CASE NO.: LCA 42/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA **APPELLANT**

and

FRANCOIS CHARLES GRACE **RESPONDENT**

CORAM: **HENNING, AJ**

Heard on: 5 November 2010

Delivered on: 9 November 2010

JUDGMENT

HENNING, AJ:

[1] In the year 1948 - to be precise on 26 May 1948 - the matter of *Western Johannesburg Rent Board and Another v. Ursula Mansions (Pty) Ltd* was called in the Court of Appeal in South Africa. According to an eye witness, who was one of the counsel involved in the appeal, the only words spoken in the appeal were:

Counsel: "*My Lord this is an appeal.*"

Presiding Judge: "*Is it? Look at your notice of appeal.*"

The report[1] of the case supports counsel's recollection. Counsel for the appellant applied for an amendment of the notice of appeal, which was refused. The notice of appeal was directed at

> "*that part of the judgment. ..which is to the effect that appellants acted arbitrarily....*"

The judgment reads:[2]

> "*This Court mero motu drew counsels' attention to the fact that the so-called notice of appeal was not a notice of appeal at all, for it does not purport to note an appeal against any part of the order made by the Court a quo.*"

The matter was struck off the roll with costs. Since that case notices of appeal have been considered with considerable respect. Comforting to counsel at the receiving end in matters of this nature may be the fact that the unsuccessful counsel in that appeal became a Chief Justice of South Africa.

[2] The appellant intended to appeal to this Court against the award of an arbitrator. The notice on the prescribed form

1 1948 (3) SA 353
2 At 354 - 355

seeks to appeal

> "*against the whole of that part of the decision or order of the Respondent made on or about the 29th day of April 2010 whereby it was decided that*
>
> ***See attached annexure A***
>
> *and the Appellant will ask this Court FOR AN ORDER*
>
> ***That the Award of the arbitrator be set aside.***"

The respondent is Mr. Grace, the employee. Annexure A is the award of the arbitrator of nineteen pages and contains five separate orders. The record consists of 384 pages.

[3] The grounds of appeal read:

> *"1. The Arbitrator erred in law in finding that it* ***(sic)*** *has jurisdiction to hear this dispute;*
>
> *2. The Arbitrator erred in law in finding that the appellant practised an unfair labour practice and unfair discrimination against the respondent;*

3. The Arbitrator erred in law in finding that the appellant should appoint the respondent to the position of SBG11 with effect from 2008;

4. The Arbitrator erred in law in finding that the respondent's transfer had been done in an unfair and unjustifiable manner;

5. The Arbitrator erred in law in finding that the respondent was entitled to an award of compensation;

6. The Arbitrator erred in law finding that the appellant should give the respondent his original payslip of March 2009."

[4] Rule 17 (3) provides:

"*An appeal contemplated in subrule (1) (c) 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 (hereafter "the conciliation and arbitration rules"), 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 Commissioner and the other parties to the appeal. "

Rule 23 (2) of the conciliation rules states that the notice of appeal must set out

> "*[a] whether the appeal is from the judgment in whole or in part, and if in part only, which part;*
>
> *[b] in the case of appeals from an award concerning fundamental rights and protections under Chapter 2 and initially referred to the Labour Commissioner in terms of section 7 (1) (a) of the Act, the point of law or fact appealed against;*
>
> *[c] in the case of an award concerning any other dispute, the point of law appealed against; and*
> *[d] the grounds upon which the appeal is based.*"

Rule 23 (3) of the conciliation rules reads:

> "*Any appeal lodged in terms of this rule must be prosecuted in the Labour Court in accordance with the Labour Court Rules made under section 119 of the Act.*"

[5] In terms of rule 17 (15) the appellant may within ten days after the record has been made available to it, "*amend, add to or vary*" the terms of its notice of appeal. The respondent in the appeal must within 21 days after receipt of the record

> "*deliver a statement stating the grounds on which he or*

> *she opposes the appeal together with any relevant documents.* "

See rule 17 (16) (b). Thereafter application may be made for a hearing date to be assigned.

[6] The question arises whether the notice of appeal complies with the prescriptions of the rule referred to in paragraph 4 above. This question touches upon three issues, namely,

- whether the notice complies with rule 23 (2) (a) of the conciliation rules,
- whether the notice complies with rule 23 (2) (c) of the same rules,
- whether the notice complies with rule 23 (2) (d) of the same rules.

[7] It seems to be generally accepted that a judgment consists of the reasons for the order granted by a Court.

> "*There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment.*"

Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa, 5th ed,* 916, see 1149-1150.

For purposes of an appeal "*judgment*" may be given a technical meaning which is equivalent to "*order.*"

Administrator, Cape v. Ntshwagela, 1990 (1) SA 705 (A), 714 J - 715 E.

The reference to "*judgment*" in conciliation rule 23 (2) (a) should, on the above basis, be interpreted as the order. Support for this conclusion is found in rule 17 (2) which uses the words "*order is appealed against.*"

[8] The problem with the notice is that it is, if one were to be generous, vague. It refers to "*the whole of that part of the decision or order.....whereby it was decided that*

See attached annexure A. "

Annexed then is the entire judgment and order. Conciliation rule 23 (2) (a) is inelegantly worded - "*the appeal is from* ***(sic)*** *the judgment,*" but its essence is a demand to be specific regarding the extent of the appeal.

The reasons for this requirement will appear from what follows.

[9] In *Songono v. Minister of Law and Order,* 1996 (4) SA 384 (E) at 385 G-H it was held:

> *"In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvas every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the*
>
> *Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, Harvey v. Brown 1964 (3) SA 381 (E) at 383; Kilian v. Geregsbode, Uitenhage 1980 (1) SA 808 (A) at 815 and* Erasmus, *Superior Court Practice B1-356-357and the various authorities there cited."*

This statement reflects what was stated in early cases, such as *Leviseur v. Frankfurt Boere Ko-operatiewe Vereniging,* 1921

OPD 80. These cases are collected in the evergreen Buckle and Jones, *The Civil Practice of the Magistrates' Courts in South Africa,* 6th ed, 691 to 695. The more recent case law is collected in *Herbstein and Van Winsen, op cit,* Vol. 2, 1159 to 1160.

[10] The Constitution promises the public a judiciary which is effective[3]. In practice this demands that judicial officers hear and determine disputes. In order to guide a hearing and to stimulate the discussion the judicial officer must prepare in advance. Should they not do so, the hearing is sterile - counsel read their heads of argument without much enthusiasm and the judicial officer listens. He/she could just as well have remained in chambers and read the papers. The hearing is a charade. When it gets to writing a judgment the judicial officer is what an American Judge called "*a lost soul.*" However, preparation is a time-consuming exercise. The judicial officer needs all the help he could obtain from the parties. To control a record of some 400 pages is time-consuming. To do so without knowing exactly where to look for what is in addition frustrating. The notice of appeal in this case is defective because

- it does not specify what part of the order is in issue[4]

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3 Article 78 (3)

4 Conciliation rule 23 (2) (a),

- it vaguely refers to contentions[5] but fails to specify the grounds[6] of appeal.

The contentions are pregnant, they call out for "*because*" followed by grounds. The grounds are absent.

[11] The respondent is also to blame for this situation. He failed to comply with rule 17 (16) (b) and to state the grounds which are relevant from his perspective.

[12] In the result the purported appeal is struck off the roll.

HENNING, AJ

ON BEHALF OF APPELLANT: Adv. G. Dicks

instructed by

LorentzAngula Inc.

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5 Conciliation rule 23 (2) (c),

6 Conciliation rule 23 (2) (d).

ON BEHALF OF RESPONDENTS: Mr. J. N. Tjitemisa
Tjitemisa & Associates