\REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2021/00004

In the matter between:

THE MINISTER OF LABOUR, INDUSTRIAL RELATIONS AND EMPLOYMENT CREATION	**APPELLANT**
AND	
MARTIN NATANGWE PANDULENI	**FIRST RESPONDENT**
MEMORY SINFWA NO	**SECOND RESPONDENT**
LABOUR COMMISSIONER	**THIRD RESPONDENT**

Neutral citation: *The Minister of Labour, Industrial Relations and Employment Creation v Panduleni* (HC-MD-LAB-APP-AAA-2021/00004) [2021] NALCMD 45 (1 October 2021)

Coram: PRINSLOO J
Heard: **7 May 2021**
Delivered: **1 October 2021**

Flynote: Notice of Appeal – Labour Appeal — Notice of appeal — Requirements of — Notice of appeal failing to attached Form LC41 as required in terms of rule 17 of Labour Court Rules and rule 23(2) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner — constituting a nullity

resulting in a situation that there is no appeal before the court – accordingly the appeal had to be dismissed.

Summary: The appellant filed a Notice of Appeal in terms of Rule 17 of the Rules of the Labour Court appealing against the whole of the arbitration award made by the Arbitrator. The appellant filed the Notice of Appeal in Form 11, which incorporated the appellant's grounds of appeal. The completed Form 11 was received by the second and third respondents on 21 December 2020. It was, however, not delivered to the first respondent.The first respondent raised two points in limine, i.e.: a) that the appeal is not properly before the court and b) the appellant's notice of appeal has not been delivered to the first respondent. The first respondent took the point that the appeal is not properly before the court as the appellant failed to lodge its notice of appeal with LC 41 as embodied by Rule 23(2), and thus the appeal is defective and not proper before the court.

Held that where a notice of appeal does not have a duly completed Form 11 and Form LC 41 attached to it when the notice is delivered, there is no notice of appeal properly so-called in terms of the Act, and a *priori* no appeal.

Held that having considered Rule 17 of Rules of the Labour Court, s 89(1) of the Labour Act and also rule 23 of the Rules Relating to the Conduct of Conciliation and Arbitration, it is clear that the non-compliance with the peremptory requirement for the filing of Form 11 and LC 41 together with the notice of appeal is fatal to the appellant’s case.

ORDER

1. The appeal is dismissed.

2. There is no order as to costs.

3. The matter is removed from the roll and regarded finalized.

JUDGMENT

PRINSLOO J:

Introduction

[1] Serving before the court for determination is an appeal launched by the appellant, the Minister of Labour, Industrial Relations and Employment Creation against the arbitration award made on 04 December 2020 pursuant to s 89 of the Labour Act [1] (herein referred to as "the Act") by the Arbitrator, Ms Memory Sinfwa.

[2] The first respondent was previously attached to the Regional Office of the Ministery of Labour, Industrial Relations and Employment Creation as an Administrative Officer stationed at Swakopmund. However, he since left the employment of the said Ministry.

Background

[3] The summary of the background that gave rise to the matter before me is as follows:

a. The High Commission of India nominated the first respondent to attend a course in English Fluency and IT Skills in New Dehli, India, from 14 March 2016 to 03 June 2016 under the ITEC/SCAAP Programme of the Ministry of External Affairs of the Government of India.
b. The Government of India offered the first respondent a fully-funded scholarship. Accordingly, the first respondent applied to the Ministry for its approval to release him to attend the said course in New Dehli.
c. The Permanent Secretary (now Executive Director) approved the first respondent's application on the recommendation of the Chairperson of the Training Committee.
d. Upon his return, the first respondent submitted a claim requesting payment of Daily Subsistence Allowance (DSA) to the appellant in terms of

[1] 11 of 2007.

the Public Services Staff Rules (PSSR) D.III/I and payment was made by the Ministry at Rate 3 of the PSSR.

e. The first respondent was not satisfied with the rate at which he was paid and requested that the rate payment be considered at Rate 1 of the PSSR.
f. As the first respondent and the appellant reached an impasse on the issue of the correct rate of payment, the first respondent referred the matter to the Office of the Labour Commissioner.

[4] The Arbitrator, Ms Sinfwa, conducted the arbitration proceedings and issued an award ordering the appellant to pay the first respondent an amount of N$ 202 293.30 being the difference between the amount of a daily subsistence allowance and transport costs that were paid out to the first respondent.

[5] On 15 November 2020 the appellant filed a Notice of Appeal in terms of Rule 17 of the Rules of the Labour Court appealing against the whole of the arbitration award made by the Arbitrator. The appellant filed the Notice of Appeal in Form 11, which incorporated the appellant's grounds of appeal. The completed Form 11 was received by the second and third respondents on 21 December 2020. It was, however, not delivered to the first respondent. From the papers, it would appear that the notice of appeal was served on the first respondent's representative who attended the arbitration proceedings. The appellant filed an affidavit of service in this regard.

[6] Despite not having been served personally with the notice of appeal, the first respondent opposed the appeal and filed his grounds of opposition in compliance with Rule 17 (16) (b) of the Labour Court Rules on 22 February 2021.

[7] In his grounds of opposition the first respondent raised two points in limine, which I will address before proceeding to the merits as upholding the points in limine will be dispositive of the appeal.

Points in limine

[8] The first respondent raised two points in limine, i.e.: a) that the appeal is not properly before the court and b) the appellant's notice of appeal has not been delivered to the first respondent.

a) Appeal not properly before the court.

[9] The first respondent took the point that the appeal is not properly before the court as the appellant failed to lodge its notice of appeal with LC 41 as embodied by Rule 23(2), and thus the appeal is defective and not proper before the court. Ms Shikongo argued that the requirement to lodge the appeal with an LC 41 is mandatory, and failure thereto renders the appeal defective.

[10] Ms Shikongo further argued that there is a flagrant disregard on the part of the appellant for the court rules as the appellant to date failed to deliver the completed form 11 notice of appeal together with form LC 41 to the respondent.

[11] Mr Ncube argued that the first respondent's firm reliance on the non-filing of form LC 41 is a matter of form over substance and that the grounds of appeal are set out in form 11 filed on behalf of the appellant. Mr Ncube further argued that the court must make a distinction between the pre- 2016 cases and the post-2016 and this is specifically with reference to the watershed case of *Janse Van Rensburg v Wilderness Air Namibia Pty Ltd*[2] and subsequently the matter of *Namdeb Diamond Corporation (Pty) Ltd v Coetzee*[3] both cases wherein the Supreme Court addressed the mischief of technicalities. In the *Namdeb* matter, Hoff JA stated as follows:

'[33] What is peculiar from the reasons advanced on 6 December 2017 is that the Labour Court referred to the passage in matter quoted at para 8 supra but declined to apply it because the notice of appeal was defective. This is exactly the mischief the Supreme court tried to combat, namely for the Labour Court to be distracted and the proceedings be unduly delayed by such technicality, but rather to focus on those points of law which are discernable

[2] *Janse Van Rensburg v Wilderness Air Namibia Pty Ltd* (SA 33/2013) [2016] NASC 3 (11 April 2016).

[3] *Namdeb Diamond Corporation (Pty) Ltd v* (SA8/2017) [2017 NASC 402 (01 August 2018).

from the notice of appeal. The Labour Court should have dismissed the *point in limine* which was clearly devoid of any merit.'

[12] The position taken by our Supreme Court on the avoidance of technicalities is, however, not a licence to litigants to disregard statutory provisions, and one should not lose sight of the fact that Form 11 and Form LC41 contain the questions of law the appellant raises in the notice of appeal and the grounds upon which the appeal is based. Thus, an appellant is obliged by the Labour Act and the aforementioned rules to inform the respondent of the case it has to meet.

[13] The appeal in casu was noted in terms of rule 17(3) of the Labour Court Rules, an appeal against an arbitral award in terms of s 89 of the Labour Act, 2007 which provides that the appeal, 'must be noted in terms of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 262 of 31 October 2008 . . . and the appellant must at the time of noting the appeal –
(a) complete the relevant parts of Form 11;
(b) deliver the completed Form 11, together with the notice of appeal in terms of those rules, to the registrar, the Labour Commissioner and the other parties to the appeal.'

[14] From my reading of rule 17 of the Rules of the Labour Court it is clear that this rule is not the only rule that governs appeals brought under s 89(1) of the Labour Act. There is also rule 23 of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice No. 262 of 31 October 2008 ('the conciliation and arbitration rules'), and it provides:

> '(1) Any party to an arbitration may, in accordance with subrule (2), note an appeal against any arbitration award to the Labour Court in terms of section 89 of the Act.
>
> (2) An appeal must be noted by delivery, within 30 days of the party's receipt of the arbitrator's award, to the Labour Commissioner of a notice of appeal on Form LC 41 ….'

[15] In *Pathcare Namibia (Pty) Limited vs Du Plessis*[4] Parker AJ stated as follows in this regard:

(From all these provisions the following conclusions follow as a matter of course:

'[6] … according to the Labour Act, a party to an arbitration who wishes to appeal against the arbitration award made in the arbitration must do so in terms of s 89 of the Labour Act, rule 17 of the rules of the court and rule 23 of the conciliation and arbitration rules. In that regard, the appellant must attach duly completed Form 11 and Form LC 41 to the notice of appeal before the notice is delivered in terms of the rules of the court and the conciliation and arbitration rules. These requirements are indubitably peremptory and necessarily required, considering the information and details that the appellant must supply on the Forms.

[7] … where a notice of appeal does not have duly completed Form 11 and Form LC 41 attached to it when the notice is delivered, there is no notice of appeal properly so-called in terms of the Act, and *a priori* no appeal. This is so whether such notice is delivered within the time limit in accordance with the Act and the Labour Court Rules and the conciliation and arbitration rules. It is not a question of whether in delivering only a nude notice without attaching to it duly completed Form 11 and Form LC 41 the respondent has been prejudiced …. The irrefragable fact that remains is that where duly completed Form 11 and Form LC 41 are not attached to a notice of appeal no notice of appeal has been delivered and, *a priori*, there is no appeal noted in terms of the Labour Act.'

[16] In both Form 11 and Form LC 41 an appellant is required to set out the grounds of appeal, but Form LC 41 goes further than that as the appellant is required to set out the questions of fact (only in the case of a dispute involving the Fundamental Rights and Protections) or law appealed against in the arbitrator's award 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.

[17] In Form 11 the appellant sets out the grounds of appeal relied upon by the appellant by starting each ground with the phrase 'the arbitrator erred at law' and then continues to set out his views on how the arbitrator erred in law. However, the

[4] *Pathcare Namibia (Pty) Limited vs Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013)

appellant failed to set out the questions of law as required by s 89 (1)(a) of the Labour Act.

[18] I am not entirely clear on whether the appellant implies that the question of law is also the grounds of appeal relied on by the appellant, ie. the question of law also doubles as grounds of appeal. That would, however be wrong, as it does not satisfy the requirements of Form 11 and Form LC 41.[5]

[19] In conclusion, having considered Rule 17 of Rules of the Labour Court, s 89(1) of the Labour Act and also rule 23 of the Rules Relating to the Conduct of Conciliation and Arbitration, it is clear that the non-compliance with the peremptory requirement for the filing of Form 11 and LC 41 together with the notice of appeal is fatal to the appellant's case.

[20] Parker AJ stated in *TransNamib Holdings Ltd vs Amukwelele:*[6]

'[2] Form 11 and Form LC41 contain the questions of law the appellant raises in the notice of appeal and the grounds upon which the appeal is based. Thus, an appellant is obliged by the Labour Act and the aforementioned rules to inform the respondent the case it has to meet. See *Pathcare Namibia (Ltd) v Du Plessis* (LCA 27/2011) [2013] NALCMD 28 (29 July 2013) (Unreported). By a parity of reasoning, the respondent who wishes to oppose the appeal must inform the appellant the grounds upon which he or she opposes the appeal, so that the appellant, too, may be informed of the case, that is the respondent's case or opposition, it has to meet.

[3] The practice of the court is firmly entrenched that where an appellant fails or refuses to comply with the peremptory requirements under the Act and the aforementioned rules the result is a dismissal of the appeal on the basis that there would be no appeal properly before the court for the court to consider. See, eg, *African Consulting Services CC v Gideon* (LCA 60/2012) [2013] NALCMD 43 (26 November 2013); and *Du Plessis*.'

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[5] *Namibia Dairies (Pty) Ltd vs Alfeus* (LCA 4/2014) [2014] NALCMD 36 (18 September 2014) at para 8.

[6] (LCA 61-2014) [2015] NALCMD 21 (17 September 2015). Also, see *Sevelinus and 57 Others v A Wutow Company (Pty) Ltd* (INT-HC-OTH-2019/00224) [2020] NALCMD 269 (3 July 2020) at para 20.

[21] In the premises, it is clear that appeal is not properly before the court for the court to consider, and the first point *in limine* must be upheld. The practice of the court is firmly entrenched that where an appellant fails or refuses to comply with the peremptory requirements under the Act and the aforementioned rules the result is a dismissal of the appeal on the basis that there would be no appeal properly before the court for the court to consider.

[22] Having upheld the first point *in limine*, it is would be unnecessary to consider the second point *in limine*.

Power of attorney

[23] Before I conclude my judgment, I need to address the last issue raised by Mr Ncube as a preliminary point regarding the filing of a power of attorney by the Offices of the Government Attorneys. Ms Shikongo did not address this matter as it relates specifically to the interest of the Office of the Government Attorney.

[24] Mr Ncube raised this issue of power of attorney as it would appear that his office was unable to obtain a hearing date for the matter on the basis that the appellant failed to file a power of attorney to found locus standi.

[25] In *Minister of Health and Social Services v Medical Association of Namibia Ltd and Another* [7] Strydom AJA stated as follows in this regard:

'[28] Prior to independence the State Attorney at Windhoek was a branch office of the office of the State Attorney, Pretoria, in terms of the State Attorney Act, Act No. 56 of 1957. (Sec. 3(2) of Act 56 of 1957.) However by State President's proclamation R161 of 1982 the Windhoek branch office was converted into the Government Attorney's office for the Territory of South West Africa. It did not repeal Act 56 of 1957 but amended certain words to bring it in line with the Proclamation. Sec. 4 of the Proclamation sets out the functions of the Government Attorney which, in general, are the same as set out in sec 3 of Act 56 of 1957.

[7] *Minister of Health and Social Services v Medical Association of Namibia Ltd and Another* 2012 (2) NR 566 SC

[29] The Government Attorney occupies a different relationship to its only client, the Government of Namibia, than a legal practitioner in private practice representing a client. His salary is paid by the Government and as such he is employed by the Government to fulfill its functions on behalf of the Government. Similarly the rules of the High Court (Rule 7(5)) and that of the Supreme Court (Rule 5(4)(c)) do not require the Attorney–General or the Government Attorney to file powers of attorney where they act on behalf of the Government of Namibia or a Minister or other officer or servant of the Government.'

[26] Power of attorney is no longer a legal requirement on the part of the legal practitioner of record acting for a party to file a power of attorney simultaneously with either the combined summons or the notice to defend.[8]

[27] I must however hasten to clarify that in terms of rule 119(10) of the Rules of Court,[9] the obligation on a legal practitioner remains to file a power of attorney in respect of lodging an appeal in terms of rules 116, 118 and 119.

[28] Although High Court Rules as referred to by the Strydom AJA has since been replaced by the new High Court Rules that came into operation in 2014,[10] it would appear that the position prevailed in respect of the Government Attorneys as set out by the Supreme Court.

[29] This was confirmed as recently as February 2021 when Parker AJ in *Gibeon Village Council v Uaaka*[11] dismissed the preliminary point raised on the issue that the Government Attorneys failed to file a power of attorney in a labour appeal. Parker AJ did not elaborate on the necessity for the Government Attorneys to file a power of attorney in light of the remarks by our Apex Court, nor will I, as judgment speaks for itself.

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[8] P T Damaseb Court-Managed Civil Procedure of the High Court of Namibia, 1st Ed at p.96.

[9] '(10) The registrar may not set down an appeal referred to in rule 116 or 118 or under this rule at the instance of a legal practitioner unless that legal practitioner has filed with the registrar a power of attorney authorising him or her to appeal and the power of attorney must be filed together with the application for a date of hearing.'

[10] GN 4 of 2014 (as amended)

[11]

Order

1. The appeal is dismissed.

2. There is no order as to costs.

3. The matter is removed from the roll and regarded finalized.

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JS Prinsloo

Judge

APPEARANCES:

APPELLANT:	J NCUBE of Government Attorneys
FIRST RESPONDENT:	L SHIKONGO of Metcalfe and Beukes Attorneys