

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: LCA 30/2015

In the matter between:

NAMIBIA DIAMOND CORPORATION (PTY) LTD

APPLICANT

And

HENRY DENZIL COETZEE

RESPONDENT

Neutral citation: *Namibia Diamond Corporation (Pty) Ltd v Coetzee* (LCA 30/2015)
[2017] NALCMD 5 (10 February 2017)

Coram: **UEITELE, J**

Heard: 06 February 2017

Delivered: 10 February 2017

Flynote: *Labour law* - Labour Court - Appeals from - Such right restricted to questions of law – Notice of Appeal or application for leave to appeal to be restricted to questions of law alone - Consequences to follow a defective notice or application for leave to appeal.

Summary: The applicant, being the Namibia Diamond Corporation, seeks leave to appeal against an order of the Labour Court given on 10 February 2016 of which the reasons were delivered on 06 December 2016. The applicant is not happy with the order made by this Court and it accordingly gave notice of its intention to appeal against the judgment and orders made by this Court. On 27 January 2017 the applicant launched these proceedings seeking leave to appeal, against the judgment and orders of this Court to the Supreme Court. The application for leave to appeal is opposed by the respondent. The primary objection of the respondent, is that the application for leave to appeal is defective and that the notice does not comply with section 89 of the Labour Act, 2007.

Held that the application for leave to appeal is the foundation of the applicant's notice of appeal. What the applicant is seeking from this Court is leave to appeal against findings on points of law or findings of facts or findings against both points of law and of facts and also to appeal against the exercise of the court's judicial discretion.

Held further that section 89 does not grant the applicant the right to appeal against the court's findings on questions of facts or against the exercise of the courts discretion. It thus follows that if s 89(1)(a) which confers on a litigant a right to appeal against a decision of the arbitrator does not confer a right to appeal against a finding of fact, the court does not have the legal power to grant such a right.

Held that the court is of the view that once it finds that the application for leave to appeal is defective, that fact alone (it is the defect) cannot and should not close the doors of the Court to a litigant. A litigant is entitled to bring his case before the Court and to have it adjudicated by a Judge. It is for that reason that the court deems it appropriate to strike the notice of appeal from the roll rather than to dismiss it.

ORDER

The application for leave to appeal is struck from the roll.

JUDGMENT

UEITELE, JIntroduction and background

[1] The applicant, being the Namibia Diamond Corporation, seeks leave to appeal against an order of the Labour Court given on 10 February 2016 of which the reasons were delivered on 06 December 2016.

[2] Mr. Henry Denzil Coetzee, was employed by the Namibia Diamond Company (Pty) Limited as a senior diamond sorter from 1 March 2010 until 1 December 2014 when he was dismissed from his employment on allegations that he committed acts of misconduct. He, in terms of s 85 of the Labour Act, 2007 referred a dispute of unfair dismissal and unfair labour practice to the Labour Commissioner.

[3] The Labour Commissioner appointed an arbitrator to conciliate and arbitrate the dispute. The arbitrator found that Mr. Coetzee was unfairly dismissed and ordered the applicant to compensate him for 16 months' loss of income as a result for the unfair dismissal. The applicant appealed against the whole of the arbitration award made by the arbitrator, under s 86(15) of the Labour Act, 2007. The respondent (Henry Coetzee) opposed the applicant's appeal and simultaneously filed a cross-appeal arguing that the arbitrator erred by not ordering the applicant to reinstate him.

[4] In the Labour Court the applicant appealed against the whole of the arbitration award made by the arbitrator under s 86(15) of the Labour Act, 2007 on 16 April 2015 holding that the respondent was unfairly dismissed by the applicant and, for that reason, ordered the applicant to compensate the respondent for 16 months' loss of income. In the Labour Court I dismissed the appeal and found that the dismissal of Henry Denzil Coetzee was substantively and procedurally unfair and ordered the applicant to reinstate Mr. Henry Denzil Coetzee and to pay him an amount equal to the monthly remuneration he would have received had he not been unfairly dismissed.

[5] The applicant is not happy with the order I made in this Court and it accordingly gave notice of its intention to appeal against the judgment and orders made by this

Court. On 27 January 2017 the applicant launched these proceedings seeking leave to appeal against the judgment and orders of this Court to the Supreme Court.

[6] The application for leave to appeal is opposed by the respondent. The primary objection of the respondent, represented by Mr. Namandje, is that the application for leave to appeal is defective and that the notice does not comply with section 89 of the Labour Act, 2007.

The applicable legal principles

[7] Labour Relations in Namibia are governed by the Labour Act, 2007¹ the section that is relevant for purposes of leave to appeal is s 89. That section reads as follows:

'89 Appeals or reviews of arbitration awards

(1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 -

(a) *on any question of law alone.'*

[8] Section 18 of the High Court Act, 1990 reads as follows:

'18 Appeals against judgment or order of High Court in civil proceedings

(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie-

(a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;

(b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has

¹ Act No. 11 of 2007.

given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.’

Consideration of the leave sought by the applicant.

[9] In considering whether to grant or not to grant the leave sought by the applicant I deem it necessary to quote the application for leave to appeal. The application for leave to appeal amongst other things reads as follows:

‘**KINDLY TAKE NOTICE** that the applicant is applying, on a date to be arranged with the registrar, for leave to appeal to the Supreme Court of Namibia against the whole of the judgment and/or order delivered by the Honourable Mr Justice Ueitele on 6 December 2016 in the above matter when he dismissed the applicant’s appeal, granted the respondent’s cross-appeal and amended the arbitrator’s award by reinstating the respondent and awarding him an amount equal to the monthly remuneration he would have received had he not been unfairly dismissed.

TAKE NOTICE FURTHER that the grounds on which the applicant seeks leave to appeal are the following, namely that the learned judge erred in the law and/or on the facts and/or did not exercise his discretion in a judicial manner and/or misdirected himself in one or more of the following respects:’

[10] The provisions of section 89 of the Act were considered by this Court in the unreported judgment of *Shoprite Namibia (Pty) Ltd v Faustino Moises Paulo*² where Parker J said:

‘The predicative adjective “alone” qualifying “law” means “without others present”.) Accordingly, the interpretation and application of s. 89 (1) (a) lead indubitably to the conclusion that this Court is entitled to hear an appeal on a question of law alone if the matter, as in the instant case, does not fall under s. 89 (1) (b). A ‘question of law alone’ means a question of law alone without anything else present, eg. opinion or fact. It is trite that a notice of appeal must specify the grounds of the appeal and the notice must be carefully framed, for an appellant has no right in the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal. In this regard it has also been said that precision in specifying grounds of appeal is ‘not a matter of form but a matter of substance ... necessary to enable appeals to be justly disposed of.’

² An unreported judgment of the Labour Court of Namibia Case No. LCA 02/2010 delivered on 07 March 2011.

[11] In the matter of *President of the Republic of Namibia v Vlasiu*³ Justice O'Linn held that, in circumstances where a party's right to appeal is restricted to questions of law and that party's notice of appeal purports to be an appeal against the "whole of the judgment and order as to cost" such notice of appeal is defective. It thus follow that in so far as the applicant purports to apply for leave to appeal against my findings of law or facts or both facts and law or against the exercise of my judicial discretion the application is defective. I say the application is defective because s 89(1)(a) of the Labour Act, 2007 only confers a right on the applicant to appeal against questions of law alone.

[12] Mr. Dicks referred me to the matter of *Van Rensburg v Wilderness Air Namibia (Pty) Ltd*⁴ where O Reagan AJA said:

[62] Moreover, as explained above, determining what constitutes a question of law is an issue that continues to trouble courts and accordingly it will continue to trouble litigants. Given that difficulty, to read s 89(1)(a) to oust the jurisdiction of the Labour Court because an appellant has failed correctly to identify a question of law would be inequitable. Instead, s 89(1)(a) should be properly construed to limit the appellate jurisdiction of the Labour Court to questions of law. Where grounds of appeal are raised that are not questions of law, the Labour Court should simply dismiss them as improperly raised, but any ground of appeal that does raise a question of law should be addressed on the merits.'

[13] Mr. Dicks accordingly argued that it will be inequitable for me to refuse to grant the applicant leave to appeal simply because the application for leave to appeal is overbroad and refers to 'questions of law', to 'questions of fact' and to the 'exercise of judicial discretion'. Mr. Namandje on the other hand argued that the *Van Rensburg* matter is not helpful to the applicant because the consideration of whether the grounds of appeal constitute points of law or points of fact can only be embarked upon when there is a proper and valid application for leave to appeal. In this matter, argued Mr. Namandje, there is no proper and valid application for leave to appeal because the application that is before Court seeks leave to appeal against questions of both law and fact.

³ 1996 NR 36 (LC).

⁴ An unreported judgment of the Supreme Court of Namibia Case No: SA 33/2013 delivered on 11 April 2016.

[14] In the *Van Rensburg* matter O Reagan AJA cautioned that:

‘This approach [i.e. the approach set out in paragraph 62 of that judgment] does not absolve litigants of their responsibility to take care in framing their notices of appeal. Good practice requires litigants to be aware of the scope of their right to appeal and to draft notices of appeal with knowledge of and attention to the governing statutory provisions.’

[15] In the matter of *S v Kakololo*⁵ the following was stated:

‘The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall...It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact or both.... The notice also serves to inform the respondent of the case it is required to meet and, regard being had to the record and the magistrate’s reasons, whether it should concede or oppose the appeal. Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case ... “an attorney filing such a notice assumes the *onus* of satisfying this Court, when the case comes on for hearing, that the appeal has been properly noted” and that, if the notice “is not a proper notice, all the consequences of a failure to note an appeal properly in terms of the Rules necessarily follow.”. Expounding on what those consequences are ... when dealing with a “notice” in which no grounds were mentioned said (at p. 675) that it “was not a valid notice of appeal, and as such it was no notice of appeal at all.”.... Such a notice is a nullity and does not have any force or effect.’

[16] I am of the view that the approach adopted by the Supreme Court in the *Van Rensburg* matter is to ensure that the Court does not abdicate its Constitutional mandate to adjudicate over disputes that come before it and to administer justice. The approach is not a license to litigants to disregard the statutory provisions and to carelessly draft their notices of appeal. Although the *Kakololo* matter deals with criminal proceedings the reasoning in that matter is applicable to this matter. The application for leave to appeal is the foundation of the applicant’s notice of appeal. What the applicant is seeking from this Court is leave to appeal against my findings on points of law or my findings on facts or my findings against both points of law and of facts and also to appeal against the exercise of my judicial discretion. Section 89 does not grant them the right to appeal against my findings on questions of facts or against the exercise of my

⁵ 2004 NR 7.

judicial discretion. It thus follows that if s 89(1)(a) which confers on a litigant a right to appeal against a decision of the arbitrator does not confer a right to appeal against a finding of fact and I do not have the legal power to grant such a right.

[17] I am therefore of the view that once I find that the application for leave to appeal is defective, that fact alone (it is the defect) cannot and should not close the doors of the Court to a litigant. A litigant is entitled to bring his case before the Court and to have it adjudicated by a Judge. It is for that reason that I am of the view that the appropriate consequences for a defective notice is to strike the notice from the roll rather than to dismiss it.

[18] In the result I make the following order.

The application for leave to appeal is struck from the roll and I make no order as to costs.

SFI Ueitele
Judge

APPEARANCES**APPLICANT:**

J. Dicks
Instructed by Kopplinger Boltman,
Windhoek

RESPONDENT:

S. Namandje
Of Sisa Namandje & Co Inc, Windhoek