REPUBLIC OF NAMIBIA

NOT REPORTABLE

CASE NO. LCA 15/2008

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

JOSEF WIMMERTH
APPELLANT

and

MEATCO NAMIBIA
RESPONDENT

CORAM: HOFF, J

Heard on: 20 November 2009

Delivered on: 10 June 2011

LABOUR JUDGMENT

HOFF, J: [1]This is an appeal against the dismissal of a complaint in the district labour court.

[2] The appellant was employed by the respondent as quality control officer from 1996 until his dismissal on 28 October 2003. He was charged with two counts namely poor work performance and being absent without leave for more than three days. After a disciplinary hearing the appellant received a final warning in respect of the conviction on poor work performance and was dismissed in respect of the count of being absent without leave for more than three days.

In terms of the Disciplinary Code and Procedure of the respondent absence without leave for three consecutive working days is a dismissible offence.

[3] The appellant's complaint in district labour court was based on an "unfair dismissal" and "unfair disciplinary hearing" and the relief claimed was reinstatement alternatively remuneration in lieu thereof.

[4] The respondent raised a point *in limine* viz. that the appellant's notice of appeal was defective.

It was submitted by Ms B van der Merwe who appeared on behalf of the respondent that it was impossible to accurately summarise appellant's grounds of appeal whereas appellant's notice of appeal is confusing and does not adhere to Rule 19(2) of the rules of the district labour court.

Rule 19(2) provides that a notice of appeal shall set out the following:

(a) whether the appeal is from the judgment or order in whole or in part, and if in part only, which part;

(b) the point of law or fact appeal against; and

(c) the grounds upon which the appeal is based.

[5] The notice of appeal which was drafted by the appellant personally starts off by stating that:

> "The imposition of a penalty is within the discretion of the chairperson and must be done upon a proper weighing of all the factors. From the judgment it does not appear as if the chairperson placed himself in the position to do so in terms of Labour Act section 45 and 56" (sic).

[6] On the second page of the notice of appeal there is a heading in bold type reading: "IMPORTANT FACTS NOT TAKEN INTO CONSIDERATON" followed by a list of points numbered from 1 to 31.

[7] The points were listed as follows:

"

"1. See Hailemo v Security Force Service NLLP 1998 (1).
2. See Pupkewits & Sons (Pty) Ltd Kankara NLLP.
3. The evidentiary burden proves of leave is testimony of J J Frankened. See p. 193.
4. The complainant mentioned in his appealed, leave.
5. Permission exhibit S. page 88.
6. Complainant never indicates permission of leave at.
7. appeal hearing due to not present exhibit U. See p. 193.
8. The telephonic prove confirmed by Ms Lipenda on 10h30. See p. 74.
9. Complainant start working from 07h00 .telephonic prove.
10. Confirmed by Ms Lipenda at 10h30 was late informed. See page. 74.
11. In conclusion the respondent has not proven on balance of probabilities.
12. The imposition of a penalty is within the discretion of the
13. Chairperson and must be done upon a proper weighing of
14. All the factors from judgment it does not appear as it.
15. The Chairperson placed himself in the position to do so.
16. The procedure followed at the disciplinary hearing. See complainant's heads of arguments.
17. Prior misconduct of the complainant thus the
18. Information is hearsay and ought to be disregarded.
19. The complainant contesting that penalty there
20 Was no one issued as prove. See p. 6

21. Evidentiary prove testimony of A G Kotze. See page. 146.
22. Testimony of P Uatanaua. See page. 62
23. Testimony of J J Franken. See page 197.
24. Mr Uatanaua have been responsible for the situation. See page 62.
25. That is the reason Mr Uatanaua did not submit my leave. See page 89.
26. Sanction of human resource code.
    See page 108
    See page 109
    See page 110
    See page 111
27. It is strange to note that both the storeman and the
28. Supervisor initially signed off the items as correct and
29. Subsequently raised the queries Exhibit M.
30 In terms of section 45 and 46 of the Labour Act dismissal is unfair.
31. See trail proceeding records
    Page: 76, 78, 79, 88, 89, 99, 146, 147, 152, 6, 127, 130, 142, 149, 61, 62, 65, 183, 185, 187, 188, 198, 195, 197, 105, 106, 107, 108, 109, 110, 111, 67, 68, 69.

With compliments of complainant."

[8] Ms Blaauw who appeared on behalf of the appellant summarized, in her heads of argument, the grounds of appeal as follows:

"5.1 Chairperson did not properly weigh all relevant factors when making the finding that appellant was dismissed for valid and fair reason;

5.2 The Chairperson erred in finding that the respondent proved their case on a balance of probabilities

5.3 The Chairperson erred in finding that the appellant had the burden of proof with regards to his alleged authorized leave;

5.4 The Chairperson erred in finding that the respondent's version is to be accepted as opposed to the appellant's version;

5.5 The Chairperson did not properly have regard to all the factors when making the finding that the respondent succeeded in proving that dismissal was for a fair and valid reason;

5.6 The Chairperson erred in finding that there was procedural fairness in the disciplinary action taken by respondent against the appellant;

5.7 The Chairperson erred in finding that the sanction, that of dismissal, was appropriate in the circumstances;

5.8 The Chairperson erred in not having regard, or proper regard to the fact that the appellant's prior record was not properly proved and or put to the appellant to challenge;

6. It is thus clear from the above, that the appellant appeals against the whole judgment."

[9] Ms Blaauw submitted that the summarised grounds *(supra)* is not an attempt to introduce new grounds but must be seen as a clarification of the existing grounds. She further submitted that although initially it appears that the complainant was only complaining about the penalty imposed, if one has regard to all the points stated it should be clear that the appellant also dealt with other grounds such as the burden of proof, his defence namely the leave obtained, the procedure followed at the hearing, that it was not fair, that the dismissal was not for a fair reason, the reference to inadmissible evidence (hearsay), reference to the testimonies of respondent's witnesses and reference to section 45 and 46 of the Labour Act.

[10] Ms van der Merwe in response submitted that the respondent is prejudiced in the sense that the points listed from 1 to 31 are not specific in any way as to inform the respondent what exactly the grounds of appeal are, the points do not state whether points of law or points of fact are appealed against and that the points formulated in the heads of argument do not correspond with what is stated in the notice of appeal.

[11] It is trite law that a notice of appeal should be clear in setting out the grounds of appeal clearly and with particularity and that specific averments must be made whether a court *a quo* had erred in law and/or in fact in reaching a specific conclusion and whether the appeal lies against the whole of the judgment or only part thereof.

[12] Ms Blaauw referred this Court to the decision of *S v Zemburuka 2008 (2) NR 737* where the notice of appeal was drawn up by a layperson without the assistance of a legal representative. The Court held that in such an instance the Court should not take an overly fastidious and technical approach where the substance of the complaint is clear.

[13] The present notice of appeal is, by no means an example of clarity. Counsel appearing on behalf of the appellant herself stated in argument before court that the notice of appeal is confusing. This notice of appeal fails to inform the respondent what the grounds of appeal are.

[14] There are numerous references *inter alia* to testimonies and exhibits followed by page references, a reference to the heads of argument of the appellant in the district labour court, references to case law and references to pages of the proceedings in the court *a quo*.

[15] Counsel appearing on behalf of the appellant must have realised the defects in the notice of appeal and in an attempt to salvage this defective notice tried to clarify the grounds of appeal in her heads of argument. This is impermissible. In addition despite the effort by counsel it did not rectify appellant's defective notice of appeal.

[16] The notice of appeal mentions that the chairperson did not weigh all the factors but fails to mention which factors were not so weighed by the chairperson. This according to the appellant relates to the imposition of a *penalty* (See points 12, 13, 14 and 16 (*supra*)).

[17] Ms Blaauw in her heads of argument (par. 5.1) repeats this statement but with a difference namely that the relevant factors were not so weighed by the chairperson when making the finding that the appellant was *dismissed for a valid and fair reason*. This clearly not only demonstrates the danger of counsel’s effort in clarifying appellant’s notice of appeal but further adds to the confusion.

[18] Paragraph 5.2 (*supra*) of counsel’s clarification or summary is no ground of appeal in the absence of further particularity.
Paragraph 5.3 (*supra*) is misleading and should be put in context. The chairperson never found that appellant had the burden of proof with regards to appellant’s unauthorized leave. The chairperson found that on the evidence presented on behalf of the respondent a prima facie case was established. This much was conceded by counsel appearing on behalf of the appellant during her submissions in this Court. This in turn placed an evidential burden on the appellant i.e. to present evidence in order to succeed in his defence that leave was indeed granted.

[19] Regarding paragraph 5.4, 5.5, 5.7 and 5.8 of counsel’s summary (*supra*) not one of these points are supported by any statement in the notice of appeal.

[20] Paragraph 5.6 (*supra*) is an all embracing ground without any particularity. It does not say in which way the chairperson erred in finding that there was procedural fairness in the disciplinary action taken by the respondent against the appellant.

The same criticism is valid in respect of points 30 and 31 of the appellants' notice of appeal.

I agree with the submission by Ms van der Merwe that the appellant by referring to certain pages of the proceedings in the court *a quo* leaves the respondent in total darkness as to which points the appellant is exactly relying on. In such a situation the respondent either has to deal with each and every aspect or point found on a specific page or may eventually realise respondent is not seeing what the appellant is seeing on a particular page.

The points raised (*supra*) by the appellant in his notice of appeal in effect would require of the respondent to embark upon a research project in a attempt to establish on which grounds of appeal, if any, the appellant relies upon. This is simply untenable.

[21] In *S v Kakololo 2004 NR 7 (HC)* Maritz J (as he then was), with Hannah J concurring, stated the following (on pp 8F and 9G) regarding failure by a litigant to state any grounds in the notice of appeal as required by Rule 67(1) of the Magistrate's Court Rules:

> "The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza 1979 (4) SA 757 (N) at 758).* 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. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrate's Courts Rule 67(3). Once those reasons

have been given, the appellant may amend the notice of appeal under subrule (5) and the magistrate may again respond to the amended grounds of appeal.

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 crystallises the dispute and determines the parameters within which the Court of Appeal will have to decide the case (Compare: *S v Maliwa and Others 1986 (3) SA 721 (W) at 727; S v Nel 1962 (1) SA 134 (T) at 135A; and R v Lepile 1953 (1) SA 225 (T) at 230H*).

Consequently, it also serves to focus the minds of the Judges of Appeal when reading the (sometimes lengthy) record of appeal, researching the law in point, considering argument and adjudicating the merits of the appeal. Given the importance of its objectives, the rule is for good reason formulated in peremptory terms and, as Broome JP pointed out in *R v Hoosen 1953 (3) SA 823 (N) at 824*,

> '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 Rule necessarily follow.'

Expounding on what those consequences are, Watermeyer J in *Hashe v Minister of Justice and Another* 1957 (1) SA 670 (C) when dealing with a 'notice' in which no grounds were mentioned, said (at 675) that it 'was not a valid notice of appeal, and as such it was no notice of appeal at all. The same view was echoed by Galgut J in *R v Zive* 1960 (3) SA 24 (T) at 26F and Erasmus J in *S v Matuba* 1977 (2) SA 164 (O) at 166. Such a notice is a nullity (per Kirk-Cohen J in *S v Maliwa and Others (supra)* at 72F) and does not have any force or effect (*per* Bresler J in S v Nel (*supra*) at 134F).

Once a nullity, it remains a nullity and cannot be resurrected or revived' – neither by condonation of the non-compliance nor by amendment of the defective notice (*per* Friedman JP in *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (B) at 94-95D and 96F).

In *Risley v Gough* [1953] Tas SR 78 at 79 (cited in Saunders' *Words and Phrases Legally Defined* 3rd ed at 78) Gibson J, dealing with a similar notice, said: '…I cannot construe the word "amended" other than to mean the perfecting or ameliorating of an existing thing – not supplying a vacuum with something that should be there'. But filing a notice of

amendment well out of time and by seeking condonation for his failure to incorporate any grounds in his notice of appeal, the appellant endeavoured to do what the law does not and the Courts should not permit. As Broome J cautioned in *R v Nicholson* 1949 92) SA 585 (N) at 598D-E, the Courts were to set foot on such a course, as the appellant's counsel invited us to embark on –

> '…We are only at the beginning of our troubles and that the clear meaning of the words having been departed from, an iliad of woes lies ahead of us before a workable rule is involved. It would have been better to be strict from the beginning. The hard way would, in the long run, have been the kindest to all concerned.'

[22] The provisions of Rule 19(2) of the District Labour Court Rules are similarly worded as Rule 67(1).

[23] It is clear from aforementioned passage that once alerted to the defective notice of appeal it was not open to counsel to clarify or summarise the purported grounds of appeal in her heads of arguments.

[24] The course that should have been followed was to withdraw the appeal and file a fresh notice of appeal under Rule 19(2) of the District Labour Court Rules, together with an application for condonation of the late filing thereof. In such an instance the Court of Appeal may condone non-compliance on good cause shown and if reasonable prospects of success have been established.

[25] In my view the notice of appeal of the appellant contains no grounds of appeal and is a nullity.

[26] The point *in limine* must for the aforementioned reasons succeed.

[27] In the result the following order is made:

The appeal is struck from the roll.

____

HOFF, J

ON BEHALF OF THE APPELLANT: MS BLAAUW

Instructed by: BIERMANN LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT ADV. VAN DER MERWE

Instructed by: THEUNISSEN, LOUW & PARTNERS