REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: LCA43/2011

In the matter between:

MEATCO CORPORATION OF NAMIBIA **APPELLANT**

And

REMOND PRAGT **FIRST RESPONDENT**

MERIAM NICODEMUS, N.O. **SECOND RESPONDENT**

Neutral citation: *Meatco Corporation of Namibia v Pragt* (LCA 43-2011) [2014] NALCMD 44 (27 October 2014)

Coram: VAN NIEKERK J

Heard: 1 March 2012

Delivered: 27 October 2014

Flynote: **Labour law** – Second respondent as arbitrator found that first respondent an employee of appellant and had been unfairly dismissed – In notice of appeal appellant formulated what it called a question of law, namely "Whether or not an employment or independent contractors' relationship existed between Appellant and First Respondent?" – The grounds upon which appeal based are that "The arbitrator erred in law by concluding the First Respondent was an employee of Appellant" - Court found that second respondent's finding of employment was one of fact and as such unassailable under section 89(1)(a) of Labour Act, 2007 (Act 11 of 2007), unless this finding was such that no reasonable arbitrator could have made it – For the purported question of law to disclose an error of law the question should be framed clearly and properly – It should set out the error of law, which is that the factual finding is one which no reasonable arbitrator could have made – Another problem is that grounds as set out are not proper grounds – As such notice of appeal defective and a nullity – Appeal struck.

ORDER

The appeal is struck from the roll.

JUDGMENT

VAN NIEKERK J:

[1] This is an appeal from an award given by the second respondent in which she recorded that the issues to be determined are (i) whether the first respondent was an employee of the respondent or not, and if so; (ii) whether the termination of his services was fair or not, and if not; (iii) what the appropriate relief would be. The second respondent found that the first respondent was an employee of the appellant; that the first respondent's employment was terminated without a fair and valid reason; and without following the correct procedure. She ordered that the appellant should pay compensation to the first respondent.

[2] The appellant's notice of appeal on Form LC41 states, *inter alia*, as follows:

> 'The questions of law appeal (*sic*) against in the arbitrator's award are as follows:
>
> a. Whether an employment or independent contractors relationship existed between Appellant and First Respondent;
> b. Whether compensation could be awarded under the circumstances.
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> The grounds of appeal against the arbitrator's award are as follows:
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> 1. The arbitrator erred in law by concluding the First Respondent was an employee of Appellant;
> 2. The arbitrator erred in law by concluding the Office of the Labour Commissioner has jurisdiction to dispose of the dispute with Appellant lodged with that Office;

3. The arbitrator erred in law to conclude First Respondent was unfairly dismissed;
4. The arbitrator erred in law to order Appellant to pay compensation to First Respondent.'

[3] The appeal is unopposed. Argument was heard in the matter on 1 March 2012 and judgment was reserved. Subsequent thereto the Court invited the appellant to present written argument on the following questions:

"1. Is the first question raised in the notice of appeal namely, 'Whether an employment or independent contractor's relationship existed between Appellant and First Respondent' a question of law?

2. If the answer to question no. 1 is "No", does this Court have the jurisdiction to consider the first question raised in the notice of appeal?"'

[4] Mr *de Beer* for the appellant kindly provided written argument, for which the Court expresses its gratitude. As part of the argument counsel referred to the similar case of *Swarts v Tube-O-Flex Namibia (Pty) Ltd and Another* NLLP 2014 (8) 44 LCN (27 March 2013). In this matter Smuts J had to determine, *inter alia*, whether the arbitrator's ruling that the appellant was an employee of the respondent for purposes of the Labour Act, 2007 (Act 11 of 2007), was a question of law or not. During the course of his judgment he noted that, in determining whether the applicant was an employee or not, the arbitrator relied on the factual circumstances surrounding the arrangement between the appellant and the respondent. He further stated:

'[16] The arbitrator further relied on what is termed the 'pragmatic approach' discussed in the work by Parker, *Labour Law in Namibia*, where it is stated:

'In England, the issue of whether a person is an employee is a question of fact.'

The work continued, after reference to English authority…

'It is therefore submitted that whether a person is an employee is a question to be resolved by the determiner of fact. However, where the question a person is an employee turns solely on the interpretation and application of a written contract of employment then, the question is a question of law.''

[5] Later Smuts J continued:

‘[26] Section 89(1) of the Act restricts appeals to this court against awards of arbitrators to any question of the law alone. The question arises as to whether this question is one of law or fact.

[27] ……..

[28] On the question as to the distinction between questions of fact and law, Scott, JA in *Betha v BTR Sarmcol* [1998 (3) SA 349 (SCA) 405C-406E] with respect lucidly explained the position thus (after referring to not dissimilar provisions in the then applicable Labour Relations Act, 28 of 1956 which also essentially restricted further appeals to questions of law):

> ‘Accordingly, the extent to which it (then court of appeal) may interfere with such findings is far more limited than the test set out above (to findings of fact in criminal appeal). As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See *Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd* 1959 (1) SA 469 (A) at 475 et seq; *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666B--D.) The inquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all.
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> The limitation on this Court's ordinary appellate jurisdiction in cases of this nature applies not only to the LAC's findings in relation to primary facts, ie those which are directly established by evidence, but also to secondary facts, ie those which are established by inference from the primary facts. The reason is that the drawing of an inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) at 810H--811G.)
>
> It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only when there is no evidence which could reasonably support a finding of fact or where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made the finding that this Court will be entitled to interfere.

> I do not understand the decision in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* 1995 (3) SA 22 (A) to be inconsistent with the above proposition. The 'finding' of the LAC referred to at 31I with which this Court disagreed was not a finding of fact in the true sense but a finding involving a value judgment. (Compare *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 795C--797J.)
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> The provision in s 17C(1)(a) limiting the Court's jurisdiction in relation to findings of fact is somewhat anomalous inasmuch as the LAC does not hear evidence and has before it the same material which is before this Court. It does not therefore have the advantages of a court of first instance and is in no better position than this Court to make findings of fact. However, Parliament in its wisdom decided to make the LAC the final arbiter on issues of fact. It may well be that its reason for doing so is related to the composition of the LAC or simply to limit the number of appeals coming to this Court. But whatever the reason, this Court is not entitled, because it disapproves of the wisdom of the provision, simply to ignore it or apply some test different from the well-established test which is to be applied when there is no appeal on questions of fact.'

[29] It would follow that this court would not interfere with findings of fact, even where these entail drawing an inference for the purpose of establishing a secondary fact – such as employment – unless they are findings which no court could reasonably have made. As was stressed by Scott, JA in relation to a similarly worded provision, the legislature has for its own reasons – presumably primarily related to the need for obtaining finality and certainty expeditiously in labour disputes, also evident in the shorter peremptory prescriptive provisions – decided that appeals from arbitrators are to be confined to questions of law alone. This court is obliged to give effect to that legislative choice made, even though arbitrators have frequently shown in appeals to this court that they have some difficulty in making proper factual determinations. This court is thus not free to substitute its own findings of fact for those of the arbitrator, unless no reasonable court could have made them.

[30] The arbitrator quoted both the definition of employee and s 128A in his ruling. After referring to the latter, he correctly acknowledged that a presumption of employment would arise if one of the eventualities spelt out in the section were to be established[1] and also correctly, that this presumption is rebuttable.

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[31] After referring to the facts, the arbitrator found that, although the appellant assisted the respondent in its business, he was not an employee of the respondent and set aside his complaint which would need to be based upon an employment relationship. Although the arbitrator did not expressly find that the respondent discharged the onus upon it of establishing that there was not an employment relationship, his finding after a reference to this presumption and his treatment of the facts would indicate that he found that the respondent had rebutted the presumption.

[32] The finding that the appellant was an employee is in my view a finding of fact of the kind described by Scott JA as a secondary fact, established by inference from the primary facts. As he stressed, it is no less a finding of fact than a finding in relation to a primary fact.

[33] The finding reached by the arbitrator on what was a tricky factual question before him was not in my view one which no reasonable court could have reached in the circumstances. He had prefaced his analysis of the facts with the applicable statutory test in the light of the presumption brought about by s 128A. He then referred to authorities before approaching the facts in finally reaching his conclusion on the question. It is thus not open to me to substitute a finding of fact (of employment) for that of the arbitrator (of no employment), even if I were inclined to reach a different conclusion. That course is not open to me by virtue of s 89 of the Act which has limited appeals to his court on questions of law alone.

[34] The question raised by this appeal, thus not being one of law alone, means that it is not open to me to interfere with the factual ruling made by the arbitrator. This court does not have jurisdiction to do so. The appeal is accordingly dismissed for this reason. No order as to costs is made.'

[6] I respectfully agree with the reasoning in the above extract. Although, as Mr *de Beer* pointed out, section 128A was not yet in operation at the time the present appeal was heard, the statement of the law as expressed in *Swarts v Tube-O-Flex* nevertheless finds application in the present matter.

[7] The first respondent's case before the second respondent was that he was an employee who had been unfairly dismissed. The appellant's case was that the first respondent was an independent contractor. The first respondent testified in support of his claim and the appellant presented evidence by several witnesses.

[8] The facts are, to a large extent, common cause. It emerged that the appellant orally engaged the first respondent as a marketing consultant during April 2008. He was paid an amount of N$35 000 per month in consultation fees on presentation of an invoice. A draft employment agreement was drawn up by the appellant, but it was never signed. On 16 February 2009 the parties entered into a written memorandum of agreement in terms of which the first respondent would act as a 'service provider' and independent contractor in his capacity as consultant. The first respondent had to provide certain services for which he would be paid N$1600 per day up to a maximum of N$35 000 per month within 10 days of delivery of an invoice. It was a special condition of the agreement that specific projects 'as spelt out' by the appellant's representative and the appellant's marketing manager would form the basis of the services to be provided by the first respondent during the contract period. The agreement expired on 31 May 2009 and was not renewed in writing.

[9] While this agreement was still in force, the appellant's canning manager was suspended. The first respondent was shifted from the appellant's head office to the canning department where he performed the duties of canning manager with overall responsibility for the canning department. During this time the first respondent assisted with the day to day running of the canning department and organised the staff. He acted as supervisor when the suspended manager returned to work and assessed the latter's work performance, completed assessment reports and approved the latter's leave application. The first respondent took daily instructions from the factory manager and fell under the latter's supervision and control.

[10] During September 2010 the first respondent received a letter stating that his service agreement with the appellant was to be terminated on 30 September 2010.

[11] It is common cause that the appellant did not at any stage deduct PAYE of social security contributions from the first respondent's remuneration.

[12] The second respondent analysed the evidence presented in light of the differences between a contract of employment and a contract of work as independent contractor summarized in *SA Broadcasting Corporation v Mckenzie* (1999) 20 ILJ 585 (LAC). Bearing in mind the definition of 'employee' as used in the Labour Act, 2007 (Act 11 of 2007), she also used the factor of the exercise of control over the first respondent (as discussed in *Paxton v Namib Rand Desert Trails (Pty) Ltd* NLLP 1998 (1) 105 (NLC) and in *Engelbrecht and others v Hennes* 2007 (1) NR 236 LC) and the dominant impression test (as discussed in *Engelbrecht v Hennes (supra)*) to conclude on the facts that the first respondent was the employee of the appellant when his services were terminated.

[13] The second respondent's finding was thus one of fact. As such it is unassailable on appeal by virtue of the provisions of section 89(1)(a) of the Labour Act, unless the finding is such that no reasonable arbitrator could have made it.

[14] The error of law which would form the basis of a question of law in this regard is that the factual finding that the first respondent was an employee of the appellant is one which no reasonable arbitrator could have made. The notice of appeal does not, however, disclose such a question of law. The question under discussion states: 'Whether an employment or independent contractors (*sic*) relationship existed between Appellant and First Respondent.' As pointed out earlier in this judgment, this is not a question of law, but a question of fact. In this regard it should be remembered that the second respondent's finding was not based only on the interpretation and application of a written contract between the parties (see *Swarts v Tube-O-Flex* (*supra*), at para. [16]).

[15] In *President of the Republic of Namibia and Others v Vlasiu* 1996 NR 36 (LC) O'Linn J held that where a party wishes to appeal on the ground that a decision of fact is such that no reasonable Court could have made it, the ground of appeal should be properly formulated in order to constitute a question of law. He stated (at 47E-G):

> ‘It follows from the above that when a party to a Labour Court proceeding wishes to appeal on the latter ground, such ground must be properly formulated in order to constitute a question of law.
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> In the present case for instance, the question of law should read:
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> > 'Whether or not there was evidence on the record from which the Labour Court could reasonably have come to the decision which it did.'
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> There is no such ground formulated in the notice of the application for leave to appeal.’

[16] The learned judge dealt with a series of appeal grounds on the facts, and rejected them as not being questions of law. He pointed out that that where the appellant bases its appeal grounds on facts which the appellant contends the Court should have found, this would in fact be a purported question of law on which the appellant cannot appeal (at 47I). The clear implication is that, if the appeal grounds had been framed along the lines he suggested, they would have constituted properly formulated questions of law.

[17] There is however, one aspect which is somewhat troublesome. It is this. It would appear that the approach in some cases (e.g. *Visagie v Namibia Development Corporation* 1999 NR 219 (HC) is to take what would *prima facie* be a question of fact contained in the notice of appeal and then to consider the evidence, where after the test of whether the finding/conclusion of fact is such that no reasonable court could have made it, is applied. If the test so applied leads to a positive answer, the question is then considered to be a question of law. It would appear that, in following this approach, the court was being generous towards the appellant.

[18] In my respectful view it should ordinarily be required of an appellant to frame questions of law clearly and properly (see also *Shilongo v Vector Logistics (Pty) Ltd* (LCA 27/2012 [2014] NALCMD 33 (7 August 2014) at paras. [8] – [9]). Where factual findings or conclusions are attacked on the basis that no reasonable court could have made them, it is, as was stated in *President of The Republic of Namibia and Others v Vlasiu* (*supra*), necessary to properly formulate the question in order for it to be a

question of law. Proper formulation has the added advantage that it focuses the mind of the framer of the question which should assist in answering another question which should be uppermost and that is, whether are there reasonable prospects of success on the stringent test of whether there is no evidence on which a reasonable court could have made the particular factual finding or, in other words, whether no reasonable court could have made the particular factual finding. In many of the labour appeals serving before this Court the notices of appeal in my view do not pass this scrutiny. The notices are frequently actually aimed at merely raising the prospect that certain factual findings may have been wrong or based on a misdirection and that, as has been clearly stated in *Betha v BTR Sarmcol* (see quotation in *Swarts v Tube-O-Flex* (*supra*)), is not the test. It is, in any event, a general requirement that a notice of appeal should be clearly framed so that the court and the respondent may be properly informed on what basis the appeal is brought.

[19] There is a further problem for the appellant. The grounds for the first question appealed on are not adequately set out. The only 'grounds' relevant to the first question are set out in paragraph 1 of the notice of appeal and it states that 'The arbitrator erred in law by concluding the First Respondent was an employee of Appellant.' These are not proper grounds at all. The framer of the notice of appeal should have set out all the reasons why it should be held that no reasonable arbitrator could have come to the conclusion that the appellant was the first respondent's employee, or, put differently, why it should be held that no reasonable arbitrator could have come to the conclusion that there existed an employment relationship and not an independent contractor's relationship between the parties. The notice of appeal is therefore defective and is a nullity *(Wimmerth v Meatco Namibia* (LCA 15/2008, Unreported – 10 June 2011); *First National Bank Namibia Ltd v Van Der Westhuizen and Another* 2012 (1) NR 195 (LC); *Namibia Dairies (Pty) Ltd v Alfeus* (LCA 4/2014 [2014] NALCMD (18 September 2014)).

[20] Having come to this conclusion, it is not necessary to consider the other question on which the appeal is brought, or the grounds set out for it, because the second

question on appeal is based on the assumption that the first question is decided in favour of the appellant.

[21] The result is that the appeal is struck from the roll.

___(Signed on original)_____

K van Niekerk

Judge

APPEARANCE:

For the appellant: Mr P J de Beer
of De Beer Law Chambers