



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

CASE NO: LC 72/2013

In the matter between:

MORNÉ VAN NIEKERK

APPLICANT

versus

MB TRUCK SPARES

RESPONDENT

Neutral citation: *van Niekerk v MB Truck Spares (LC 72/2013) [2013]*
NALCMD 20 (20 June 2013)

CORAM: UNENGU AJ

Heard on: 27 May 2013

Delivered on: 20 June 2013

Flynote: Labour Court Rules and Practice – Application to stay operation of Arbitrators award – Notice of appeal defective – No appeal noted.

Summary: Urgent application for stay of operation of the Arbitrator's award pending the outcome of the appeal. Applicant not completing form LC 41 as prescribed by Rules relating to the Conduct of Conciliation and Arbitration – No appeal before Court. First point *in limine* by respondent upheld and application dismissed.

RULING

UNENGU AJ

[1] The applicant, on an urgent basis had applied for relief in the following terms:

1. "That the execution of the award so given by the Arbitrator on 22 April 2013 be stayed pending the outcome of the appeal so noted by the applicant on or about 20 May 2013.
2. Such further and/or alternative relief as the Honourable Court deem appropriate." Further notice was given that the affidavit of Kurt Otto Schimmel along with the annexures thereto will be used in support of the application.

[2] The respondent worked for the applicant as a Buying and Stock Controller when a dispute arose between fellow employees of the applicant and the respondent. As a result of this dispute, the respondent left the premises of the applicant but returned back to the premises the following day with his baby in his arms. What transpired thereafter was the subject matter before the Arbitrator.

The respondent claimed that he was unfairly dismissed and that the dismissal was neither substantive nor procedurally fair.

[3] The applicant, on the other hand opposed the respondent's claim and alleged that the respondent was not dismissed from his work but had resigned. Therefore, the issue for determination by the Labour Commissioner was whether the respondent was dismissed or had resigned from his work.

[4] First, the dispute was referred for Conciliation but failed. Arbitration proceedings then ensued, which proceedings culminated in the arbitrator finding in favour of the respondent and ordered an award of compensation in terms of section 86(15)(e) of the Labour Act¹. That award so granted in his favour, the respondent wants now to enforce and as a result thereof, the applicant has approached this Court, on an urgent basis to stay the execution of such award pending the outcome of the appeal.

[5] Meanwhile, the respondent is raising points *in limine* against the applicant's application. The first point raised is that the applicant failed to note an appeal against the arbitration award, prior to the filing and noting of this application, as is required by the Labour Act and/or the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (Con/Arb Rules).

¹ Act No. 11 of 2007.

[6] The second point is that the applicant purports to appeal against factual findings of the 2nd respondent (*sic*). (There is no 2nd respondent in this application).

[7] The third and last point is that the applicant's notice of motion does not comply with the requirements of the Rules of this Court in that his notice of motion is not on Form 2, and that the application does not bear the necessary revenue stamps as required by the Rules of the Court.

[8] The law regulating appeals of arbitration awards in terms of the Labour Act, is section 89 of the Act and provides as follows:

“(i) 89(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 –

(a) on any question of law alone; or

(b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law, or mixed fact and law.”

[9] Subsection (2) on the other hand provides that a party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on that party. Subsections (3) and (4) deal with condonation of the late noting of appeals on good cause shown and applications

for orders reviewing and setting aside of awards in situations where a party to a dispute has alleged a defect in any arbitration proceedings respectively.

[10] The Rules of the High Court (Labour Court Rules), in Rule 17 provide that:

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

(a) ...

(b) ...

(c) an arbitration tribunal award, in terms of section 89 of the Act.

[11] As this appeal is against an arbitration award noted in terms of section 89 of the Act, it is apposite to refer also to sub rule (3) of Rule 17 which states as follows:

“(3) An appeal contemplated in sub rule (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 the noting of the appeal –

(a) complete the relevant parts on Form 11;

(b) deliver the completed Form 11, together with the notice of appeal in terms of these rules, to the Registrar, the Commissioner and the other parties to the appeal.” (emphasis added)

[12] I must mention at this juncture that it has been agreed upon by the parties

through their legal representatives Messrs Mouton and Boltman for the applicant and respondent respectively, to deal with the points *in limine* first and if upheld, that will dispose of the application, but if not upheld, the hearing on the urgency and merits of the application would then follow.

[13] The importance of the rules have been stated by the High Court as follows²:

“The Rules of the Court are an important element in the machinery of justice. Failure to observe such rules can lead not only to the inconvenience of immediate litigants of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for proper application of the law that the Rules of the Court which have been designed for that purpose can be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance”. I cannot do otherwise but to agree with what has been stated in the *Swanepoel* matter. Litigants must comply with the rules to avoid inconveniences and unnecessary delays of cases.

² *Swanepoel v Marais and others* 1992 NR 1 at 2J-3A

[14] I have indicated above the law applicable to the noting of an appeal against arbitrator's award as well as the procedure to be followed, the forms to be filled by the appellant, and the importance of compliance of the Rules of Court.

[15] It is trite law that when an appeal is noted, the appeal operates to suspend any part of the award that is adverse to the interest of an employee, but does not operate to suspend any part of the award that is adverse to the interest of an employer³

[16] However, in terms of section 89(7) an employer against whom an adverse award has been made, may apply to the Labour Court for an order varying the effect of sub section (6) for the court to make an appropriate order.

[17] Now, in view of the authority referred to above, can the Court find that there is an appeal noted by the applicant against the arbitration award prior to the filing of this application to vary the adverse effect of the award against him? When I speak of an appeal noted against the award, I mean an appeal properly noted as required by the authority referred to by me. In my view, not.

³ Section 89 (6) (a) and (b)

[18] Mr Boltman submitted and argued that the noting of an appeal against the award must precede the application for the suspension of the operation of the adverse effect of the award, made against an employer. In this case, the applicant. He contended that in the present application an appeal has not been noted because Form 11 delivered was not accompanied by Form LC 41.

According to him the requirements for the noting of a proper appeal have not been met. These requirements, he said are those contained in the Labour Rules, Rule 17(1)(c) read with Rule 17(3).

[19] He further argued that an appeal against an arbitrator award must be made on form LC41 as per Rule 23(2)(a) to (d) of the Conciliation Arbitration Rules, and be delivered with form 11. In this present matter, he submitted, no appeal in terms of the Conciliation Arbitration Rules is before Court and as such, no appeal has been noted. He referred the Court, as authority, to a few cases of this Court and one such case is *Nedbank of Namibia Ltd v Louw*⁴, wherein Henning, AJ (as he then was) comprehensively discussed the provisions of sections 86, 87 and 89 of the Labour Act when dealing with a similar appeal. He further cited numerous other cases of this Court which cases did not deal with an application to stay the effect of the award pending an appeal but rather with different issues.

⁴ LC 66 /2010 [2010] NALC 7 (30 November 2010)

[20] I think there is substance in counsel's submission. The applicant has a high mountain to climb. The provisions of Rule 17(1)(c) read with sub rule (3) thereof are mandatory and any failure to comply therewith, will result in no proper noting of an appeal as envisaged by the rule.

[21] In fact, any intended appeal noted against an arbitration tribunal award in terms of section 89 of the Act, must be noted in accordance with the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 262 of 31 October 2008. The applicant, therefore, must follow the procedure in Rule 23(1) and (2) of the Conciliation and Arbitration Rules indicated above. The appeal must be noted by delivery within 30 days of the party's receipt of the arbitrator's award, to the Labour Commissioner on Form LC 41.

[22] In the present appeal, notice of the appeal was not given on Form LC 41 rendering the appeal not properly noted as Mr Boltman argued. This omission by the applicant forms the core objection raised in the first point *in limine* by the respondent. Mr Boltman stressed that non-compliance of the requirements stipulated in the Rules relating to the conduct of the Conciliation and Arbitration before the Labour Commissioner has the effect of an appeal not to have been noted properly. He stressed that there is no appeal before Court in this

application. He then requested the Court to dismiss the application on that point alone.

[23] Mr Mouton on the other hand argued that there is nothing in the Rules suggesting that an appeal must be noted prior to the application proceedings to stay the adverse effect of the award. He submitted that the notice of appeal was lodged at the same time with the application.

[24] I have already indicated above that the notice of appeal delivered by the applicant was not done in accordance with Rule 23(2) relating to the conduct of the Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 202 on 31 October 2008 – known as the Conciliation and Arbitration Rules – making the appeal not properly been noted. It is not denied, in any event, that Notice of Appeal was delivered at the same time together with the urgent application. What is denied is the validity of such notice due to not being delivered on Form LC 41.

[25] According to Mr Mouton, the case law listed by Mr Boltman only states that, or is to the effect, that an application for stay of proceedings cannot hang in the air, but to be supported by the noting of an appeal. He distinguished the facts of the *Nedbank* matter and those in this application and said that in the *Nedbank* matter, no Notice of Appeal was filed at the time of the application for stay. He indicated to the Court that in the present application, the Notice of Appeal was, in

any event, faxed to the offices of the Legal practitioners of the respondent. In conclusion, Mr Mouton – submitted that the first point *in limine* of the respondent is baseless as it was an urgent application, and that there was a prayer in the Notice of Motion asking for the forms of service relating to time and the Rules of Court be dispensed with.

[26] It is not denied, that Notice of Appeal was delivered together with the urgent application.

[27] I agree that it is an urgent application brought before Court, which by its nature should be treated differently from normal applications. The Court can condone the non-compliance of the rules in urgent applications but only if a proper application has been filed. The time periods and the form of service, if urgency has been established by the applicant, the Court will condone the non-compliance of the Rules.

[28] However, the objection by the respondent in the present application is that there is no application for stay before Court due to the error made by the applicant when it delivered the Notice of Appeal. The objection goes further and state that the application be ignored because the appeal was incorrectly noted by not following what is provided for in the Act and the Rules.

[29] Therefore, it is incorrect for Mr Mouton to argue that there is nothing in the rules suggesting that an appeal must be noted prior to the application proceedings. One has to read Rule 17(1)(c) together with section 89(6); (7); (8) and (9) to understand what the law requires of the applicant when applying for an order from the Labour Court to vary the effect of an adverse award made against him or her.

[30] It is my view that the respondent has raised a valid point in his first point *in limine* which must be upheld, and the application to be dismissed on that point alone. Therefore, in view of the conclusion I have reached as aforesaid, it is not necessary to deal with the remaining two points *in limine*.

[31] Accordingly, I make the following order:

1. The first point *in limine* raised by the respondent is upheld;
2. The application is dismissed.

E P UNENGU

Acting Judge

APPEARANCES

APPLICANT:

MR BOLTMAN

PRACTITIONER FOR THE APPLICANT

GF KÖPPLINGER

LEGAL PRACTITIONERS

RESPONDENT:

MR MOUTON

PRACTITIONER FOR THE

RESPONDENT

MUELLER LEGAL PRACTITIONERS