



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 4/2014

In the matter between:

NAMIBIA DAIRIES (PTY) LTD**APPELLANT**

And

SILAS ALFEUS**FIRST RESPONDENT****LAHYA N DUMENI N.O****SECOND RESPONDENT**

Neutral citation: *Namibia Dairies (Pty) Ltd vs Alfeus* (LCA 4/2014) [2014] NALCMD 36 (18 September 2014)

Coram: PARKER AJ**Heard:** 27 June 2014**Delivered:** 18 September 2014

Flynote: Labour Law – Arbitration tribunal – Appeals from – Such permissible on questions of law only – Court explained the phrase ‘questions of law’ with regard to appeals in terms of s 89(1)(a) of the Labour Act 11 of 2007 – Court held that a question of law set out in a notice of appeal cannot double as grounds of appeal required by Form 11 in terms of the Labour Court Rules and Form LC 41 in terms of the Conduct of Conciliation and Arbitration before the Labour Commissioner – Court held further that a ‘ground’ under Form 11 and Form LC 41 connotes the basis or the reason underlying an appellant’s contention that the arbitrator erred, or misdirected himself or herself, on the law – A ‘ground’ is, therefore, the basis upon which or the

reason why the appellant has raised the question of law and upon which the court should determine the question of law – Consequently, court concluded that where no grounds are put forth to support a question of law raised in the notice of appeal such notice is defective and, accordingly, a nullity and the appeal should fail.

Summary: Labour Law – Arbitration tribunal – Appeals from – Such permissible on questions of law only – Court explained the phrase ‘questions of law’ with regard to appeals in terms of s 89(1)(a) of the Labour Act 11 of 2007 – Court found that in instant case, of the seven items raised as questions of law in the notice of appeal only the first item qualified as a question of law – Court found further that the questions of law formulated in the notice of motion doubled as grounds of appeal which is not permitted – Consequently, court found that no ground is put forth to support the only question of law in the notice of appeal – Court concluded, therefore, that the notice of appeal is defective and, accordingly, a nullity and so the appeal should fail – Court, therefore, dismissed the appeal without costs.

ORDER

- (a) The appeal is dismissed.
- (b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The appellant (the employer) appeals against only the orders of the arbitration award made by the second respondent (the arbitrator) in favour of the first respondent (the employee). There is filed with the court a completed Form 11 (in

terms of rule 17(3) of the Labour Court Rules), being the notice of appeal. Accompanying the notice of appeal is a completed Form LC 41 (in terms of rule 23(2) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ('the conciliation and arbitration rules').

[2] In his grounds opposing the appeal, the first respondent contends that the appellant's notice does not meet the peremptory requirements of the rules. The first respondent's reason for so contending is that the notice does not contain both questions of law and grounds of appeal; and that even if some of them are found to be questions of law, there are no grounds of appeal to support those questions of law. Consequently, for Mr Denk, on the authority of *African Consulting Services CC v Gideon* (LCA 60/2012) [2013] NALCMD 43 (26 November 2013) and other cases, this court should hold that the notice of appeal is a nullity.

[3] Mr Rukoro, counsel for the appellant submitted, in response to Mr Denk's argument, that *African Consulting Services CC* is 'not on all fours' with the instant matter; that is, as I understand Mr Rukoro, *African Consulting Services CC* is distinguishable. I agree with Mr Rukoro on that point. In *African Consulting Services CC* the issue there was that in breach of the Labour Act and rule 23(2) of the conciliation and arbitration rules, the appellant had failed to deliver Form LC 41 together with the notice of appeal (Form 11). For such failure the court upheld a point *in limine* thereanent and dismissed the appeal. In the instant case, the appellant delivered both Form 11 and Form LC 41 as required by the Labour Act and the rules. Nevertheless, the appellant was not out of the woods yet; for, Mr Denk submitted further, as I have said previously, that the notice does not contain both questions of law and grounds of appeal, and even those questions which may be found to be questions of law do not have grounds of appeal to support them. This is the gravamen of the respondent's preliminary objection.

[4] Thus, the next level of the enquiry is to determine (a) whether only questions of law have been set out in the notice of appeal as required by s 89(1)(a) of the Labour Act; and (b) if so, whether the appellant has set out grounds of appeal to support the questions of law in the notice of appeal.

[5] Based on the authorities, eg *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('PERSKOR') 1992 (4) SA 791 (A); *President of the Republic of Namibia and Others v Vlasiu* 1996 NR 36, I form the view that questions of law are those questions determined by authoritative legal principles, and they are in contradistinction to questions of fact which are capable of proof, and are the subject of evidence adduced for that purpose. Besides, both questions of law and questions of fact stand apart from questions of judicial discretion (*liberum arbitrium* of the courts) which are not subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court and are, accordingly, questions as to what is right, just, equitable or reasonable, except so far as determined by law. See *Shilongo v Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 33 (7 August 2014) Based on these conclusions, I should proceed to determine whether the appellant has set out in the notice of appeal questions of law only.

[6] The appellant has set out seven items on Form 11 which he characterizes as questions of law; the same items appear *verbatim et literatim* on Form LC 41. I accept that item 1 is a question of law. Item 2 is not a question of law but a question of fact. Items 3 and 4 are not questions of law; they are questions of judicial discretion. Item 5 is not a question of law; it is a question of fact. Item 6 is not a question of law; it is a question of fact. Item 7 is not a question of law; it is a question of fact. It follows, as a matter of law of s 89(1)(a) of the Labour Act, that this court is not entitled to sit on appeal on items 2, 3, 4, 5, 6 and 7. And so I proceed to consider item 1 only which I have found to be a question of law within the meaning of s 89(1)(a) of the Labour Act.

[7] It is Mr Denk's submission, as I have mentioned previously, that even if some of the items are found to be questions of law, they are not supported by grounds, rendering them irrelevant for purposes Form 11 and Form LC 41. Mr Rukoro does not agree that there are no grounds of appeal. In this regard the issue the court should determine is whether item 1 has any grounds supporting it.

[8] In both Form 11 and Form LC 41 an appellant is required to set out not only the questions of law at issue but also the grounds on which the appellant relies in contending that there is a question of law which, if the appeal court determined in the appellant's favour, should lead to the court upholding the appeal on that question of law. What the appellant has done in the instant case is essentially to tell the court that the question of law is also the ground relied on by the appellant. To say that an arbitrator has 'erred in law in finding that the first respondent's dismissal was substantively unfair' does not tell anyone, including the court and the respondents, the reason why or the basis upon which the appellant contends that the arbitrator erred in law, that is, the reason why or the basis upon which the appellant has raised the question of law. (See *Shilongo*.) All that the statement in item 1 (and the rest of the items) have done is to state a conclusion of the appellant. The appellant does not tell the court the basis on which or the reason why (that is, the ground) the court should hold for the appellant as respects the question of law raised. In sum, what I see is that the question of law also doubles as grounds. That is wrong: it does not satisfy the requirements of Form 11 and Form LC 41.

[9] A 'ground of appeal' in terms of rule 17(2) of the Labour Court Rules and rule 23(2)(d) of the conciliation and arbitration rules connotes the basis or the reason underlying an appellant's contention that the arbitrator erred, or misdirected himself or herself, on the law; that is, the basis upon which or the reason why the appellant has raised the point of law. The ground is, thus, the basis or the reason upon which the court should determine the question of law raised by the appellant. (See *Shilongo*.)

[10] Based on these reasoning and conclusions, I find that the notice of appeal is defective because it sets out the appellant's conclusion as to the arbitrator's finding that the dismissal of the first respondent was substantively unfair (item 1) but it does not put forth the basis or reason for the appellant's conclusion; that is, it does not, as Mr Denk submitted, give any ground to support the appellant's conclusion. It follows inevitably that the notice of appeal is a nullity as respects item 1. Thus having found that items 2 to 7 are not questions of law and having decided that the appellant has

not put forth any ground to support item 1, which is the only question of law, the appeal should fail, and it fails; whereupon I make this order:

- (a) The appeal is dismissed.
- (b) There is no order as to costs.

C Parker
Acting Judge

APPEARANCES

APPELLANT:

S Rukoro

Instructed by Sisa Namandje & Co. Inc., Windhoek

RESPONDENTS:

A H G Denk

Instructed by Engling, Stritter & Partners,
Windhoek