

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

CASE NO: LCA 22/2016

In the matter between:

**MICHAEL ARNORDUS DE SWARDT T/A**

**LEEUEWKOP LOGISTICS**

**APPELLANT**

and

**JACOBUS VAN WYK**

**1<sup>ST</sup> RESPONDENT**

**LOGION SLINGER**

**2<sup>ND</sup> RESPONDENT**

**ALEX KUTAMUNDU**

**3<sup>RD</sup> RESPONDENT**

**SAMUEL HERMANUS CHRISTOF**

**4<sup>TH</sup> RESPONDENT**

**BONIFATIUS BENDT**

**5<sup>TH</sup> RESPONDENT**

**NICHOL ALEXANDER VAN WYK**

**6<sup>TH</sup> RESPONDENT**

**FREDERIECH ATAH WERMANN**

**7<sup>TH</sup> RESPONDENT**

**CECILIA AFRIKANER**

**8<sup>TH</sup> RESPONDENT**

**CHRISTIAN GAINGOB**

**9<sup>TH</sup> RESPONDENT**

**JACOLINE JUDITH HOASES**

**10<sup>TH</sup> RESPONDENT**

**NICLAAS ROOINASIE**

**11<sup>TH</sup> RESPONDENT**

**ALETTA LITICIA ROOINASIE**

**12<sup>TH</sup> RESPONDENT**

**JOSEPH WINDSTAAN N.O.**

**13<sup>TH</sup> RESPONDENT**

**THE LABOUR COMMISSIONER N.O.**

**14<sup>TH</sup> RESPONDENT**

**THE DEPUTY LABOUR COMMISSIONER**

**15<sup>TH</sup> RESPONDENT**

**Neutral citation:**

*De Swardt t/a Leeuwkop Logistics v Van Wyk* (LCA 22/2016)  
[2017] NALCMD 4 (7 January 2017)

**Coram:** UNENGU AJ  
**Heard:** 26 September 2016  
**Delivered:** 26 September 2016  
**Reasons released:** 07 February 2017

**Flynote:** Labour appeal – Court refuses respondents to take part in the proceedings for their failure to comply with Rule 17(16)(b) of the Labour Act – No condonation application to file the statement of opposition filed – Court following previous decisions dealing with Rule 17(16)(b) excluded the respondents from participating in the hearing allowing the appellant to make submissions where after Court upheld the appeal.

**Summary:** Labour appeal in which the appellant appealed against the arbitration award issued in favour of the respondents. Despite filing notice to oppose the appeal, the respondents failed to deliver a statement in terms of Rule 17(16)(b) of the Labour Act Rules as well as an application for condonation to file the statement of opposition out of time – following previous decisions of this court, the Labour Court excluded the respondents from participating in the proceedings, and allowed the appellant to make submissions and upheld the appeal which order was made on 26 September 2016.

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## REASONS

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UNENGU AJ:

### Introduction

[1] On 26 September 2016 after hearing submissions from Ms De Jager, counsel for the appellant and Mr Rukoro, counsel for the first to twelfth respondents; I made an order upholding the appeal, setting aside the award handed down on or about the 23<sup>rd</sup> day of January 2016 by the arbitrator Joseph Windstaan, who is the 13<sup>th</sup> respondent under case number CRWK-977 and dismissed the complaints of the respondents with no cost order made.

[2] A request for reasons for the order together with an application for leave to appeal against the order was filled by the Directorate of Legal Aid at the Registrar of

the High Court's Office on behalf of the first to twelfth respondents. Both documents, the request for reasons and the application for leave to appeal were signed *pp* by somebody from the Directorate of Legal Aid on behalf of Mr Rukoro.

[3] In view of the fact that the appeal in the matter was disposed of on 26 September 2016 and file taken to the general office for filing purposes, both the request for the reasons and the application for leave to appeal were only brought to my chambers at the beginning of December 2016, close to the High Court going on recess. Therefore, I was unable to give reasons requested by the respondents due my absence from the office.

[4] Another delay in the matter was caused when the record of proceedings for 26 September 2016 requested from Tunga Transcription Services was received late. I hope that the explanation set out above is reasonable and has explained why the Court only now has attended to the request for reasons made in October 2016 already.

### Reasons

[5] Initially, fifteen respondents were cited by the appellant in this matter when he appealed against the arbitration award issued against him by arbitrator Joseph Windstaan on 23 January 2016. In the meantime, however, the appellant decided not to pursue against the officials from the Office of the Labour Commissioner, who were represented by the Government Attorney's Office, but forged ahead against the other respondents represented by Mr Rukoro instructed by the Directorate of Legal Aid.

[6] It is common cause that the notice of appeal was served on the respondents on 13 April 2016. Thereafter, the first to twelfth respondents, through the firm Sisa Namandje Co. Inc., on 26 April 2016 delivered a notice of intention to oppose the appeal. However, the legal practitioners Sisa Namandje Co. Inc. on 2 June 2016 withdrew as legal practitioners for the first, second and third respondents, and on 22 June 2016 withdrew as legal practitioners for the first to twelfth respondents.

[7] On 12 August 2016, although the notice of set down was duly served on the first to twelfth respondents, the respondents without an explanation, opted to stay

away from the proceedings and the hearing of the appeal was postponed by Ueitele, J to 23 September 2016 for hearing before me.

[8] On 23 September 2016, again none of the respondents, including their legal representative was present at Court, and because of a full roll on that day, the hearing was again postponed to 26 September 2016. This was done with the view to grant counsel for the appellant the opportunity to address the Court on the grounds of appeal, even though those grounds were not opposed by any of the respondents.

[9] It is on this day, the 26 day of September 2016 when Mr Rukoro and some of the respondents appeared in Court demanding a hearing in terms of Rule 17(6) of the Rules. However, after hearing arguments from Ms De Jager and Mr Rukoro, also the fact that no application for condonation to file the statement of opposition<sup>1</sup> was moved by Mr Rukoro on behalf of the respondents, neither one for a postponement to comply with Rule 15 and 17(16) the Court following previous judgments<sup>2</sup> of this Court, denied the respondents the opportunity to take part in the hearing of the appeal. In the result, the appeal was heard unopposed and Ms De Jager proceeded to argue the matter.

[10] Parker, AJ in the matter of *Benz Building Suppliers v Stephanus and others supra* when dealing with the issue of a failure by a respondent in an appeal, to deliver a statement envisaged in Rule 17(16)(b) stated:

“(13) it must be remembered that this is an appeal and this Court qua appeal should proceed in determination of the appeal on the basis of (a) the record of the arbitral proceedings; (b) the appellants’ grounds of appeal and (c) the respondents’ ground for opposing the appeal. In this regard, as regards the first respondent, it must be remembered that such grounds as are required by Rule 17(16)(b) of the Rules of the Labour Court must be grounds that inform the arbitrator, the appellant and this Court of the grounds on which the arbitration award is attacked by the appellant and which the first respondent supports.”

[11] In this appeal those grounds are also missing, which is why this Court is not informed of the grounds on which the arbitration award is supported by the respondents. What is before Court, are only the grounds of appeal attacking the

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<sup>1</sup> Rule 17 (16).

<sup>2</sup> *Swakop Uranium (Pty) Ltd v Kalipa* (LCA 41/2014) delivered on 04 December 2015; *Walvis Bay Stevedoring Co. (Pty) Ltd v Ndjembela Alutumani* (LCA 46/2014) delivered on 13 May 2014; *Benz Building suppliers v Stephanus and others* 2014(1) NR 283 at 288.

arbitration award. Having said that, it is therefore my view that, the conduct of the respondents to disregard the provisions of *Rule 17(16)(b)* had dire consequences for them as their participation in the proceedings was denied. Rules are there to be followed by litigants, but if they are only to be obeyed and followed when a legal practitioner or a litigant sees fit to do so, then the existence of the Rules will serve no purpose.<sup>3</sup> (See also *Swanepoel v Marais and others*<sup>4</sup>).

[12] Ms De Jager filed extensive written heads of argument which she expanded on in her oral submissions. She discussed the grounds of the appeal with reference to various cases as authority. She pointed out that the respondents failed to comply with the provisions of *section 86(3) of the Labour Act*<sup>5</sup> and *Rule 14(1) of the conciliation arbitration Rules* read with *section 129 of the Labour Act* as no evidence was led in the arbitration proceedings that the dispute was served on the appellant.

[13] Service of a process is the all important first step which sets a legal proceeding in train. Without service, can there really be any argument that the proceedings are extant against a party<sup>6</sup>. Service of a process is a legal requirement, therefore and as there was no service on the appellant to set the legal proceedings in the train, the proceedings conducted by the arbitrator were not extant against the appellant.

[14] In addition, the appellant is a foreign company, a South African company whose drivers were in transit to Angola through Namibia, the respondents were supposed to file a dispute or claim in South Africa as the appellant has no business address in Namibia. In that regard, I agree with Ms De Jager that the arbitrator lacked jurisdiction to hand down an award against the appellant. The result is that the award so handed down is invalid and unenforceable. That being so, grounds 1 and 2 of the appeal should succeed.

[15] All in all Ms De Jager, counsel for the appellant, pointed out in her written heads of argument and oral submissions mistakes of non-compliance with the provisions of the *Labour Act* with regard to the service of documents like applications and affidavits filed by Cecilia Afrikaner, Nichol, Alexander van Wyk, Aletta Leticia

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<sup>3</sup> *Indigo Sky Gun (Pty) Ltd v John Stone* 1997 (NR 239 (HC))

<sup>4</sup> 1992 NR 1

<sup>5</sup> Act 11 of 2007

<sup>6</sup> *Knouws NO v Josea and Another* 2007 (2) NR 792 (HC)

Rooinasie, the notice of joinder or dismissal by Paul Nero, Alex Katamundu, Bonifatius Bendt, Ligion Slinger and Samuel Hermanus Christof, on the appellant.

[16] In my view this non-compliance with the rules, again constituted a fatal mistake on the part of the respondents which mistake was perpetuated by the arbitrator as he did in paragraphs 7 and 8 of his award.

[17] The same mistake was made in respect of the other respondents who were joined to the proceedings contrary to the provisions of the *Rules of the Labour Act* and the *Labour Act* itself. It would seem though that the claims of some of the respondents who were joined to the proceedings at a later stage, had prescribed well before the respondents referred these claims to the Office of the Labour Commissioner. Meaning that these respondents had no claims to refer to the Office of the Labour Commissioner at the time they purported to do so. (See *Nedbank Ltd v Louw*<sup>7</sup>)

### Conclusion

[18] Having regard to the grounds of appeal filed by the appellant against the award issued by the arbitrator, the written and oral submissions by counsel and the authorities cited in support of the allegations in the grounds of appeal, I am satisfied that the appellant managed to persuade this Court to make the order it did on 26 September 2016, namely:

- “1. The appeal is upheld.
2. The award handed down on or about 23<sup>rd</sup> day of 2016 by the arbitrator Joseph Windstaan, the 13<sup>th</sup> respondent under arbitration case number CRWK-977 is hereby set aside.
3. The complaints are dismissed.
4. No order as to costs made.”

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E P UNENGU  
Acting Judge

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<sup>7</sup> 2011 (1) Nr 217 (LC)

ON BEHALF OF:

APPELLANT/PLAINTIFF:

KÖPPLINGER BOLTMAN

1<sup>ST</sup> -12<sup>TH</sup> APPLICANT/1<sup>ST</sup> -12<sup>TH</sup> DEFENDANT:

LEGAL AID

13<sup>TH</sup> RESPONDENT/13<sup>TH</sup> DEFENDANT:

NO APPEARANCE

14<sup>TH</sup> RESPONDENT/4<sup>TH</sup> DEFENDANT:

NO APPEARANCE

15<sup>TH</sup> RESPONDENT/15<sup>TH</sup> DEFENDANT:

NO APPEARANCE