NOT REPORTABLE

CASE NO.: LCA 60/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

PARCEL FORCE NAMIBIA (PTY) LTD

Applicant

and

HALWEENDO HOSEA

Respondent

***CORAM*: PARKER J**

Heard on: 2011 February 18
Delivered on: 2011 March 22

JUDGMENT

PARKER J: [1] The genesis of the matter now before this Court lies in the institution of a complaint by the respondent (the complainant in the district labour court) in the district labour court, Oshakati, on 9 April

2008 in terms of the repealed Labour Act, 1992 (Act No. 6 of 1992) in which the respondent complained that the appellant (the respondent in the district labour court) had dismissed him unlawfully. The appellant's legal representatives filed with the district labour court, Oshakati, the appellant's reply (form 6) to the respondent's complaint by registered mail. The 'Certificate of Posting of a Registered Article' issued by the Post Office, Ausspannplatz, bears the date stamp of 14 May 2008. Thus, going by the date stamp of the clerk of the civil court, Oshakati magistrate's court, the clerk of that court received the reply (form 6) on 20 May 2008, and did not do anything – in the form of service on the respondent – with it. In view of that, Mr. Tjitemisa, counsel for the respondent, submitted as follows:

> 'The appellant filed its reply on 20 May 2008 and being 29 days after the filing and service of the reply.
>
> 'Rule 7(1) of the rules of the District Labour Court provides that the reply should be filed within 14 days of service of the complaint but Appellant failed to comply with this rule. This was the first non-compliance of (with) the rules by the Appellant.'

[2] I take a different view of the law as contained in the rules of the erstwhile district labour courts ('the rules'); and although the legal point I rely on is not exactly the same as the one raised by Mr. Tjitemisa, the point I have raised is not unrelated to Mr. Tjitemisa's legal point. I am alive to the fact that this is an appeal but I think this Court *qua* appeal court is entitled to raise the legal point *ex mero motu* because it is related to the legal point raised by Mr. Tjitemisa, as I have said, and,

more important, the facts against which I have applied the legal point are 'well-nigh incontrovertible.' (See Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edn.: p. 1248, and the cases there cited.)

[3] The first port of call in the enquiry is rule 7(1) of the rules, which provides:

> 'If the respondent wishes to defend a complaint in question he or she shall serve a copy of a reply (form 6) to the complaint upon the complainant in the manner prescribed in subrule (2) of rule 5 within 14 days of service of the complaint on him or her and file the original thereof together with the proof of such service as contemplated in subrule (3) of that rule, with the clerk of the court.'

[4] And as respects the manner of service of a reply (form 6) on a complainant; rule 5(2) provides that service of a reply, inter alia, is –

> '(a) …
> (b) …
> (c) …
> (d) …
> (e) by the delivery thereof in such other manner as may be directed by the clerk of the court.'

[5] The evidence is overwhelming and incontrovertible that there was no proper service of the appellant's reply on the respondent in accordance with the rules. The appellant's reply was sent by registered mail to a 'H. Hamukushi, P.O. Box 15480, Oshakati, Namibia.' There is no evidence on the record indicating that the manner of service was

directed by the clerk of the court; and, in any case, there is no proof of service in accordance with rule 5(3)(d) of the rules. That being the case, the only proper order that the chairperson of the district labour court should have made in terms of rule 7(3) was to order that the appellant who had not served the reply in accordance with rule 7(1), read with rule 5(2), of the rules 'shall not be entitled to take part in the proceedings of the court.' The reason is that there is no evidence on the record establishing that 'on good cause shown' by the appellant for failure to effect service of the reply on the respondent in accordance with the rules, the appellant was granted leave by the chairperson of the said district labour court to take part in the proceedings before the court.

[6] Thus, on the facts *in casu* and on the law, the learned chairperson lacked the power to permit the appellant 'to take part in the proceedings of the court.' That is to say; when there had been failure on the appellant's part to serve the reply in accordance with the rules, the learned chairperson could only exercise a discretion and grant leave to the appellant to take part in the proceedings, if sufficient, good and bona fide explanation had been placed before the learned chairperson to enable the chairperson to determine whether good cause had been shown. (See *Leweis v Sampoio* 2000 NR 186 (SC) where the phrase 'good cause' is interpreted and applied.) No explanation of any hue or colour was placed before the learned chairperson of the district labour court in question. *A priori*, the appellant was not entitled to take part in the proceedings of the district labour court, including bringing the rescission application. Thus, by permitting the appellant to take part in

the proceedings without any justification in terms of rule 7(3), which in my opinion is clearly peremptory, the learned chairperson acted outwit rule 7(3). The decision of the learned chairperson is, accordingly, both wrong and unjudicial and of such a kind as to entitle this Court, sitting as an appeal court, not to countenance and perpetuate it. Significantly, regard should be had to the high authority of O'Linn AJA on the dangers attendant upon the court's failure to apply the law and rules in the following passage in *Minister of Home Affairs, Minister Ekandjo v Van der Berg* 2008 (2) NR 548 (SC) at 561G:

> '... if the Courts do not apply the rules and the law, the rule of law will be abrogated and justice will be unattainable.'

[7] On this basis alone, in my judgment the appeal should fail, and it fails. In the result, I make the following orders:

(1) The appeal is dismissed.

(2) There is no order as to costs.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr S Horn

Instructed by: M B De Klerk & Associates

COUNSEL ON BEHALF OF THE RESPONDENT:

Mr J N Tjitemisa

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