REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 27/2012

In the matter between:

CORNELIUS SHILONGO **APPLICANT**

And

VECTOR LOGISTICS (PTY) LTD **RESPONDENT**

Neutral citation: *Shilongo vs Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 33 (7 August 2014)

Coram: PARKER AJ
Heard: **24 July 2014**
Delivered: **7 August 2014**

Flynote: Labour Law – Leave to appeal – Appeals under the repealed Labour Act 6 of 1992 – Such appeals only permissible on questions of law – Applicant must accordingly set out clearly the questions of law applicant seeks leave to appeal on – Court held that this is necessary to inform respondent what case he or she has to meet and to enable the court to determine whether this a deserving case in respect of which there is a reasonable prospect that the Supreme Court may take a different view about the Labour Court's judgment in virtue of such questions of law.

Summary: Labour Law – Leave to appeal – Appeals under the repealed Labour Act 6 of 1992 – Such appeals only permissible on questions of law – Applicant must accordingly set out clearly the questions of law applicant seeks leave to appeal on – Court held that this is necessary to inform respondent what case he or she has to meet and to enable the court to determine whether this a deserving case in respect of which there is a reasonable prospect that the Supreme Court may take a different view about the Labour Court's judgment in virtue of such questions of law – Court found that the applicant has not indicated what questions of law on which the applicant seeks leave of the Labour Court to appeal to the Supreme Court – Court found further that even if the court were to interpret the applicant's Notice of Application for Leave to Appeal generously since applicant is a lay litigant representing himself and accept that leave is sought to appeal against the award granted to the applicant by the Labour Court that does not raise a question of law: it is a question of judicial discretion (*liberum arbitrium* of the courts) – Court concluded that the applicant has failed to show that he has reasonable prospects of success on a further appeal – Consequently, the court dismissed the application without costs.

ORDER

That both the application and the counter application are dismissed. There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is an application for leave to appeal by the applicant Mr Shilongo. The respondent in that application is Vector Logistics (Pty) Ltd, the applicant's former employer before he was dismissed by the disciplinary body of the employer (the

respondent). Not happy with the dismissal, the applicant sought redress in the district labour court ('DLC') under the repealed Labour Act 6 of 1992 ('the repealed Labour Act') where the applicant was unsuccessful. The DLC upheld the decision of the employer's disciplinary body. The DLC found the applicant's dismissal to be fair in terms of s 45(1) of the repealed Labour Act.

[2] Aggrieved by the DLC's decision the applicant appealed to the Labour Court where his appeal succeeded and the order of the district labour court was set aside. The Labour Court then ordered the respondent (the employer) to pay the applicant N$39 296 (being an amount equal to the applicant's four months' salary). Not being happy with the order that it must pay the applicant the N$39 296, the respondent, too, has launched a counter application for leave to appeal. I shall consider the application first. The applicant represents himself, and Mr Maasdorp represents the respondent.

[3] It has been stated in a long line of cases that in an application of this kind the applicant must satisfy the court that he or she has reasonable prospects of success on appeal. See *S v Nowaseb* 2007 (2) NR 640, and the cases there gathered. The principle was enunciated in criminal proceedings but there is no good reason why the principle enunciated in those cases should not apply with equal force to civil proceedings.

[4] It was observed in *S v Nowaseb* that –

'[2] (Thus) an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view …. But, it must be remembered, "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal". (*S v Ceaser* 1977 (2) SA 348 (A) at 350E)'

The court in S v Nowaseb approved the view stated by Diemont JA in *S v Sikosana* 1980 (4) SA 559 A at 562H-563A that –

> 'If he (the Judge) decides to refuse the application he must give his reasons …. It may be that his reasons for his refusal will appear from the reasons for convicting (*R v White* 1952 (2) SA 538 (A) at 540) but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.'

This is the manner in which I approach the determination of the present application and, indeed, the counter application.

[5] The applicant filed 'Notice of Application for Leave to Appeal', accompanied by an affidavit 'in support of this application'. It must be pointed out that the disciplinary hearing, the proceedings in the DLC and the appeal to the Labour Court were all governed by the repealed Labour Act, the repealed Rules of the District Labour Court and the repealed Labour Court Rules in terms of s 15 of Schedule 1 of the Labour Act 11 of 2007 and the rules made thereunder.

[6] I have noted these remarks on the law and rules to make the point that the instant case is governed by the repealed Labour Act and the repealed DLC rules and the repealed Labour Court Rules; and their significant will become apparent in due course.

[7] First and foremost, the application is governed by s 21(1)*(a)* of the repealed Labour Act, and so the present application must be considered against the interpretation and application of s 21 of the repealed Labour Act which provides:

> '(1) Any party to any proceedings before –
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> (a) the Labour Court may appeal, with the leave of the Labour Court or, if such leave is refused, with the leave of the Supreme Court of Namibia granted on application by way of petition to the Chief Justice, to the Supreme Court of Namibia (see Act 10 of 2001) on any question of law against any

> decision or order of the Labour Court or any judgment or order of the Labour Court given on appeal from a judgment or order from a district labour court, as if such judgment or order were a judgment or order of the High Court of Namibia.'

Furthermore, in terms of rule 6(1) of the Labour Court Rules, 'Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. Additionally, in terms of rule 6(3), 'The notice of motion shall be in the form of Form 2. '[I]n the form of' means the notice must be as near as possible to Form 2, that is, the particulars in the notice of motion must substantially conform to the particulars in Form 2. Since the applicant is a lay person representing himself, I have considered the substance of the applicant's pleadings rather than the form in which they are presented. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC).) However, as I said in *Idan v State* (CA 34/2014) [2014] NAHCMD 217 (14 July 2014) (Unreported), para 4, 'the proposition should not be taken too far as to cover situations … where a statutory provision has not been complied with'.

[8] In the instant case, both the applicant (or the and the respondent (the applicant in the counter application)) are permitted by the repealed Labour Act to appeal to the Supreme Court, with the leave of the Labour Court, on any question of law against any decision or order of the Labour Court given on appeal from the DLC. It is, therefore, crucial and peremptory for the applicant to set out clearly the question or questions of law on which he seeks leave of the court to appeal to the Supreme Court. This is important because in considering whether to grant the application for leave to appeal the court should be persuaded that what the applicant is seeking leave to appeal on are indeed questions of law. Doubtless, if the applicant has not set out the questions of law he desires to appeal on, there is nothing placed before this court for this court to consider in determining the application. In this regard, as I have said previously, the judicial largesse that the Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* has thrown to lay litigants representing themselves does not entitle such lay litigants to violate express

provisions of an Act of Parliament; neither does it entitle a court to give judicial blessings to such violation by overlooking the violation.

[9] The setting out clearly and precisely the questions of law an applicant desires to appeal on conduces to due administration of justice. As I have said previously, it enables the court to decide whether it is entitled to hear the appeal or, as is in the present case, to decide whether leave to appeal should be granted. Besides, it informs the respondent in advance what case he or she has to meet. The court is entitled to hear an appeal if questions of law are raised. If it is not questions of law that are raised, in virtue of s 21(1)*(a)* of the repealed Labour Act, an appeal court is not entitled to hear the appeal. By a parity of reasoning, if it is not questions of law that have been raised the court has nothing placed before it to enable the court to decide whether to grant the leave to appeal.

[10] In the instant case the applicant for leave to appeal does not indicate what questions of law he seeks leave to appeal on which this court can consider in determining whether this is a deserving case in respect of which there is a reasonable prospect that the Supreme Court may take a different view about the judgment and order of the Labour Court in virtue of such questions of law.

[11] If one were to interpret the applicant's 'Notice of Application for Leave to Appeal' generously one may accept that the appeal for which leave is sought is on 'the award granted to the appellant' (see the Notice). What the applicant is alluding to is the order that the Labour Court granted. But the applicant does not indicate the question of law he seeks leave to appeal on. Thus, neither the court nor the respondent is in a position to know what questions of law are at play in this proceeding; that is the question of law the Supreme Court will be asked to determine if leave was granted. In any case, the order of award of compensation granted by the Labour Court cannot be a question of law within the meaning of s 21(1)*(a)* of the repealed Labour Act. It is a question of judicial discretion, *liberum arbitrium* of the courts (*Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('PERSKOR') 1992 (4) SA 791; *President of the Republic of Namibia v Vlasiu* 1996 NR 36). And in my view, judicial discretion was exercised

judicially and reasonably as evidenced by the analysis, reasoning and conclusions undertaken by the Labour Court appearing in paras 17 and 18 of the judgment delivered on 5 February 2014.

[12] Having given considerable thought objectively to the application, and disabusing my mind, as far as humanly possible, of the fact that I had no doubt – none at all – concerning the award that was granted in the order based on the facts and the authorities, I should say that I am not at all satisfied that there is a reasonable prospect that the Supreme Court may take a different view about the order. In my judgement, therefore, the applicant has failed to show that he has reasonable prospects of success on a further appeal. The application, therefore, fails; and it is rejected.

[13] I now proceed to consider the counter application brought by the respondent. The respondent has raised two questions of law thus:

> ‘1. The Court erred in law by finding on the facts before it that the dismissal was procedurally unfair solely because the charges that formed the basis for the appellant’s dismissal were served on him before the disciplinable offence was committed because:
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> 1.1 On the facts and as found by the chairperson of the District Labour Court, the appellant was aware of his duties yet had not taken any steps to comply with his duties either on Thursday, 25 January 2007 or up to 16h00 on Friday, 26 January 2007, when the charges were delivered, or at any subsequent time following delivery of the charges up to the time of the hearing.
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> 1.2 The charge sheet clearly reflected a recognized disciplinary offence, was comprehensive to the appellant and contained sufficient information to enable the appellant to ascertain the misconduct alleged and prepare for the case he had to meet.

2. The Court erred in law by finding that a procedurally unfair dismissal *per se* equates to an unfair dismissal for the purpose of section 45(1) of the Labour Act, 6 of 1992. The next step in the enquiry ought to have been whether there was a valid reason for the dismissal, which there was.'

As to the first question of law; I should say that with the greatest deference to the respondent the respondent misreads the judgment delivered on 5 February 2014. In para 14 of the judgment, the Labour Court held that on the interpretation and application of s 45(1) of the repealed Labour Act the word 'procedure' in that provision is not restricted to a disciplinary hearing: It refers to a whole gamut of processes, including a disciplinary hearing conducted by the employer; and every step of the continuum of processes should be executed fairly in order for the 'procedure' to be statute compliant.

[14] In para 15 of that judgment, the Labour Court explained why on the record it is clear that when disciplinary procedures were initiated against the appellant, the applicant (employee) had not committed the disciplinable offence which led to his been brought before the disciplinary body for a disciplinary hearing. Thus, in para 16 of the judgment the court states that when the 'Notice of Disciplinary Hearing', containing the charge sheet, was drafted the applicant had not committed the disciplinable offence. When an attempt was made to serve the Notice and the charge sheet, on the applicant, the applicant had not committed the disciplinable offence. All these facts formed part of the evidence placed before the DLC but the DLC disregarded them.

[15] As was reasoned in para 16 of the judgment, the DLC 'did not consider those cogent pieces of evidence because for the chairperson (of the DLC), procedural fairness under the repealed Labour Act arises only in circumstances 'emanating from the disciplinary hearing' (to quote the words of the learned chairperson of the DLC). The Labour Court concluded in para 16 of the judgment that that was a serious misdirection on the law on procedural fairness under s 45(1) of the repealed Labour Act; and it 'is such a kind as would entitle this court to uphold Grounds 2 and 3 of the Notice of Appeal; and it is such a kind as would entitle this court to conclude that the

decision of the DLC that the respondent (applicant in the counter application) followed a fair procedure in the circumstances of this case is wrong'. And so, *pace* Mr Maasdorp, the Labour Court did not find only 'that the dismissal was procedurally unfair solely because the charges that formed the basis for the appellant's dismissal were served on him before the disciplinary offence was committed'.

[16] I move on to consider the second question of law on which the respondent applies for leave to appeal. 'It is trite law that in order to establish whether the dismissal of the complainant was in accordance with the law this Court has to be satisfied that such dismissal was both procedurally and substantively fair, 'stated by Karuaihe J in *Rossam v Kraatz Welding Engineering (Pty) Ltd* 1998 NR 90 at 92. The *ipssissima verba* of s 45(1)*(a)* of the repealed Labour Act say so clearly: An 'employee dismissed … without a valid and fair reason and not in compliance with a fair procedure, shall be regarded to have been dismissed unfairly'. Syntactically, the two main clauses in s 45(1)*(a)* are joined together by the conjunction 'and'. The two main clauses are, therefore, not disjunctive.

[17] I do not read *Kahoro and Another v Namibia Breweries Ltd* 2008 (1) NR 382 (SC) as authority for the proposition, put forth by Mr Maasdorp, that where an employer establishes that there was a valid and fair reason to dismiss an employee but 'not in compliance with a fair procedure' then the employee shall be regarded to have been dismissed fairly. Such interpretation could never have been the intention of the Legislature expressed so clearly and unambiguously and limpidly in s 45(1)*(a)* of the repealed Labour Act. The holding in *Kahoro and Another* was that failure to follow fair procedure impacted on substantive fairness and so where a court was faced with a situation in which because of absence of fair procedure, it could not determine one way or other whether there was valid and fair reason for the dismissal of the employee, then the employer who bore onus to prove that the dismissal was fair has failed to discharge the onus. It is my view that *Kahoro and Another* tends to controvert, rather than advance, the respondent's contention and Mr Maasdorp's argument in support of the contention. I should say that any decision that follows the Maasdorp proposition, which Mr Maasdorp says is based on *Kahoro and Another*, will be a decision *per incuriam* and wrong.

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[18] This court delivered a fully reasoned judgment when it upheld the appeal by the applicant (the respondent in the counter application) and judged that his dismissal was unfair because of absence of fair procedure. I have considered carefully and objectively the respondent's counter application against the law and facts of the case. And I have disabused my mind – as far as humanly possible – of the fact that I had no doubt that the learned chairperson of the DLC erred in point of law as respects procedural fairness when applied to the facts placed before him. Having done all that, I am not satisfied at all that there is a reasonable prospect that the Supreme Court may take a different view and hold that there was presence of procedural fairness, or that even if there was absence of procedural fairness, the respondent (employer) discharged the onus cast on it by s 45(1)*(a)* of the repealed Labour Act on the basis that the respondent had proved it had a fair and valid reason to dismiss the applicant (employee) and so it had discharged the onus cast on it by s 45(1)*(a)* of the repealed Labour Act. But, as I said previously, the onus cast on the applicant (employer) is for it to prove both that (1) it had a valid and fair reason to dismiss he employee and (2) that the dismissal was in compliance with a fair procedure, before the dismissal can be regarded as fair within the meaning of s 45(1)*(a)* of the repealed Labour Act. Based on these reasons, I hold that the respondent has failed to show that it has a reasonable prospect of success on an appeal to the Supreme Court. It follows that the counter application also fails, and it is rejected.

[19] In the result, both the application and the counter application are dismissed. There is no order as to costs.

C Parker

Acting Judge

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APPEARANCES

APPELLANT:	In person
RESPONDENT:	R L Maasdorp Instructed by Köpplinger-Boltman Legal Practitioners, Windhoek