



REPORTABLE

CASE NO: SA 8/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**NAMDEB DIAMOND CORPORATION
(PTY) LTD**

Appellant

and

HENRY DENZIL COETZEE

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 9 July 2018

Delivered: 1 August 2018

Summary: Appeal as of right or with leave against an order of the Labour Court striking the appellant's application for leave to appeal from the roll.

Section 14(1) of the Supreme Court Act 15 of 1990 provides that a party has a right of appeal to the Supreme Court from any judgment or order of the High Court. Section 14(2)(b) provides that legislation may limit, grant or exclude such right or which prescribes the proceedings which have to be followed in the exercise of that right.

Section 18(2)(b) of the High Court Act 16 of 1990 provides that an appeal from any judgment or order of the High Court in civil proceedings shall lie, where the High Court sat as a court of appeal, if leave is granted by the court, which has given the judgment or order.

Leave to appeal was not granted by the Labour Court, neither was leave refused. The application was struck from the roll. Striking the application from the roll was an order of the Labour Court given as per appeal court and the appealability of such order is qualified by the provisions of s 14(1) of the Supreme Court Act read together with s 18(2)(b) of the High Court Act as well as s 14(2)(b) of the Supreme Court Act.

Leave to appeal was not sought from the Labour Court against the order striking the application for leave to appeal from the roll. Leave should have been sought against that order. If leave had been sought and was refused, the appellant would have been entitled to petition the Chief Justice in terms of s 14(6) of the Supreme Court Act.

Appeal not properly before this court and struck from the roll.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and FRANK AJA concurring):

Introduction

[1] In arbitration proceedings, the respondent (as applicant) claimed that his dismissal by the appellant was procedurally and substantively unfair and sought reinstatement together with compensation. The arbitrator found that respondent's dismissal was indeed procedurally and substantially unfair, however refused

reinstatement and made an award of compensation for the loss of income in favour of the respondent.

[2] The appellant appealed to the Labour Court against the finding of the arbitrator and against the award. The respondent cross-appealed against the order refusing his reinstatement.

[3] On 10 February 2016, the Labour Court by way of an order dismissed the appeal. A cross-appeal was upheld and appellant was ordered to reinstate the respondent. The appellant was also ordered to compensate the respondent for lost salaries. The reasons for the dismissal of the appeal and the orders made, were delivered on 6 December 2016.

[4] On 16 December 2016, the appellant filed an application for leave to appeal (in terms of s 18(2)(b) of the High Court Act 16 of 1990) against the whole judgment and/or order delivered on 6 December 2016. In this application the appellant stated that the grounds on which the appellant sought leave to appeal were: ‘. . . 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’

[5] This application for leave to appeal was heard on 3 February 2017. Judgment was delivered on 10 February 2017. The application for leave to appeal was struck from the roll.

[6] The Labour Court upheld a point *in limine* raised on behalf of the respondent, namely that the application for leave to appeal was defective, since in its grounds for leave to appeal the appellant stated that leave was sought *inter alia* on the basis that ‘the learned judge erred in the law and/or on the facts’

[7] The presiding officer in his judgment, in the application for leave to appeal, stated: ‘. . . 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’. It appears that the court *a quo* also found that the application for leave to appeal was a nullity.

[8] On 23 February 2017, the appellant filed a notice of appeal, as of right, against the judgment of the Labour Court handed down on 10 February 2017, striking the appellant’s application for leave to appeal from the roll. One of the grounds given that the Labour Court erred in striking the application for leave to appeal from the roll was that the application included the words ‘and/or on the facts’, since the Labour Act 11 of 2007 does not limit an appellant’s right to appeal from the Labour Court (sitting as a court of appeal) regarding questions of law alone. An alternative ground of appeal was that the court *a quo* correctly quoted the case of *Van Rensburg v Wilderness Air Namibia*¹, but then failed to apply the very principle laid down by the Supreme Court, being:

¹ (SA 33-2013) [2016] NASC (11 April 2016) para 62.

'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.

Simultaneously, the appellant filed an amended application for leave to appeal (by deleting the words 'and/or on the facts'), together with a condonation application.

[9] This amended application for leave to appeal in the Labour Court was heard on 30 March 2017. The Labour Court reserved its judgment until 31 May 2017, on which date, delivery of the judgment was postponed to 18 August 2017, thereafter to 24 November 2017, then again to 16 February 2018. It was then further postponed to 20 April 2018 and then again to 1 June 2018 and again to 8 June 2018.²

Submissions by counsel

[10] Mr Namandje, who appeared on behalf of the respondent, raised two points *in limine*. The first point *in limine* emphasised that the appellant is still seeking leave to appeal in the Labour Court and that the matter has been postponed for a ruling in this regard. Therefore the appellant's appeal should be dismissed on the basis of the 'once and for all rule'.

[11] The second point *in limine* is to the effect that the appellant did not obtain leave to appeal from the Labour Court sitting as a court of appeal, neither was the Chief Justice approached for leave to appeal on petition.

² The Labour Court subsequently gave its ruling on 22 June 2018, striking the application for leave to appeal from the roll for a second time.

[12] Thirdly, it was submitted in the event of this court not upholding aforementioned points *in limine*, that the appellant did not demonstrate that the court *a quo* erred in finding that the dismissal of the respondent was substantively and procedurally unfair, and was wrong in upholding the respondent's cross-appeal.

[13] Mr Heathcote, who appeared on behalf of the appellant, submitted with reference to the provisions of s 18 of the High Court Act 16 of 1990 and s 14 of the Supreme Court Act 15 of 1990, that the appellant is before this court as of right. This was his primary submission. The alternative submission was that this court should exercise its inherent jurisdiction and grant leave to the appellant to appeal against the judgment of the Labour Court handed down on 10 February 2017. In this regard, this court was referred to the *New Clicks* matter³ in which the South African Court of Appeal laid down that where an unreasonable delay is caused by failing to give judgment on an application for leave to appeal, such failure could only be interpreted as a refusal of leave, and that it (the Court of Appeal) has the power to determine the application for leave to appeal, and if satisfied, to grant such leave.

[14] In my view it would be convenient firstly to consider Mr Heathcote's main submission.

Has the appellant a right to appeal?

³ *Pharmaceutical Society of South Africa & others v Thabala-Msimang & another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & another* 2005 (3) SA 238 (SCA).

[15] Article 79(4) of the Namibian Constitution provides that the 'jurisdiction of the Supreme Court with regards to appeals shall be determined by an Act of Parliament', whilst Art 80(3) likewise provides that the 'jurisdiction of the High Court with regards to appeals shall be determined by an Act of Parliament'.

[16] Section 18 of the High Court Act reads as follows:

- '(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 shall be required;
 - (b) in the case of the 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 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.
- (3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order . . . shall be subject to appeal save with leave of the court which has given the judgment or has made the order, or in the event of such leave being refused, leave to appeal being granted by the Supreme Court.'

[17] Section 14 of the Supreme Court Act 15 of 1990 reads as follows:

- (1) The Supreme Court shall, subject to the provisions of this Act or any other law, have jurisdiction to hear and determine any appeal from any judgment or order of the High Court and any party to such proceedings before the High Court shall if he or she is dissatisfied with any such judgment or order, have a right of appeal to the Supreme Court.
- (2) The right of appeal to the Supreme Court
 - (a)
 - (b) shall be subject to the provisions of any law which specifically limits it or specifically grants, limits or excludes such right of appeal, or which prescribes the proceedings which have to be followed in the exercise of that right.
- (3) Where in any civil proceedings leave to appeal to the Supreme Court is required in terms of any law, the Supreme Court may, where such leave has been refused, on application to it, grant such leave, and may vary any order as to costs made by the court in question refusing leave to appeal.

[18] Further in terms of s 14(6) an application for leave under subsec (3) shall be submitted by petition addressed to the Chief Justice within 21 days.

[19] Mr Heathcote during his submissions explained that the appellant was not sure⁴ whether an appeal to the Supreme Court against the order of the court *a quo* (striking the application for leave to appeal from the roll) was of right or whether leave was required.

⁴ It was stated that uncertainty arose before the judgment of this court in the matter of *Di Savino v Nedbank Ltd* 2017 (3) NR 880 (SC).

[20] It was submitted that the only Namibian guidance (in respect of case law) at the time was the matter of *S v Arubertus* 2011 (1) NR 157 (SC) which suggested that if a matter is struck from the roll in a criminal case in an appeal from the Magistrate's Court to the High Court, then the order striking the matter from the roll was appealable as of right. If the appeal is upheld against the order striking the matter from the roll, then the merits would be referred back to the High Court. It was submitted that the appellant's case was similar to that in the *Arubertus* matter with an important difference, namely that in the *Arubertus* matter the High Court sitting as a court of appeal did not decide the merits of the appeal, whereas in the present instance the court *a quo* had already decided the merits against the appellant. Therefore the order in *Arubertus* referring the matter back to the High Court cannot be applied in the present appeal.

[21] In the *Arubertus* matter this court relied on the authority of *S v Absalom*,⁵ a decision of the Appellate Division in South Africa where it is was held as follows:⁶

'An application for condonation of the late noting of a criminal appeal from the Magistrate's Court is not a civil proceedings as intended in s 20(4) of the Supreme Court Act 59 of 1959. Such an application is so closely bound up with the accused's conviction, sentence and appeal that it is a criminal proceeding. The court further found that the amendment of the Supreme Court Act by the Appeals Amendment Act 105 of 1982 (whereby the requirement of leave to appeal was extended – see s 20(4) of Act 59 of 1959 as amended by s 7 of Act of 105 of 1982) did not cover an appeal against the refusal of condonation for the late noting of a criminal appeal. Such an accused can appeal to the Appellate Division and he did not have to have leave to appeal therefor.'

⁵ 1989 (3) SA 154 (AD).

⁶ Quotation from the headnote.

[22] As was explained in *Absalom* that although the dominant provision to wit s 21(1) of the Supreme Court Act was applicable ‘subject to the provisions of this section and any other law’, there was indeed no other relevant law applicable to the issue of a dismissal of an application for condonation in those circumstances. There was no provision for an application to the Provincial Division concerned for leave to appeal against its refusal to grant condonation, therefore the only remedy available was an appeal to the Supreme Court in terms of s 21(1) of the Supreme Court Act 59 of 1959.

[23] This court was also referred to the matter of *S v Koch* 2006 (2) NR 513 (SC), where one of the issues was whether an appeal lies to this court against an order of the High Court in which a judgment of the Magistrate’s Court in terms of the provisions of the Extradition Act⁷, was confirmed. Section 14 of the Extradition Act provides for an appeal to the High Court from a judgment of the Magistrates Court, but is silent on a further appeal to the Supreme Court.

[24] In view of the nature of the enquiry in terms of the Extradition Act, being neither civil nor criminal in nature but *sui generis*, this court expressed the view ‘that one would be hard put to find that an appeal from a decision of the High Court to the Supreme Court can be brought under s 18(1) of Act 16 of 1990’. This court however, found that s 14(1) of the Supreme Court Act is wide enough to include an appeal to this court. Although s 14(1) of the Namibian Supreme Court Act differs to some extent

⁷ Act 11 of 1996.

from s 21(1) of the South African Act, it provides for a right of appeal to this court, in the same way s 21(1) provides for an appeal to the Supreme Court (in RSA) 'from any decision of the court of a provincial or local division'.

[25] In *Nakale v S*⁸ a case referred to by Mr Heathcote, this court reaffirmed the principle 'that where on an appeal noted to it, the High Court does not consider the merits of the appeal other than in the context of the application for condonation, but it only decides and refuses the application for condonation for the late noting of an appeal, an appellant is entitled to appeal to the Supreme Court against the decision, refusing condonation as of right. If the Supreme Court upholds the appeal . . . the matter has to be remitted to the High Court for the merits of the appeal to be heard and decided in that court. This is so because the Supreme Court does not have the power to hear the appeal on the merits, there being no provision in our law for an appeal directly to the Supreme Court against a conviction by a magistrate'.

[26] Mr Heathcote referred to the judgments in these criminal cases to emphasise his argument (as I understood it) that s 14 of the Supreme Court Act provides a litigant a right of appeal to the Supreme Court where there is no limitation by the provisions of any law and in circumstances where a particular situation is not covered by the provisions of any law. Counsel argued by analogy to these criminal matters referred to, that in the present instance the court *a quo* by striking the application from the roll, did not refuse the application, obviously neither was the application granted. In such an instance, the striking of the application from the roll is not covered by the

⁸ (SA 04-2010) [2011] NASC 2 (20 April 2011) para 6.

provisions of s 18(2)(b) of the High Court Act, which provides that where leave to appeal has been *refused*, a litigant may appeal to the Supreme Court for leave to appeal.

[27] In such a case, as demonstrated by the judgment in the criminal matters, the applicant, in terms of s 14(1) of the Supreme Court Act, has a right of appeal to the Supreme Court so it was submitted.

[28] It is apparent from the provisions of s 18(2)(a) of the High Court, that a litigant may as of right appeal to the Supreme Court where the High Court sat as a court of first instance and no leave to appeal is required. However s 18(2)(b) requires leave to appeal where the High Court sat as a court of appeal, as in the present instance.

[29] The question which arises is whether the appellant in this matter required leave to appeal against the order striking the application for leave to appeal from the roll, since such an order was an order given where the High Court sat as a court of appeal.

[30] I am of the view that the reliance on the aforesaid criminal judgments do not support the argument that the appellant, in the present circumstances, has a right to appeal, since s 14(1) of the Supreme Court Act is qualified or limited by the provisions of s 18(2)(b) of the High Court Act.

[31] This court has stated the following in *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC) para 35:

'Section 14(1) of our Supreme Court Act 15 of 1990 provides that the Supreme Court has the jurisdiction to hear and determine any appeal from any 'judgment or order of the High Court'. Section 18(1) of the High Court Act 16 of 1990 states that where the High Court sits as a court of first instance, an appeal from a judgment or order of that court in civil matters lies with the Supreme Court as of right. However, where the High Court sits as a court of appeal, leave to appeal against any judgment or order of that court in civil proceedings must first be obtained from the High Court and if refused, leave must be sought and obtained from the Supreme Court by way of a petition to the Chief Justice as provided for under the law.⁹

[32] The striking from the roll of the application for leave to appeal is an order of the High Court sitting as a court of appeal, thus leave to appeal against that order was required. This was not applied for in the court *a quo*. If leave had been applied for and refused, appellant could then have petitioned the Chief Justice in terms of the provisions of s 14(6) of the Supreme Court Act.

[33] What is peculiar from the reasons advanced on 6 December 2017 is that the Labour Court referred to the passage in *Wilderness* matter quoted in para 8 *supra* but declined to apply it because the notice of appeal was defective. This was 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 a technicality, but rather to focus on those points of law which are discernible from the notice of appeal. The

⁹ Emphasis provided.

Labour Court should have dismissed the point *in limine* which was clearly devoid of any merit.

[34] The appellant in this matter in its notice of appeal filed on 23 February 2017 explained that one of the points raised in the threefold procedure was to file an application for leave to appeal to the Supreme Court against the Labour Court's judgment of 10 February 2017 striking the appellant's application for leave to appeal from the roll.

[35] Section 14(1) indeed provides a right of appeal from any judgment or order of the High Court to the Supreme Court. Section 14(6) however prescribes that the procedure in order to exercise such right '*shall*¹⁰ be submitted by petition addressed to the Chief Justice'

[36] It is therefore in my view not open to the appellant to approach this court directly for an application for leave to appeal without utilising the procedure prescribed in s 14(6) of the Supreme Court Act, neither has this court¹¹ the power to approach the Chief Justice in order to obtain his permission to deal with the application for leave to appeal as if it is a petition and to grant the required leave to the appellant to appeal the matter.¹²

[37] The appeal in my view is not properly before this court and stood to be struck from the roll.

¹⁰ An indication that it is a mandatory provision.

¹¹ In terms of the provisions of the Supreme Court Act 15 of 1990.

¹² As requested by the appellant.

[38] In the result the following orders are made:

- (a) The appeal is struck from the roll.
- (b) The appellant is ordered to pay the costs of this appeal, such costs to include the costs of one legal practitioner.

HOFF JA

MAINGA JA

FRANK AJA

APPEARANCES

APPELLANT:

R Heathcote (with him G Dicks)

Instructed by Köpplinger Boltman, Windhoek

RESPONDENT:

S Namandje (with him T Iileka)

Of Sisa Namandje & Co. Inc., Windhoek