REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 11/2014

In the matter between:

SELMA TOROMBA & OTHERS **APPELLANT**

And

WOERMANN BROCK & CO. (PTY) LTD **1ST RESPONDENT**

HONOURABLE MAGISTRATE VON PLETZEN **2ND RESPONDENT**

Neutral citation: *Toromba v Woermann Brock & Co. (Pty) Ltd* (LCA 11/2014) [2015] NALCMD 25 (28 October 2015)

Coram: UNENGU AJ
Heard: **31 July 2015**
Delivered: **28 October 2015**

Flynote: Labour Law – Labour appeal in terms of the Labour Act 6 of 1992 – Appeal against the judgment of the district labour court dismissing an application for rescission of judgment – Appeal on grounds 1 – 5 dismissed – Appeal on ground 6 upheld – Request for costs by the respondent refused.

Summary: The appellants have appealed against the judgment of the chairperson sitting in the district labour court dismissing an application for rescission, and against a conviction of contempt of court against the appellants' legal representative – The Labour Court on appeal dismissed the appeal on grounds 1 – 5 of the notice of

appeal but upheld the appeal contained in ground 6. Further, the request for costs by the respondent also refused.

ORDER

(i) The appeal prayed for in paras 1 – 5 of the notice of appeal is dismissed.

(ii) The appeal prayed for in para 6 of the notice of appeal is upheld.

(iii) The respondent's request for a costs order is refused.

JUDGMENT

UNENGU AJ:

[1] This is an appeal against the order of the chairperson of the district labour court on 4 October 2013 in an application for rescission by the appellant. The grounds for the appeal are fully set out hereunder in this judgment.

BACKGROUND

[2] The background of the matter has been summarised in the written heads of the respondent. The dispute originated in 2001 following the dismissal of a large number of employees by the respondent.

[3] A number of the dismissed employees commenced legal proceedings against the respondent by means of three separate complaints in the district labour court.

2.1 Under case number 22/2002 as Selma Toromba and Three Others;
2.2 Under case number 57/2002 as Ingrid Mengo and 19 Others;
2.3 Under case number 48/2002 as Josea Haukambe and 19 Others.

[4] The three matters were consolidated on 11 April 2002 and in this regard the chairperson of the district labour court, Mr Daniels, found as follows:

'The complaints have been consolidated on 11 April 2002 by the Chairperson, Mr L Hangalo. It is maybe just for this court to clearly indicate that the complaints have been consolidated under DLC case no. 57/2002 as *Selma Toromba and Others v Woermann Brock & Co. (Pty) Ltd*.'

[5] In November 2007 a large number of forms 10 were delivered to Mr Köpplinger, the legal practitioners of record for the respondent at the time. The names of the persons reflected in these forms 10 did not correlate with the names of the complainants named in the complaint forms. There were also at least fifty forms 10 for persons not mentioned in the complaint forms.

[6] At the hearing on 07 July 2008 the chairperson of the district labour court Ms Shaanika acted grossly irregular by compiling herself a list of complainants, adding to the 44 complainants named in the complaint forms more than 50 further names not previously mentioned. This decision by the chairperson was set aside by the honourable Damaseb, JP in the Labour Court in September 2010 when the following order was made:

'Accordingly, I make the following order:

1. The ruling made by the first respondent on 07 July 2008, to the effect that the persons not named in the Form 2 claims filed respectively on 23 January 2002 under case number 23/2002; 12 February 2002 under case number 57/2002 and 19 February 2002 under case number 58/2000 (and since consolidated under case number 57/2002), are joint complainants as contemplated in Rule 13(2) of the Rules of the DLC solely on account of their having executed form 10 of the said Rules, is reviewed and set aside.

2. The matter is remitted to the District Labour Court for the district of Windhoek for the case to be heard *de novo* before a different magistrate as if the ruling by the first

respondent (referred to in order 1 above) had not been made; and otherwise for the case to be dealt with according to law.'

[7] The trial proceeded in the district labour court before chairperson Sindano on 14 September 2011. On the first day of the trial, prior to the commencement of proceedings, the parties concluded an agreement to limit the issues the court had to decide. The existing issue of who the named complainants were had to be resolved first. The court *a quo* recorded the agreement as follows:

'In the circumstances, the parties have agreed that the court should initially determine who the named complainants are before the matter can proceed with full fletched trial.'

[8] The district labour court answered this question posed by agreement by finding on 21 November 2012 as follows:

'[42] Order:

1. There are only 44 named complainants before court, defined as follows:

a. Selma Toromba and 3 Others CASE NO. DLC 22/2002;
b. Josea Haukambe and 19 Others CASE NO. DLC 48/2002;
c. Ingrid Mengo and 19 Others CASE NO. DLC 57/2002.'

[9] An appeal was lodged on behalf of the persons who were found not to be named complainants but this appeal was not proceeded with and has lapsed.

[10] On 25 February 2013 the appellant brought an application for separation of the trial of the 44 named complainants from the trial of the 50 people not so named. This request was granted by means of a ruling on 26 April 2013 by chairperson Gawanab.

[11] The case for the remaining 44 named complainants was set down for hearing from 22 July 2013 to 26 July 2013 before chairperson Van Pletzen. The respondent

called an independent witness Mr Swiegers to confirm a video footage. After his testimony and cross examination the respondent raised a legal issue as a point *in limine*.

[12] The ruling on the point *in limine* was made on 24 July 2013, and the relevant part reads as follows:

'This court has, in the proceedings held on 14 September 2011 and 21 November 2011, heard extensive arguments and evidence with regard to the lodging of the complaints in this matter. The issue during these proceedings was to determine who the named complainants in this case was, (sic) the court found the 44 complainants who are represented by Mr Tjitemisa were the only named complainants in this matter.

Mr Barnard argued that, due to the fact that Form 10 agreements which were handed to Mr Köpplinger after the ruling of Mr Daniels on behalf of the 38 complainants who were to be represented by Josea Haukambe and Ingrid Mengo, now show that Selma Toromba was indeed appointed by all of them, the complainants as lodged are not in accordance with the rules. No Form 10 agreements were ever signed by those 38 complainants, appointing Josea Haukambe and Ingrid Mengo. Therefore the lodging of their complaints was not in terms of the Rules of the district labour court rules, and because of that the limitation created in section 24 of the Act should apply. The agreements were in any case not lodged properly with the clerk of the district labour court as required by Rule 13 (2).

Mr Tjitemisa argued that, because Mr Sindano found that the 44 complainants were complainants in this matter, this should mean that they are properly before this court.

If one reads the ruling of Mr Sindano, it is clear, that what he indeed found, was that the complainants were defined as : Selma Toromba and 3 Others, Josea Haukambe and 19 Others and Ingrid Mengo and 19 Others.

However, if one looks at the Form 10 agreements that appear in the court file, it is clear that the only representative appointed by all complainants is Selma Toromba. The joint complaints filed by Josea Haukambe and Ingrid Mengo are therefore not in accordance with the Rules of the district labour court. Since no Form 2 complaints were filed on behalf of the 38 other people, no complaints as defined in Rule 3 (3) or Rule 13 (2) exist, and therefore

these 38 people are not properly before the court. Non-compliance with the Rules of the court is fatal to the complaints of every other complainant except Selma Toromba and the three people she represents, Josea Haukambe and Ingrid Mengo.

I find that section 24 of the Act should therefore apply to those 38 people.'

[13] The ruling was delivered on 24 July 2013. The trial continued on that day in respect of the six remaining complainants. The matter was then postponed for continuation of the trial. The appellant did not lodge an appeal against the ruling of 24 July 2013. If it has wished to do so, it should have done so within 14 days, by 13 August 2013. Instead, the appellants filed the application for rescission on 07 August 2013. The judgment by chairperson Van Pletzen dismissing the rescission application was given on 4 October 2013.

[14] In the judgment on the rescission application the court *a quo* found that Rule 22 of the district labour court rules was the appropriate rule under which an application for rescission application had to be brought. Further that the rules of the district labour court do not provide that applications for rescission in the district labour court could be heard in terms of the provisions of section 36 of the Magistrate's Court Act[1]. Further, that on the merits that in the proceedings before chairperson Sindano the issue to be determined was limited to who the named complainants were and that chairperson Sindano did not give a judgment on the validity and enforceability of the complaints, and that chairperson van Pletzen was thus not precluded from dealing with the issue.

[15] The present appeal against the order dismissing the application for rescission was lodged on 24 October 2013.

GROUNDS OF APPEAL

[16] The grounds whereon the appellants' appeal lies to the Labour Court are the following (as per its notice dated 24 October 2013):

[1] Act 32 of 1944 as amended.

‘1 That the Chairperson erred in law in finding that the application for rescission of the judgement of the Honourable Court should have been brought in terms of Rule 22 of the Rules of the District Labour Court.

2. That the chairperson erred in law in finding that the procedures which were followed was as a result not the correct procedure in applying for recession.

3. That the Chairperson erred in law in not having taken into consideration that application for rescission on the grounds other than the grounds reflected in Rule 22 of the Rules of the District Labour Court were in the past not lodged in terms of Rule 22 and as such the Honourable District Labour Court was bound by its earlier decisions (*stare decises*).

4. Should Rule 22 be in the applicable one to the lodging of the application which appellants dispute the learned Magistrate erred in law in not having taken into consideration that Rule 10 of the Rules of the District Labour Court prescribe that the Chairperson shall, so far as it appears appropriate, seek to avoid formality in the proceedings.

5. The learned Magistrate erred in law in having concluded that Rules 36 of the Magistrate’s Court Act read together with Rule 26 of the Rules of the District Labour Court were not the correct rules in terms of which the application for rescission should have been brought.

6. The learned Magistrate erred in law and/or on the facts in having concluded that the legal representative of the appellants Mr Tjitemisa was in contempt of court in having used the words “I submit that the conduct of both Magistrate and the Respondent leave much to be desired” when Mr Tjitemisa deposed to the Founding Affidavit in the application on behalf of the appellants.’

[17] The respondent does not oppose the appeal in terms of ground 6 in the Notice of appeal, the finding of contempt of court. The appeal on this point is not conceded but the respondent will abide by the decision of the court.

APPELLANTS’ HEADS

[18] Mr Phatela in his written heads submitted that, the judgment by the honourable chairperson Mr GB van Pletzen on 24 July 2013 which is partly a subject-matter of this appeal relates to an issue on which the honourable district labour court already ruled upon on 30 October 2007 and on 21 November 2012. Mr

Phatela submitted further that, the issue for determination before the honourable Sindano was “who the complainants before court were who had lodged valid and enforceable complainants”.

[19] Mr Phatela submitted further that, the honourable court pronounced itself on the issue on 21 November 2012 and clarified itself on 01 August 2013 as to what the issue was for determination and what its ruling was.

[20] Mr Phatela submitted further that, on 21 February 2013 the matter was before the honourable chairperson Gawanab for an application to separate the 44 complainants who were successful in the point *in limine* before honourable Sindano from the 50 complainants who were not successful. During those proceedings the respondents admitted that there were 44 complainants properly before court.

[21] Mr Phatela submitted further that, this court was *functus officio* at the time when the honourable Van Pletzen made his ruling. He submitted further that, since the court already pronounced itself on who the named complainants before court were who had lodged valid and enforceable complaints the same court could not revisit its own decision as was done by the honourable Van Pletzen and overturned its own ruling.

[22] Mr Phatela submitted further that, the court was misled by the respondent by submitting that honourable Sindano did not determine the identities and exact numbers of complaints who were before court and who had lodged valid and enforceable complaints.

[23] Mr Phatela submitted further that, Rule 22 of the district labour court deals with an application for rescission were a judgment or an order has been obtained by default in terms of Rule 10 (3) and (4) it does not deal with a judgment or an order which is *void ab origine* or was obtained by fraud or by mistake common to the parties. He submitted further that, the district labour court has jurisdiction to hear the rescission application in terms of Rule 26 in that the provisions of section 36 of the

Magistrates Court Act (Act 32 0f 1944) became applicable. He submitted further that, there is no substance on which the Honourable Mr Van Pletzen could have found Mr Tjitemisa guilty of contempt of court in having used the words “I submit that the conduct of both the Magistrate and the respondent leave much to be desired” in his Founding Affidavit in the application on behalf of the Appellants.

RESPONDENTS’ HEADS

[24] Mr Barnard submitted in his heads that, the application for rescission was fatally defective as the provisions of section 36 of the Magistrate’s Court Act cannot find application in the district labour court by means of the provisions of Rule 26, and further that even upon an application of the provisions of section 36 of the Magistrate’s Court Act, the complainants had not nearly made out a case for the rescission of the ruling on 22 July 2013. He submitted further, that the Founding Affidavit in the application for rescission is so devoid of any substance and so littered with defamatory and contemptuous allegations that the only reasonable conclusion is that the application was brought in a frivolous manner to vex the respondent.

[25] Mr Barnard submitted further that, the application had no prospects of success and was manifestly futile. Further that, the appeal is similarly manifestly without prospects of success. He further submitted that even if the appeal is successful on the grounds of appeal it will be of no avail and it will be of no effect. Even if the provisions of section 36 of the Magistrate’s Court Act are applicable in the district labour court, there is no appeal against the finding by the court *a quo* that it was not *functus officio* to hear and decide the point *in limine.* Mr Barnard concluded by asking this Court to dismiss the appeal with costs.

[26] I proceed now to deal with the grounds of appeal as set out in the notice to appeal. The first ground alleges that the chairperson erred in law in finding that the application for the rescission of the judgment of the honourable district labour court should have been brought in terms of rule 22 of the district labour court. The reason being that rule 22 deals with rescission of judgments or orders by default made in

terms of rule 10(3) or 4 while the judgment sought to be rescinded by chairperson Van Pletzen was not obtained by default. I agree. But I do not agree with the submission by Mr Phatela that s 36 of the Magistrate's Court Act is the appropriate section under which the application for the rescission should have been brought. Similarly, I disagree with counsel that the district labour court had jurisdiction to hear the rescission application in terms of rule 22 by virtue of the application of s 36 of the Magistrate's Court Act. In my view, the chairperson was correct to find that the rules of the district labour court do not provide for the district labour court to hear an application for rescission brought in terms of s 36 of the Magistrate's Court Act. The respondent is also correct in its submission that there is no appeal launched against the finding of the court that it was not *functus officio*: Therefore, it will not assist the appellant at this stage of the proceedings to argue that the chairperson Mr Van Pletzen was *functus officio* in respect of the point *in limine*. The ground of appeal has no substance and as such must fail.

[27] The second ground reads that the chairperson erred in law in finding that the procedures which were followed was as a result not the correct procedure in applying for the rescission. This ground of appeal should be read together with ground 3. In ground 3 the appellant alleges that the chairperson erred in law in not having taken into consideration that the application for rescission on the grounds other than the grounds reflected in rule 22 of the Rules of the district labour court were in the past not lodged in terms of rule 22 and as such the honourable district labour court was bound by its earlier decisions (*stare decises*). Regrettably, the appellant did not specify which incorrect procedures the chairperson found to have been followed in applying for the rescission. If the appellants are referring to the finding by the chairperson that the rules of the district labour court do not provide that an application for rescission can be heard in terms of the provisions of s 36 of the Magistrate's Court Act, then the appellants are totally wrong and I disagree. The chairperson was correct to find that s 36 does not apply in rescission applications brought under the Labour Court Act 6 of 1992. The two statutes are different from one another, with different powers and functions. Even though the two Acts are on

par as regard the jurisdiction but they differ in respect of their powers and functions, therefore, independent from each others.

[28] I agree with the submissions of Mr Barnard for the respondent that the district labour court, just as the magistrate's court, does not have inherent jurisdiction. It is a creature of the Labour Act, which is only authorised to exercise the powers and functions accorded to it in terms of the Act.

[29] It is, therefore, irregular for the appellant to allege that s 36 of the Magistrate's Court Act was applicable in the application for rescission of a judgment of a district labour court by means of the provisions of rule 26. As already stated, Rule 26 of the Rules of the district labour court provides for the application of rules of the Magistrates' Courts, the rules applicable to civil proceedings in the magistrate's courts made in terms of s 25 of the Magistrate's Court Act and not to the Magistrates' Court Act self.

[30] Hereunder is a quotation of Rule 26 of the district labour court:

'Application of rules of magistrates' courts

26. Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in magistrates' courts made in terms of section 25 of the Magistrates' Court Act, 1944 (Act 32 of 1944), shall apply to proceedings before the court with such qualifications, modifications and adaptions as the chairperson may deem necessary in the interest of all the parties to such proceedings.'

[31] As regard ground 3, there is no such a thing that a district labour court, which was at the level of a magistrate's court, was bound by its previous decisions (*stare decises*). *Stare decises* rule does not apply to judgments of the magistrate's court. That being the case, I do not consider it necessary to elaborate further on this ground. There is no substance in it either, therefore, the appellants should fail on both grounds 2 and 3.

[32] With regard ground 4 of appeal, it is not clear what the appellants are appealing against. The ground is vague and absurd. The purpose of grounds of appeal is said to apprise fully all interested parties of what issues are in appeal (See *S v Gey van Pittius and Another* 1990 NR 35 (HC)). Ground 4 falls far short from informing, not only the chairperson who presided over the district labour court, on where his judgment was being attacked, but this court also does not know which part of the judgment is being attacked. It would seem that the appellants are not happy because the chairperson did not consider the provisions of rule 10 of the district labour court avoiding formality in the proceedings before him. However, the appellants, failed to state where in the judgment, the chairperson was too formalistic contrary to the provisions of rule 10. This ground should also, in my view, fail.

[33] I have discussed s 36 of the Magistrates Court Act, above already. Therefore, I do not want to repeat the same things I have already said in paras 29 and 30 of this judgment. Suffice to add that rule 26 of the District Labour Court Rules did not make s 36 of the Magistrates' Courts Act applicable to applications for rescission of judgments in labour matters. The chairperson was correct to find that s 36 was not applicable.

[34] In conclusion, and in ground 6, the appellants, have also appealed against the conviction of contempt of court of their legal representative, Mr Tjitemisa by the chairperson for having used the words: 'I submit that the conduct of both the magistrate and the respondent leave much to be desired in the founding affidavit he made in the application on behalf of the appellants'.

[35] As pointed out by Mr Barnard in his written heads of argument, that the district labour court is a creature of statute, which is the Labour Act[2], and in section 19 from where it derived its jurisdiction and powers. Anything not provided for in the Act, the chairperson could not validly do. Unlike the high court, the district labour court did not have inherent jurisdiction. The Magistrates' Courts Act, 1944 in s 108 makes

[2]Act 6 of 1992.

provision for custody and punishment for contempt of court[3]. There is no such a provision in the Labour Act of 1992 which could have allowed or authorised the chairperson to commit Mr Tjitemisa for contempt of court. The chairperson referred to a judgment of Van Niekerk J in the matter of *Christian t/a Hope Financial Services v The Chairperson of Namibia Financial Institution Supervisory Authority and Others*[4] in which Van Niekerk J convicted and punished Mr Christian for contempt of court as a result of the contents of certain documents he had filed with court which documents formed part of the record.

[36] In the *Christian* matter above Van Niekerk J was clothed with inherent jurisdiction and powers by virtue of common law to convict and punish Mr Christian summarily for contempt which inherent jurisdiction and powers the court below did not possess. The Labour Act of 1992, unlike the Magistrates' Court Act of 1944 as amended[5], does not make provision for custody and punishment for *contempt of court in facie curiae*. The chairperson, therefore, did not have any legal basis to convict and punish Mr Tjitemisa summarily for contempt of court *in facie curiae*. I believe the respondent was aware of the misdirection by the chairperson in that regard and elected not to oppose the appeal against the order. It is in my opinion, a wise choice taken by the respondent. The record of proceedings also does not state under which law Mr Tjitemisa was convicted and punished.

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[3]'Section 108: Custody and punishment for contempt of court
(1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehave himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection (3) of section *five* provided) be liable to be sentenced summarily or upon summons to a fine not exceeding one hundred rand or in default of payment to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine. In this subsection the word 'court' includes a preparatory examination held under the law relating to criminal procedure.
(2) In any case in which the court commits of fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.
[subsec. (1) amended by sec. 23 of Act 19 of 1963.]'.

[4]2009 (1) NR 37.

[5]S 108.

[37] Mr Barnard *qua* legal representative for the respondent prayed for an order to dismiss the appeal with costs. Orders for costs are provided for in s 20 of the Labour Act, 1992 which reads as follows:

'20 The Labour Court or any district labour court *shall* not make any order as to any costs incurred by any party in relation to any proceedings instituted in Labour Court or any such district labour court, except against a party which in the opinion of the Labour Court or district labour court has, instituted, opposing or continuing any such proceedings, acted *frivously* or v*exatiously*.' (Emphasis added).

In this instant matter, in my opinion, the appellants never acted frivously or vexatiously in instituting, opposing or continuing this appeal. There is no malice or ulterior motive in the launching of the appeal (*National Housing Enterprise v Beukes and Others* 2009 (1) NR 87 (LC)).The request for costs, therefore, is refused.

[38] In the result and as consequence of conclusions arrived at above, I make the following orders:

(i) The appeal prayed for in paras 1 – 5 of the notice of appeal is dismissed.

(ii) The appeal prayed for in para 6 of the notice of appeal is upheld.

(iii) The respondent's request for a costs order is refused.

P E UNENGU

Acting Judge

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APPEARANCES

APPELLANTS:	T C Phatela Instructed by Tjitemisa & Associates, Windhoek
FIRST RESPONDENT:	P Barnard Instructed by Neves Legal Practitioners, Windhoek
SECOND RESPONDENT:	H Harker of Government Attorney, Windhoek