REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 87/2011

In the matter between:

PATHCARE NAMIBIA (PTY) LIMITED **APPLICANT**

and

SALLY HENDRINA DU PLESSIS **FIRST RESPONDENT**
TUULIKI M SHIKONGO N.O **SECOND RESPONDENT**
LABOUR COMMISSIONER **THIRD RESPONDENT**

Neutral citation: *Pathcare Namibia (Pty) Limited vs Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013)

Coram: PARKER AJ
Heard: **12 July 2013**
Delivered: **12 July 2013**
Reasons: **29 July 2013**

Flynote: Labour law – Labour Court's discretionary power to condone appellant's late noting of an appeal on good cause shown – Such power is restricted to an appeal the notice of which complies with the peremptory requirements under s 89 of the Labour Act 11 of 2007 and the applicable rules – Where the notice of appeal is not in conformity with the Labour Act and the applicable rules and it is noted late, there is nothing for the court to condone – There is no appeal whose late noting the court may condone.

Summary: Labour law – Labour Court's discretionary power to condone an appellant's late noting of an appeal on good cause shown in terms of s 89(3) of the Labour Act 11 of 2007 – The court's discretionary power should be exercised only where there is a proper notice of appeal and what is lacking is its noting within the statutory time limit under s 89(2) of the Labour Act 11 of 2007 – Court held that *in casu* the notice of appeal does not satisfy the requirements of subrules (1)*(c)* and (3) of rule 17 of the Labour Court Rules and so there is no notice of appeal and *a priori* no appeal – Consequently, the court held that the court is not entitled to exercise a discretion under s 89(3) of the Labour Act and condone such notice for in law and logic there is no appeal whose late noting the court may condone – Consequently the court dismissed the condonation application.

JUDGMENT

PARKER AJ:

[1] In this matter the appellant (employer) lodged what it considered to be a notice of appeal against an arbitral award made by an arbitrator, but that notice is not accompanied by Form 11 and Form LC 41, described in para 4 et al of this judgment. That is not the only headache of the appellant. The so-called notice was lodged outside the time limit prescribed in s 89 of the Labour Act 11 of 2007. Thus, in this application the applicant (appellant) sought an order in terms appearing in the notice of motion. It is primarily an application, praying the court to condone the applicant's (employer's) non-compliance with the Labour Court Rules ('the rules') in the noting of an appeal to the Labour Court ('the court') and a concomitant order to reinstate the appeal, as well as certain connected and incidental relief.

[2] Ms Visser represents the applicant (the appellant), and Ms De Jager the first respondent (the respondent). The respondent moved to reject the application. After hearing Ms Visser and Ms De Jager I dismissed the application, with no order as

costs; and said then that my reasons for the decision would follow in due course. These are my reasons.

[3] Appeals under the Labour Act 11 of 2007 ('the Act') are governed by s 89 of the Act; and s 89(3) gives the court the discretionary power to condone 'the *late noting* of an appeal on good cause shown'. (Italicised for emphasis.) The discretion is not an absolute discretion; it is a guided discretion, that is, in the exercise of the discretion the court may grant a condonation application only if, in the opinion of the judge, the applicant has shown good cause for the applicant's failure to note the appeal within the time limit prescribed by s 89(2) of the Act. What this means is that the court may exercise its discretion in favour of granting an application to condone only if the appellant has shown 'good cause'. Furthermore, and significantly; what the court has discretionary power to condone is the 'late' noting of an appeal; not anything else.

[4] Thus, what an applicant may call upon the court to condone is the late noting of a proper appeal whose noting is outside the statutory time limit. If the appeal that was noted late is not a proper appeal, there is nothing for the court to condone in terms of s 89(3) of the Act. And what is a proper appeal? It is an appeal the notice of which meets all the substantive and peremptory requirements prescribed in rule 17 of the rules. In the instant case, the relevant rule is subrule (1)*(c)*, read with subrule (3)*(a)* and *(b)*, of rule 17. In terms of rule 17(3), an appeal against an arbitration award, in terms of s 89 of the Act, as is in the instant case –

'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 (…), 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 (Labour) Commissioner and the other parties to the appeal.'

[5] It follows from these provisions of the Act that that is not all. According to rule 23 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 ('the conciliation and arbitration rules') –

> '(1) Any party to an arbitration may, in accordance with subrule (2), note an appeal against any arbitration award to the Labour Court in terms of section 89 of the Act.
>
> (2) An appeal must be noted by delivery, within 30 days of the party's receipt of the arbitrator's award, to the Labour Commissioner of a notice of appeal on Form LC 41 ….'

[6] Thus, according to the Labour Act, a party to an arbitration who wishes to appeal against the arbitration 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.

[7] It follows inevitably that where a notice of appeal does not have duly completed Form 11 and Form LC 41 attached to it when the notice is delivered there is no notice of appeal properly so called in terms of the Act, and *a priori* no appeal. This is so whether such notice is delivered within the time limit in accordance with the Act and the rules of the court and the conciliation and arbitration rules. It is not a question of whether in delivering only a nude notice without attaching to it duly completed Form 11 and Form LC 41 the respondent has been prejudiced, as Ms VIsser appears to propose. The irrefragable fact that remains is that where duly completed Form 11 and Form LC 41 are not attached to a notice of appeal no notice of appeal has been delivered and, *a priori*, there is no appeal noted in terms of the Labour Act.

[8] In all this it must be remembered that what s 89(3) of the Labour Act empowers the court to do – in the exercise of a discretion, as I have said previously – is to condone the late noting of an appeal. The statutory language admits of no other construction. And, I should say, 'appeal' in that subsection means indubitably a proper appeal, as Ms De Jager submitted. Where there is no proper notice of appeal, and accordingly 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 s 89(3) of the Act.

[9] With all this reasoning and conclusions, my response to paras 22 and 23 of the founding affidavit is this: The advice the deponent (Ms Linda Susan Dodds) says she received to the effect that 'the non filing of Form 11 (and Form LC 41, I should add) could jeopardize the intended appeal and that applicant/appellant carried the risk of the appeal not being considered on (the) merits' was a good advice. Ms Dodds's argument that 'I respectfully submit (the requirement that a notice of appeal shall be accompanied by duly completed Form 11 and Form LC 41) are (is) formalistic and technical consideration' has, therefore no legal leg to stand on. Ms Dodds's argument is, with respect, oversimplistic, fallacious and self-serving. In sum, there is no late lodging of a notice of appeal for the court to exercise discretion to condone in terms of s 89(3) of the Labour Act.

[10] For all these reasoning and conclusions this court cannot even begin to exercise the discretion given to it by s 89(3) of the Act. On the facts and in the circumstances of this case, the implementation of s 89(3) is not available in this case. It follows also that there is no appeal to reinstate, and there is no appeal to prosecute. Accordingly, I dismissed the application and made the order appearing in para 2.

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C Parker

Acting Judge

APPEARANCES

APPLICANT:	I Visser Instructed by Chris Brandt Attorneys, Windhoek
FIRST RESPONDENT:	B De Jager Instructed by Nambahu Associates, Windhoek
SECOND AND THIRD RESPONDENTS:	No appearance