REPORTABLE

CASE NO.: SA 53/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

REINHOLD HASHETU NGHIKOFA **Appellant**

and

Respondent

CLASSIC ENGINES CC

CORAM: SHIVUTE CJ, MTAMBANENGWE AJA and O'REGAN AJA

Heard: **8 November 2013**

Delivered: **26 March 2014**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and MTAMBANENGWE AJA concurring):

[1] This is an appeal against an order of the High Court dismissing points taken *in limine* by the appellant, Mr R H Nghikofa, in relation to an action launched by the respondent, Classic Engines CC. The respondent employed the appellant in February 2009 as the manager of the branches of its business situated in Oshikango and Ondangwa. In terms of the written employment contract, appellant

was responsible, amongst other things, for handling sales and assisting and providing service to respondent's customers. Respondent alleges that during the period of appellant's employment, which lasted from February 2009 till July 2009, the appellant 'made secret profits' from respondent's clients and accordingly respondent suffered damages. The respondent accordingly issued summons in the High Court to recover the damages it had allegedly suffered as a result of appellant's conduct.

[2] Appellant raised several points *in limine* to respondent's cause of action. Appellant noted that he had previously sued respondent in terms of the Labour Act 11 of 2007 (the Act) for unfair dismissal arising from the termination of his contract of employment and on 11 November 2009, the appellant and respondent had entered into a settlement agreement in relation to the unfair dismissal claim. In terms of that agreement, respondent had agreed to pay appellant an amount of N$78 864,56 in full and final settlement of appellant's unfair dismissal claim within twelve months of 30 November 2009.

[3] The respondent failed to pay the amount due in terms of this agreement and, instead, issued summons in the High Court in these proceedings. The *in limine* points which form the subject matter of this appeal relate to the unfair dismissal proceedings described in the previous paragraph. Appellant argues that respondent was precluded from issuing summons in the High Court because the settlement agreement entered into following appellant's claim in terms of the Act had constituted a settlement of all disputes arising between the appellant and respondent in relation to the contract of employment. Appellant also argues that

respondent was precluded from issuing summons in the High Court to recover damages because the claim related to a dispute arising from a contract of employment in terms of s 86 of the Act and the High Court has no jurisdiction to entertain such a claim. Moreover, appellant asserts that respondent's claim has prescribed in term of the provisions of the Act.

[4] The High Court dismissed the appellant's points *in limine* with costs. It is against this decision of the High Court that appellant now appeals.

Preliminary issue: condonation

[5] Before turning to the merits of this appeal, it is necessary to consider several preliminary issues concerning condonation. The High Court delivered three interlocutory judgments in this matter: on 29 July 2011, 3 February 2012 and 25 July 2012. The last of these related to the *in limine* points at issue in this appeal. In his notice of appeal, appellant sought to appeal against two of the three judgments of the High Court but at the hearing of this matter, appellant made clear that he was only persisting in an appeal against the judgment of 25 July 2012, and nothing further need be said about the two earlier judgments. There are three issues relating to condonation that require consideration: the alleged late filing of the notice of appeal; the late filing of the appeal record and security for costs; and the late filing of appellant's heads of argument.

[6] First, there is a dispute as to the date upon which appellant lodged his notice of appeal. According to appellant his notice of appeal was first lodged on 23 August 2012 and that on 29 August 2012 the Registrar of the Supreme Court

informed him that the notice was irregular as it lacked the High Court case number. According to appellant, he filed a corrected notice of appeal on the same day. The notice of appeal before this court bears the date 29 August 2012. Appellant argues that both notices were duly served on the respondent, so the respondent would have suffered no inconvenience.

[7] Respondent argues that the date of the notice of appeal as reflected on it, is 29 August 2012 and that therefore the notice of appeal was filed out of time. Respondent also argues that appellant was not entitled to lodge two notices of appeal. This argument is formalistic, and overlooks the fact that by lodging an amended notice of appeal, appellant was merely ensuring compliance with the rules. Although the first notice of appeal does not form part of the appeal record, there is no reason to disbelieve appellant's version of the facts. Indeed respondent does not dispute them. In the light of the facts that (a) appellant lodged an irregular notice of appeal timeously; (b) lodged a corrected notice as soon as the irregularity was brought to his attention by the Registrar; (c) that at worst for appellant the notice was four days late; and (d) that respondent has not been materially prejudiced by the non-compliance with the rules, there would be much to recommend the grant of condonation in relation to the failure to lodge a proper notice of appeal timeously. However, as will be seen from what follows, appellant also seeks condonation in relation to three further instances of non-compliance with the rules and all four instances should be considered together.

[8] Secondly, there is an application before the court to condone the appellant's late filing of the appeal record and late filing of security for costs. This application

is defective in that it does not include an application for reinstatement of the appeal. It is trite that the failure to lodge the appeal record and/or security timeously results in the lapsing of the appeal (see rule 5 of the Rules of the Supreme Court). The proper procedure therefore is to lodge an application for condonation for the late filing and seek the reinstatement of the lapsed appeal. As mentioned before, the appellant has applied for condonation but has failed to apply for the reinstatement of the appeal.

[9] Appellant lodged the appeal record and filed security for costs on Monday 29 October 2012. The rules stipulated that the appeal record and security should be filed within three months of the date of the judgment against which the appeal is brought. The appeal record and security for costs should thus have been filed by Wednesday 24 October 2012 and they were several days late.

[10] Appellant's legal practitioner deposed to an affidavit in support of the application for condonation. He states that the mistake arose because he had thought that the date of the judgment had been 29 July 2012, instead of 25 July 2012. Although respondent asserts that it has been prejudiced by the dilatory manner in which appellant has proceeded, the extent of the delays in this matter, at least insofar as the remaining appeal is concerned, were minor and it is unlikely that the fact that both the appeal record and security for costs were lodged a few days late caused material prejudice to respondent.

[11] Finally, appellant's heads of argument should have been lodged on Thursday 10 October 2013 and they were lodged on Monday 14 October 2013.

Appellant filed an application for condonation. His legal practitioner stated in the affidavit supporting the condonation application that he had made a mistake in calculating 14 October 2012 as the date upon which the heads should be filed. He said that he had made the mistake at a time when he was called urgently to visit his mother who was very ill. He did not check his calculation till Friday 11 October 2013 when he realised that he had miscalculated. Although respondent again asserts that it was prejudiced by appellant's dilatory filing of his heads, the delay was only four days.

[12] An important consideration in determining whether it is appropriate to grant condonation in respect of the non-compliance with the rules on the four occasions discussed, is the question of the prospects of success upon appeal. I accordingly now turn to consider the merits of the case. If appellant's prospects on the merits of the appeal are not good, given that there are four separate instances of non-compliance with the rules, this would be a case in which condonation should be refused.

Merits

[13] The key issue in the appeal is whether as a result of the settlement of appellant's unfair dismissal claim launched in terms of the Act, respondent is precluded from seeking damages from appellant for the alleged 'secret profits' drawn by appellant from respondent's business while appellant was employed by the respondent.

[14] As mentioned above, the settlement entered into between appellant and respondent related to appellant's unfair dismissal claim lodged with the Office of the Labour Commissioner. During the statutory conciliation in respect of the unfair dismissal claim, the respondent agreed to pay the appellant an amount of N$78 864,56 in respect of appellant's basic salary for August, September and October 2009, as well as for 9 days of November 2009, one month's wages in lieu of notice, and 28 days of leave. The agreement stipulated: 'the agreement remains (sic) full and final settlement and binding on both parties'.

[15] Appellant argues that the settlement agreement had the result of resolving all the disputes between the parties arising from his employment and that it was accordingly not open to respondent to sue him in damages for losses occasioned by what respondent refers to as 'secret profits'. Appellant also argues that respondent's failure to counterclaim for the damages it now seeks in the labour proceedings has the consequence that the respondent may not seek them in the High Court at this stage. There are two issues that need to be considered: (a) was the respondent required to counterclaim in the Act proceedings for the damages it now seeks in the High Court rather than proceeding in the High Court, and (b) if not, did the settlement agreement properly construed destroy the claim for contractual damages now pursued by the respondent.

Was respondent obliged to counterclaim in respect of his damages claim before the Labour Commissioner?

[16] Section 84 of the Act defines 'dispute' to include 'a complaint relating to the breach of a contract of employment of a collective agreement.' Section 86 then provides that a party to a dispute *may* refer the dispute in writing to the Labour Commissioner or any labour office, which, in turn, may then be referred to conciliation as happened here.

[17] It appears that at no stage during the proceedings before the Labour Commissioner did the respondent raise the question of the contractual damages it had suffered. The Act does not expressly confer the power to determine contractual damages upon an arbitrator although s 86(15)*(d)* of the Act empowers an arbitrator to make 'an award of compensation' but does not expressly mention damages. The High Court judge, in his judgment in this matter, expressed the view that an arbitration tribunal acting in terms of s 85 of the Act has no power to determine claims based on damages arising from contracts of employment. It is not necessary for this court to determine that question here. It is only necessary for this court to determine the narrower question: assuming that the respondent could have raised its damages claim before the Labour Commissioner, was it compelled to do so?

[18] There is nothing in the Act that expressly purports to exclude the jurisdiction of the High Court in relation to damages claims arising from contracts of employment. Indeed, as pointed out above s 86(2) of the Act provides that a party

may refer a dispute to the Labour Commissioner, and is thus not compelled to do so. A court will ordinarily be slow to interpret a statute to destroy a litigant's cause of action (see *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16). In the absence of a clear rule that if a litigant fails to counterclaim for damages arising from a contract of employment that has been placed before the Labour Commissioner in relation to a different dispute, the court will rarely conclude that such a rule is implicit in legislation.

[19] Appellant's counsel referred to the important principle of fairness that underlies labour law. He cited the statement by Swanepoel J in *Pinks Family Outfitters (Pty) Ltd t/a Woolworths v Hendricks* 2010 (2) NR 616 (LC) at para 20, that important principles 'in labour law cases is that fairness and reasonableness form an integral part of an employment relationship' and that 'the interests of both parties should be considered'. Counsel suggested that if the principle of fairness was applied in this case, the court would prevent respondent from suing appellant in the High Court because the matter has already been settled in proceedings under the Act. The principle enunciated by Swanepoel J recognises that in determining fairness it is necessary to look at the interests of both parties. In this case, it is hard to see why it would be fair to respondent to conclude that its right to claim damages from appellant has been destroyed in circumstances where the legislation does not stipulate that consequence.

[20] I conclude, therefore, that given the absence of a clear legislative provision sustaining it, appellant's argument that respondent was compelled to bring its counterclaim in the proceedings under the Act cannot be upheld.

Did the settlement agreement properly construed destroy respondent’s contractual damages claim?

[21] The second question to be considered is whether the settlement agreement entered into between appellant and respondent in respect of the unfair dismissal claim put an end to any other claim respondent had arising from the contract of employment it had entered into with appellant. The answer to this question turns on the interpretation of the settlement agreement.

[22] It is clear that the settlement agreement was entered into during conciliation proceedings under the Act that related to appellant’s unfair dismissal claim. There is no mention in the settlement agreement of respondent’s claim for damages arising from the alleged 'secret profit-taking' by the appellant. Moreover, the clause upon which appellant relies states simply (if ungrammatically) that 'the agreement remains (sic) full and final settlement and binding on both parties'. The agreement does not state in clear and unequivocal terms that it is in full and final settlement of any and all claims arising from the contract of employment. At the time the agreement was signed there was only one claim aired, and that was appellant’s claim for unfair dismissal. It is clear that the clause intended that the agreement of which it formed part would be in full and final settlement of that claim. It cannot be said, however, that the language of this clause was sufficiently broad to encompass any other claim that might have arisen from the contract of employment. Accordingly, appellant’s argument in this respect can also not be upheld.

[23] In the circumstances, appellant does not have prospects of success upon appeal. It follows that appellant's applications for condonation should fail.

[24] Given that appellant has failed in these proceedings, there is no reason why he should not be ordered to pay respondent's costs.

Order

[25] The following order is made:

1. The applications for condonation are refused.

2. The appeal is struck from the roll.

3. Appellant is ordered to pay respondent's costs on appeal, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN AJA

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SHIVUTE CJ

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MTAMBANENGWE AJA

APPEARANCES

APPELLANT:	Mr Z J Grobler Instructed by Grobler & Co
RESPONDENT:	Mr C J van Zyl Instructed by Köpplinger Boltman Legal Practitioners