NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LCA 39/2009

In the matter between:

TELECOM NAMIBIA LIMITED	**FIRST APPELLANT**
IWAY	**SECOND APPELLANT**
FRANS J B NDOROMA	**THIRD APPELLANT**

and

LORRAINE KLEIN	**RESPONDENT**

Neutral citation:

Telecom Namibia Ltd v Klein (LCA 39-2009) [2013] NALCMD 5 (5 February 2013)

Coram: VAN NIEKERK, P

Heard: 12 February 2010

Delivered: 5 February 2013

Flynote: Appeals – To Labour Court from the district labour court – What judgments or orders are appealable – Only judgments or orders having the effect of a final judgment and any order as to costs are appealable.

Labour law – Meaning of 'frivolous or vexatious' in section 20 of Labour Act, 6 of 1992 discussed

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ORDER

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1. The appeal against the costs order is upheld.

2. There shall be no order as to costs.

JUDGMENT

VAN NIEKERK, P:

[1] This is an appeal from the district labour court to be adjudicated in terms of the now repealed Labour Act, 1992 (Act 6 of 1992). The relevant facts are as follows. The respondent filed a complaint against the appellants in the district labour court. The appellants filed a notice of opposition and requested further particulars, which were provided. At a later stage a rule 6 conference was held which was not attended by the appellants, who later claimed that they had not received notice of it. The respondent then served notice of an application for,

inter alia, an order barring the appellants from participating in the hearing of the complaint and defending the matter as a result of their failure to file a reply in terms of rule 7 of the district labour court rules and their failure to attend the rule 6 conference. Hereafter the appellant filed a reply to the complaint and a notice of opposition to the application.

[2] On the date of hearing of the application, the respondent's lawyer referred to the fact that rule 7(1) of the district labour court rules states that a reply must be served within 14 days after service of the complaint. She submitted, *inter alia* that (i) as there was a request for further particulars, which were furnished, the reply had to be served within 14 days after the further particulars were provided; and (ii) as the appellants' reply was served after a period of 14 days had expired, the appellants' reply was late and, in the absence of an application for condonation, the appellants were in default.

[3] On behalf of the appellants it was *inter alia* submitted that magistrates' court rule 12(1)(b) was applicable in the circumstances and that the respondent was required to first serve a notice of bar if no reply was filed. This the respondent had not done and therefore the respondent did not have the jurisdictional facts in place for her application.

[4] The chairperson of the district labour court made an *ex tempore* ruling giving reasons. He rejected the appellants' argument and held that the magistrates' court rules are not applicable. He further held that rule 7(1) of the district labour court rules was applicable and that the appellants had 14 days after the further particulars were furnished to file a reply. He agreed with the respondent's counsel that the appellants should have filed an application for condonation. However, as he thought it fair that all the parties should be afforded the opportunity to ventilate the issues in the main dispute, he did not bar the appellants, provided that they filed an application for condonation for their late reply within a reasonable time. In addition, the chairperson ordered the appellants to pay the costs of the day's proceedings on an attorney-and-client scale.

[5] Thereafter the appellants appealed to this Court against the entire judgment and the costs order. On appeal the respondent takes the point that the ruling by the chairperson on the merits of the application is not appealable as it is an interlocutory order of a procedural nature and not final. The respondent concedes that the costs order is appealable.

[6] Mrs *Bazuin,* who argued the matter on heads of argument drawn by Mr Barnard, referred to section 21(1)(b) of the Labour Act, which states:

> 'Any party to any proceedings before any district labour court may appeal to the Labour Court against any judgment or order given by such district labour court, as if such judgment or order were a judgment or order of a magistrate's court.'

[7] Counsel submitted that the words 'as if such judgment or order were a judgment or order of a magistrate's court' can only mean that the appeal from the district labour court is subject to the same limitations in substantive law as an appeal from the magistrate's court to the High Court. Such appeals are limited by the provisions of section 83(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), which read as follows:

> '..... a party to any civil suit or proceeding in a court may appeal to the court of appeal, against any rule or order made in such suit or proceeding and having the effect of a final judgment ..... and any order as to costs.'

[8] The respondent's argument is supported by two cases in this jurisdiction. In *Thiro v M & Z Motors* NLLP 2002 (2) 370 NLC Silungwe, P upheld an argument that a certain ruling by the district labour court granting condonation for the late filing of a rule 7(3) reply was merely incidental to the pending action as it did not dispose of any issue in the main action and that, as such it was not appealable right away. In considering the opposing arguments by counsel, the learned judge stated the following (at 373):

> 'It is common cause that the respondent noted an appeal against the chairperson's ruling on condonation but that this was withdrawn upon a

realisation that the said ruling was of an interlocutory nature and was thus not appealable. It is further common cause that the ruling was incidental to the main action. The only bone of contention is whether that ruling has "the effect of a final" order? If the answer to the question is in the affirmative, then the ruling was appealable within 14 days pursuant to rule 19(2) of the Rules of the District Labour Court.

Section 83(b) of the Magistrates' Courts Act entitles a party to any civil suit or proceedings to appeal against:

> "any rule or order made in such suit or proceeding and having the effect of a final order."

It is trite law that an interlocutory order which does not have a "final or definitive effect" is not appealable forthwith. The rationale underlining the prohibiting or limiting of appeals against interlocutory orders is salutary in that it discourages piecemeal appeals. See Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (AD) at 870; DH Meskin Construction Co (Pty) Ltd & Another v Magliamo 1979 (3) SA 1303 (T) at 1306B-C; Makhoti v Minister of Police 1981 (1) SA 69 (A).

In casu, the order for condonation of the appellant's late filing of his complaint can hardly be said to have had a final or definitive effect upon the main action. Hence, the order was not appealable forthwith and so the second point *in limine* fails.'

[9] In *De Beers (Pty) Ltd v Izaaks* (reported by SAFLII as (LCA 28/2006) [2009] NALC 2 (6 February 2009)) Parker, P dealt with an appeal against a decision by the district labour court in terms of section 24 of the Labour Act granting approval to the complainant (respondent on appeal) who lodged his complaint after a period of 12 months had expired. The Court held that such an order was interlocutory and that it did 'not have any effect "on the final determination of the main action in the case"' (see para. [9]). The Court held that such an order was not appealable (see paras [5],[8] and [11]).

[10] Mr *Denk* for the appellants, who argued the matter partly on the heads of argument of Mr Philander, submitted that section 21(1)(b) of the Labour Act allows for party to 'any' proceedings before the district labour court to appeal against 'any' judgment or order and that the words 'as if such judgment or order were a judgment or order of a magistrate's court' merely indicate that district labour court judgments and orders rank equally with magistrates courts judgment and orders. In support of this argument, he also referred to section 19 of the Labour Act which provides for the jurisdiction and powers of the district labour courts, more specifically section 19(4), which reads (the insertion in square brackets is mine):

> 'Subject to the provisions of this section and section 17 and 22, a district labour court shall, in the exercise and performance of its powers and functions, have all the powers of a magistrate's court under the Magistrates' Court[s] Act, 1944 (Act 32 of 1944), as if its proceedings were proceedings conducted in, and any order made by it were a judgment of, a magistrate's court.'

[11] With respect to learned counsel, it seems to me that if it were merely a question of ranking, the provisions of section 19(4) would have been sufficient. There would have been no need for the Legislature to include the same deeming provision in section 21(1)(b). The fact that it is included in this section, which specifically deals with what matters are appealable, indicates that the intention was that the section must be read with the limitations provided for by section 83(b) of the Magistrates' Courts Act. It is so that, from the judgments delivered in *Thiro* and *De Beers* there is no indication that the meaning of section 19(4) and 21(1)(b) was specifically argued. However, in my view the conclusion is irresistible that the Labour Court in those cases were led to section 83(b) of the Magistrates' Courts Act as they considered it to be applicable by virtue of the provisions of section 21(1)(b) of the Labour Act.

[12] Mr Denk further relies on the case of *Louw v The Chairperson of the District Labour Court and Another (Case 1)* NLLP 2002 (2) 147 NLC. In that case the

applicant brought an application to the Labour Court to review and set aside the decision of the first respondent awarding costs against the applicant and her representative on an attorney-and-client scale and ordering that costs must be paid before the resumption of further proceedings in the matter. The respondents in the case took the point that the applicant should not have approached the Court by way of review, but should have appealed. To this the applicant contended, *inter alia*, that the review was brought on the basis that the costs order was irregularly granted. He further submitted that the order arose from interlocutory proceedings and that one cannot appeal from an interlocutory order. The Court further set out counsel's submission as follows (at p151):

> 'He submitted however that one can appeal against a cost order but that one can only do so once there is a final judgment and that applicant cannot get a final judgment because of the costs order against her in that she is not in the financial position to pay it.'

[13] In response to these submissions Hoff, AP (as he then was) stated (at p152):

> '.....it is trite law that one can appeal against the cost order but the question to be answered is whether that is the case only where a final judgment had been obtained.'

[14] The learned judge referred to section 83(b) of the Magistrates' Courts Act and continued (at p153)(the insertion in square brackets and omission are mine):

> 'Rule 19 of the District Labour Court Rules states that any party [may take] ..... on appeal to the Labour Court a judgment or order of the district labour court. This rule differs from section 83 of Act 32 of 1944 in that no reference is made to a suit or proceeding having the effect of a final judgment. In my view an appeal may be lodged against any order in terms of Rule 19 including against an order of costs given in terms of section 20 of the Labour Act, Act 6 of 1992.'

[15] Rule 19(1), which is the part to which the learned judge referred, reads as follows:

> 'Any party to a complaint may, with due regard to the provisions of section 21(2) of the Act, note, in accordance with subrule (2), an appeal to the Labour Court against a judgment or order of the court, except any order referred to in rule 17.'

[16] It seems to be that the view expressed that 'an appeal may be lodged against any order in terms of Rule 19' is *obiter* in the context of what Hoff, AP was called upon to decide. Regrettably I find myself in respectful disagreement with my learned Brother on the meaning and effect of rule 19(1). In my respectful view rule 19(1) must be read subject to the provisions of the Labour Act, more specifically section 21(1)(b), stating which judgments and orders of the district labour court may be appealed against, namely 'any judgment or order given by such district labour court, as if such judgment or order were a judgment or order of a magistrate's court.' I cannot determine from the *Louw* judgment whether this section was brought to the learned judge's attention.

[17] Be that as it may, it should also be noted that the Labour Courts' Rules Board established under section 22(1) of the Labour Act had the power under section 22(4) to make rules for the district labour court rules in relation to certain matters specified in section 22(4)(a)-(h). None of these paragraphs state that the Rules Board may determine what judgments or orders are appealable. The only matters in relation to district labour court appeals on which the Rules Board may make rules are the period within which and the manner in which an appeal shall be noted (see section 22(4)(g)). Clearly the Rules Board cannot extend the appeal jurisdiction of the Labour Court by making a rule which does not conform to the provisions of the Act. In any event, I do not think this was the intention of the Rules Board.

[18] In my view the point taken by the respondent is good. As far as the merits of the ruling are concerned, the matter is not appealable.

[19] I now turn to the appeal on the costs order. The notice of appeal was drawn up before the transcription of the chairperson's ruling was available and the appellants reserved their rights to amplify the grounds once it did become

available. At some stage after the hearing the chairperson provided a written version of the ruling which is not the same as the transcribed ruling in several respects. The differences amount to more than correction of patent errors or editing of the language. I think it would not be wrong to read them together, but where there are irreconcilable differences, I think the transcribed version should be preferred. Essentially the chairperson found that the appellants, by failing to file an application for condonation caused inconvenience and prejudice to the respondent. The implication is that this failure led to the postponement of the matter. As the respondent's legal representatives are seasoned lawyers, the chairperson considered that they should have guarded against the inconvenience caused. The chairperson further reasoned, as I understand it, that as the appellants actually filed a reply (although late), it was not necessary for them to argue that there was no need for them to reply until a notice of bar had been filed. With respect to the chairperson, I think this approach begs the question. Clearly the issue before him was whether they were late and appellants were of the view that they were not late, because they had filed the reply before a notice of bar had been served. It would further appear that the learned chairperson reasoned that if the appellant had filed an application for condonation for the late reply, the respondent need not have participated in 'unnecessary' proceedings that day. He thereupon held that the appellants should pay the costs of the unnecessary proceedings on an attorney-and-client scale.

[20] The grounds of appeal which have a bearing on the appeal against costs are:

> '10. That the Learned Chairperson erred in the law and/or on the facts in finding that the Respondent was prejudiced by filing of the Appellants' Reply;
>
> 11. That the Learned Chairperson erred in the law and/or on the facts in failing to consider that the Appellants Reply had been filed prior to the hearing of the "application" by the Respondent and the pursuant to the practice in the Windhoek District Labour Court, the matter would in any event have had been postponed to a date agreed upon between the Appellants and the Respondent;

12. That the Learned Chairperson erred in the law and/or on the facts in finding that the Appellants were frivolous in opposing the "application" launched by the Respondent in terms of Rule 7(3) of the District Labour Court.

14. That the Learned Chairperson erred in the law and/or on the facts in ordering that the Appellants should pay legal costs on the scale as between attorney-and-client.'

[21] It should be noted that in the transcribed ruling the chairperson did not expressly find that the appellants were frivolous in any way, although he did state in the written ruling that they were frivolous to contest the matter in the absence of an application for condonation for the late filing of a reply. Nevertheless, I think it must be taken that he, being an experienced chairperson, was aware of the provisions of section 20 of the Labour Act and that in court he, by implication, found the appellants to have been frivolous.

[22] Section 20 provides that the Labour Court or any district labour court shall not make any order as to any costs incurred by any party in relation to any proceedings instituted in the Labour Court or any such district labour court, except against a party which in the opinion of the Labour Court or district labour court has, in instituting, opposing or continuing any such proceedings, acted frivolously or vexatiously.

[23] Mr *Denk* submitted with reference to *Minister of Health & Social Services v Vlasiu* NLLP 1998 (1) 35 NLC at 52 that where a party is *bona fide* in opposing a particular matter and makes out an argument which has some chance of succeeding, the party cannot be said to be acting frivolously or vexatiously.

[24] In *National Housing Enterprise v Beukes and others* 2009 (1) NR 82 (LC) I had occasion to state the following after quoting section 20 (at 87E-88F):

> 'The question arises: what does it mean to say that a party has 'acted frivolously or vexatiously'? In *Fisheries Development Corporation of SA Ltd v*

Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) Nicholas J, as he then was, while dealing with an application to stay proceedings which were alleged to be vexatious or an abuse of the process of the court, said this (at 1339F):

> 'In its legal sense, "vexatious" means
>
> > "frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant"
>
> (*Shorter Oxford English Dictionary*). Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; "abuse" connotes a mis-use, an improper use, a use *mala fide*, a use for an ulterior motive.'

The learned judge distinguished the meaning attributed to the word 'vexatious' in the context mentioned above from the meaning accorded to it in the context of an award of attorney and client costs in the following way:

> 'Mr Morris sought to rely on the statement by VIEYRA AJ in *Marsh v Odendaalsrust Cold Storages* Ltd 1963 (2) SA 263 (W) at 270C - F. In that case VIEYRA AJ was dealing with an application for an order for costs on the basis as between attorney and client and he said this [at 1339H - 1340A]:
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> > "No doubt orders of this kind will be granted because of some reprehensible conduct on the part of the losing party such as malice or a misleading of the Court. But, as pointed out by GARDINER JP in *In re Alluvial Creek Ltd* 1929 CPD 532 at 535, the order may also be granted where the proceedings are vexatious in effect even though not in intent. 'There are people' says the learned Judge, 'who enter into litigation with the most upright purposes and a most firm belief in the justice of their cause, and yet these proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense with which the other side ought not to bear'.
>
> It is plain that in the passage quoted GARDINER JP was using the word vexatious in a special sense in the particular context of an award of attorney and client costs. Plainly that meaning has no bearing on the meaning to be attributed to the word when used in its ordinary legal sense, as it was in the decisions of the Appellate Division which

> are referred to above. There is accordingly no basis for a finding that the plaintiff's conduct is vexatious or an abuse of the process of the Court.'
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> The remarks of Gardiner JP were referred to with approval by Clayden J in *Epstein & Payne v Fraay and Others* 1948 (1) SA 1272 (W) at 1276; by Hiemstra J in *Singer Manufacturing Company v Kilov and Another* 1959 (3) SA 215 (W) at 218; and by Banks AJ in *Lemore v African Mutual Credit Association and Another* 1961 (1) SA 195 (C) at 199.
>
> [21] It seems to me that the intention in enacting s 20 was to allow a measure of freedom to parties litigating in labour disputes without them being unduly hampered by the often inhibiting factor of legal costs. The exception created by the section uses the word 'acted', indicating that it is the conduct or actions of the party sought to be mulcted in costs that should be scrutinised. In other words, the provision is not aimed at the party whose conduct is such that 'the proceedings are vexatious in effect even though not in intent'.'

[25] Mrs *Bazuin* emphasized that a court of appeal will not easily overturn a decision on costs as it is in the discretion of the court *a quo.* It is trite, however, that such a discretion must be exercised judicially. Considering the facts of the case before me, I cannot find any that support a contention that the appellants acted with the sole purpose of causing annoyance to the defendant; or that they were *mala fide* in any way or abused the process for an ulterior motive. Even if the basis for their opposition might not be good in law (it is not necessary to express any view on it), this in itself is not sufficient to conclude, as the learned chairperson by implication did, that they acted frivolously or vexatiously. It therefore necessarily follows that he could not, in law, have awarded such costs on an attorney-and-client scale.

[26] In the light of this finding it is not necessary to consider the other grounds of appeal or the other arguments raised by counsel for the appellants.

[27] In the result I make the following order:

1. The appeal against the costs order is upheld.

2. There shall be no order as to costs.

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K van Niekerk

President

APPEARANCE

For the appellants: Adv A Denk

Instructed by LorentzAngula Inc.

For the respondent: Mrs Bazuin

of Bazuin Inc. Legal Practitioners