policies failed and the dismissal was thus upheld.

[5] Aggrieved by the dismissal, the appellant, as he is entitled to, filed a dispute with the Labour Commissioner in which he sought reinstatement and compensation. Because the dispute could not be resolved at conciliation, it escalated to arbitration where the 3rd respondent presided. After the close of the arbitration proceedings, the arbitrator found that the appellant's dismissal was substantively and procedurally fair. He thus dismissed the claim for unfair dismissal and made no order as to costs on 14 August 2020.

[6] The appellant filed a notice of appeal against the award and the grounds of appeal and these are dated 3 November 2020. By notice, dated 15 January 2021, the respondent filed a notice in terms of rule 9(b)(ii) of this court's rules, alleging that this court does not have the jurisdiction to hear and determine the application and/or grant the relief sought by the appellant.

[7] I must criticise the respondent's legal practitioners in view of the fact that the notice to raise the point of law is devoid of reasons why it is claimed that the court lacks jurisdiction as alleged. It is necessary for a party in the respondent's position to clearly state the bases upon which it is claimed that the court lacks jurisdiction. This enables the respondent and the court to appreciate the reasons therefor and also assists in the preparation and research of the issue at hand.

[8] It is unseemly that the grounds alleged for lack of jurisdiction must be seen for the first time in the heads of argument. Heads of argument are designed to serve a different purpose and are not the initial and final conveyers of the points of law raised. That must be left either to affidavits or notices to raise points of law, as the case may be.

[9] It is in the heads of argument that it becomes apparent for the first time why the respondent alleges that the court lacks jurisdiction. It alleges that the application

for condonation of the late filing of the appeal was never delivered and/or filed as required in terms of rule 6. That being the case, there is no application for condonation properly so called.

[10] The respondent further urges the court to find that it lacks jurisdiction because no appeal was noted at the time the application for condonation of the late filing of the appeal was brought by the applicant.

[11] Needless to say, the appellant opposes the legal contention that this court lacks jurisdiction in the manner alleged by the respondent or at all. Whilst the appellant acknowledges that it filed its notice of appeal 72 days after the stipulated date in terms of the Labour Act, 2007, the court has a discretion to condone the delay.

[12] I do not wish to burden the judgment with further argument. It is necessary that regard is had to the papers filed and the provisions of the Act, read with the relevant rules of this court. A consideration of all the above documents should place the court in a proper position to decide the matter.

Determination

[13] Before venturing into the application for condonation, it is appropriate in my considered view to deal with the contentions raised by the respondent, namely that the court has no jurisdiction and the bases argued in regard to that legal contention.

[14] First, it is alleged by the respondent that the appellant should be non-suited for the reason that he has failed to comply with the provisions of rule 6 of this court's rules. This rule deals with application and provides the following in material parts:

'6 (1) Ever application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.
(2) . . .
(3) The notice of motion must be on Form 2.

(4) The original notice of motion, together with all annexures thereto, must be filed with the Registrar after service of a true copy thereof upon every party to whom the notice of application is to be given.'

[15] It is the respondent's argument that the application for condonation was not delivered as required by the rules on the relevant parties. In dealing with this requirement, reference was made to rule 1 of the court's rules, which defines 'delivery' to means 'service of copies on all parties and filing the original with the registrar.'

[16] Having regard to the papers filed, Mr. Muchali for the appellant, I am of the view that there is no proper response made to the respondent's contention. Mr. Muchali argues that the court on 21 October 2021 ordered the parties to file heads of argument and that it thereby granted the application for condonation, by implication, I would venture to add.

[17] I do not agree with the contention by Mr. Muchali and it does not correspond with the court order issued on 21 October 2021. Having read that court order, the court did not make any order granting the application for condonation. All it did was to put the parties to terms regarding fling of their respective heads of argument and thereafter postponed the matter to 09 December 2021 for allocation of a date of hearing. I accordingly do not agree that the issue of whether there is a proper application for condonation was decided by the court.

[18] It is clear that there was no service of the application for condonation in terms of the rule 6 quoted above. As such, it was not delivered in terms of the rules, resulting in coming to what is an inevitable conclusion that there is no proper application for condonation before court. Where there is no service or delivery in terms of the rules, there can be no proper application before court.

[19] I would, however, considering that the 'application' did come to the notice of the respondent, find that although there was no strict compliance, there may have been substantial compliance, considering that the respondent got aware of the application and managed to file its papers. I do so in the peculiar circumstances of

this case because of the important findings that I make regarding the other issues below. This is not to be considered, in any way, shape or form, to be an encouragement of parties not to comply with mandatory provisions of the rules.

[20] There is, however, one aspect in respect of which the appellant did not comply with the relevant rule. Rule 6(1) states in peremptory terms that an application must be brought on notice of motion, supported by an affidavit. I have checked the documents filed on e-justice but I have not seen any notice of motion, although the affidavit which should accompany the notice of motion is filed.

[21] The requirement for the filing of a notice of motion is not an idle, inconsequential or pedantic requirement by the rules, meant to irritate or unnecessarily burden an applicant. A notice of motion serves the specific purpose of notifying the court and the respondent of the exact nature, scope and character of the relief that the applicant intends to obtain from the court.

[22] It is accordingly important that applicants, intent on filing applications, should comply with the mandatory provisions of rule 6(1) above. In the absence of a notice of motion in the instant case, it is accordingly clear that there is no proper application before court to speak about. There is just a bundle of papers uploaded on e-justice and which do not meet the requirements of an application. There is accordingly no application before court for determination.

[23] I should point out that even if the court would have not exercised its discretion on the issue of service and agreed that there was no service or delivery of the application in terms of the rules, it is however clear that it cannot be properly argued that that fact deprives this court of jurisdiction. The absence of a notice of motion, as found above, also does not render the court bereft of jurisdiction to deal with the matter. These deficiencies may cause the court to strike the matter from the roll or dismiss it in its wisdom. They certainly do not serve to deprive it of jurisdiction.

Absence of notice of appeal

[24] Mr. Boltman, for the respondent, also argued that there is no proper notice of appeal before court and as such, the court may not properly exercise its powers of condonation. In this submission, the court was referred to *African Consulting Services CC v Gideon*.[1] At para 6-9 the court, per Mr. Justice Parker, reasoned as follows:

'[6] (1) An appeal brought under s89 (1)(*a*) of the Act is an appeal properly so called if the notice of such appeal against an arbitration tribunal award meets all the substantial and peremptory requirements prescribed in rule (1)(*c*), read with subrule (3)(*a*) and (*b*) of rule 17 of the Labour Court Rules. . .

[7] Rule 17 of the Rules of the Labour Court provides:

(1) This rule applies to an appeal noted against –

(a) a decision of the Labour Commissioner made in terms of the Act;
(b) a compliance order issued in terms of section 126 of the Act; and
(c) an arbitration tribunal award, in terms of section 89 of the Act.

(2) An appeal contemplated in subrule (1)(*a*) and (*b*) must be noted by delivery of a notice of appeal on Form 11, setting out concisely and distinctly which part of the decision, or order is appealed against and the grounds of appeal, on which the appellant relies for the relief sought.
(3) An appeal contemplated in subrule (1)(*c*) must be noted in terms of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 262 of 31 October 2008 (hereafter "the conciliation and arbitration rules") and the appellant must at the time of noting the appeal –
(a) complete the relevant parts of Form 11;
(b) deliver the completed Form 11 together with the notice of appeal in terms of those rules to the registrar, the Commissioner and other parties to the appeal."

[25] At para 6 of the same judgment, having discussed the relevant provisions, the learned judge concluded the treatise as follows:

[1] (LCA 60/2012) [2013] NALCMD 43 (26 November 2013).

'According to the Labour Act, a party to an arbitration who wishes to appeal against an award made in the arbitration must do so in terms of s 89 of the Labour Act, rule 17 of the rules of the court and rule 23 of the conciliation and arbitration rules. In that regard, the appellant must attach duly completed Form 11 and Form LC 41 to the notice of appeal before the notice is delivered in terms of the rules of the court and the conciliation and arbitration rules. These requirements are indubitably peremptory and necessarily required, considering the information and details that the appellant must supply on the Forms.'

[26] Having regard to the notice of appeal filed by or on the appellant's behalf, it is worth pointing out that there was no compliance with the requirements mentioned in the above quotation, namely, the Act, the rules of this court and the conciliation and arbitration rules. In particular, there was no compliance with the mandatory provisions of rule 17(2) and (3) of this court's rules, which are peremptory.

[27] As such, and on the authority quoted immediately above, there is no proper notice of appeal before court. The existence of a properly drafted and rule compliant notice of appeal is a *sine qua non* for the court being able to exercise its condonation powers to condone a notice of appeal that was filed late.

[28] To drive the point home, Mr. Justice Parker in *Pathcare*[2], reasoned as follows, at para [8]:

'Where there is no proper notice of appeal, and accordingly there is no appeal, as is in the present proceeding. It matters tupence if what is masquerading as a notice of appeal was delivered within the statutory time limit. There is simply no appeal that has been noted; and as a matter of law and logic, if there is no appeal there is nothing whose late noting the court may condone; there is simply nothing for the court to condone in terms of s89(3) of the Act.'

[29] It is accordingly clear, having regard to *Pathcare* that the appellant in the instant matter finds himself in double jeopardy, so to speak. I say so for the reason that he did not file the appeal on time, hence the application for condonation. Secondly, there is no proper notice of appeal, because the one purported to be filed,

[2] *Pathcare Namibia (Pty) Ltd v Du Plessis* (LCA 87/2011) NALCMD 28 (29 July 2013).

does not comply with the peremptory requirements mentioned in *Africa Consulting* quoted above.

[30] Finally, on this issue, Smuts J held the following in *Bobo v Ohorongo Cement (Pty) Ltd*[3] at para 19:

> 'This court has the power in s 89(3) to condone the late filing of an appeal on good cause shown. The ordinary meaning of that statutory provision plainly presupposes and is premised upon the noting of an appeal which is late, as was held by Parker AJ. I agree that an application for condonation under s89(3) can thus only be brought once a notice of appeal has been filed out of time for the purpose of seeking condonation for its late filing.'

[31] It appears to me, having regard to the foregoing, that the respondent's point of law holds water. The court's discretion to condone the late noting of an appeal stems from the provisions of s 89(3). If there is no proper notice of appeal filed, the court does not have jurisdiction to exercise its powers accordingly. In the instant case, because of the finding that there is no proper notice of appeal, the court's hands are tied and it cannot condone the non-compliance. The point of jurisdiction is accordingly well taken and must succeed.

Failure to file answering affidavit

[32] I do not intend to dedicate much time and effort to this point for it is clearly meritless. Mr. Muchali argued that the respondent's choice to raise a point of law and not file an affidavit is irregular. It cannot be so when proper regard is had to rule 6(9)(b)(ii) of this court's rules. Where a party does not wish to plead over on the merits but wishes to raise a point of law only, it is empowered under the said rule to only raise a point or points of law, as the case may be. It is an election that the respondent took in this matter and apparently to very good, final and decisive effect from the findings made by the court above.

Conclusion

[3] *Bobo v Ohorongo Cement (Pty) Ltd* (LC 81/2013) [2014] NAHCMD 7 (19 February 2014).

[33] In view of the discussion above, together with the conclusions reached, it is appropriate that the respondent's point of law should be upheld. It has a lot of merit and the appellant has failed to provide any answer to it that would preclude the dismissal of the application.

Costs

[34] This is a labour matter. In terms of s118 of the Act, costs may only be granted where there is vexatious or frivolous conduct on the part of a litigant in either instituting, defending or proceeding with a claim or defence. There is not allegation of such in this matter nor am I persuaded that there is, on the papers and the conduct of the parties, any reason to issue an order for costs.

Order

[35] In consequence of what has been stated above, I am of the considered view that the following order meets the justice of this case:

1. The Respondent's point of law of absence of jurisdiction is upheld.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPELLANT:	J. Muchali Of Jermaine Muchali Attorneys
RESPONDENT:	J. Boltman Of Kopplinger-Boltaman