



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 12/2015

In the matter between:

MEAT BOARD OF NAMIBIA

APPELLANT

And

HERNHUTT B NITSCHKE

RESPONDENT

Neutral citation: *Meat Board of Namibia v Nitschke* (LCA 12-2015) [2015]
NALCMD 18 (30 July 2015)

Coram: PARKER AJ

Heard: 12 June 2015

Delivered: 30 July 2015

Flynote: Labour law – Appeal – Service of notice of – Service of notice of appeal governed by rule 5 of the Rules of the Labour Court and rule 23(3) of the Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner – Service must comply with the relevant provisions of these rules – Court held that it is a fundamental principle of fairness in litigation that litigants should be given proper notice of legal proceedings that are instituted against them – This principle lies at the root of the *audi alteram partem* rule of natural justice – Where there has been a failure of proper service of process on a party there is surely

unfairness in the proceedings and, furthermore, the non-compliance with the rules is so material and pervading that it cannot be overlooked because the overlooking of such material non-compliance renders the proceedings unfair and, accordingly, offensive of art 12(1) of the Namibian Constitution – The notice of appeal served is not in compliance with the rules and is therefore a nullity – Court held further that the rules of service in the rules of court and the Conciliation and Arbitration rules are reasonable and are not harsh because on good cause shown a judge in chambers is entitled in terms of rule 5(5) of the rules of court to direct service in a manner other than prescribed by the rules of court – Court held also that where a legislation or a rule or a regulation prescribed the manner in which service of process should be effected, it is not open to a party to decide to serve process in any other manner without leave of the court, and only if, in terms of the legislation or rule or regulation the court is entitled to grant such leave.

Summary: Labour law – Appeal – Service of notice of – Service of notice of appeal governed by rule 5 of the Rules of the Labour Court and rule 23(3) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner – Service must comply with the relevant provisions of these rules – Court held that it is a fundamental principle of fairness in litigation that litigants should be given proper notice of legal proceedings that are instituted against them – This principle lies at the root of the *audi alteram partem* rule of natural justice – Where there has been a failure of proper service of process on a party there is surely unfairness in the proceedings and, furthermore, the non-compliance with the rules is so material and pervading that it cannot be overlooked because the overlooking of such material non-compliance renders the proceedings unfair and, accordingly, offensive of art 12(1) of the Namibian Constitution – The notice of appeal served is not in compliance with the rules is accordingly a nullity – Court held further that the rules and of service in the rules of court and the Conciliation and Arbitration rules are reasonable and are not harsh because on good cause shown a judge in chambers is entitled in terms of rule 5(5) of the rules of court to direct service in a manner other than prescribed by the rules of court – Respondent served notice of appeal on the Public Service Union and not on the respondent – Court found the service to be

defective – Court concluded that the notice of appeal is a nullity and it is not competent for a court to condone it – Principles in *Standard Bank Namibia Ltd v Maletzky* (SA 15/2013) [2015] (24 June 2015); and *Knouwds NO v Josea and Another* 2007 (2) NR 292 (HC) applied – Having found service to be defective for non-compliance with the rules, court struck the appeal.

ORDER

- (a) The appeal is struck.
- (b) Each party to pay his own costs.

JUDGMENT

PARKER AJ:

[1] The appellant appeals from the arbitration award made under case number CRWK692-14 on the basis, primarily, that the arbitrator erred in law for finding that the appellant (a) did not have a valid and good reason to dismiss the respondent and (b) did not act procedurally fairly in the conduct of the internal disciplinary hearing involving the respondent.

[2] A notice of appeal was issued from the registrar's office on 24 February 2015. Service of notice of appeal in the Labour Court ('the court') is governed by the Labour Court Rules ('the rules of court'), read with the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner ('the Conciliation and Arbitration rules'). Relevant to the instant proceeding are these provisions, that is -

- (A) in respect of the rules of court:

rule (5)(2)(a)(i), (ii), (iii), (iv); and rule 17(5)(c); and

(B) in respect of the Conciliation and Arbitration rules:
rule 23(3).

[3] It is clear from these provisions that in the instant proceeding, Mr Hernhutt Nitschke is 'the person concerned' in terms of rule 5(2)(a)(i) of the rules of court. He is also the 'respondent' and 'the person to be served' in terms of rule 3 of the Conciliation and Arbitration rules. There is nothing on the papers to establish that Nitschke authorized any representative to accept service of the notice of appeal on his behalf in terms of rule 5(2)(a)(i) of the rules of court. What is evident is that the notice of appeal was not served on Nitschke *qua* respondent. It was served on the Public Service Union, apparently because, as Mr Horn, counsel for the appellant submitted, a Public Service Union official had represented the respondent at the arbitration. But that does not make service of the notice of appeal rule compliant, as Mr Cupido, counsel for the respondent, argued.

[4] Apart from all else, where a legislation or a subordinate legislation (a rule or regulation) prescribes a manner in which service of process should be effected, it is not up to a party to decide to serve process in any other manner without leave of the court and only if in terms of the legislation or rule or regulation the court is entitled to grant such leave. Significantly, in terms of rule 5(5) of the rules of court, 'A judge of the court sitting in chambers may direct that service be effected in a manner other than (that) prescribed in this rule'. For this reason, I hold the view that the aforementioned rules on service of process are reasonable and are not harsh. In the instant case, a judge sitting in chambers has not given any such direction either *ex mero motu* or on application by the appellant.

[5] As the Supreme Court stated in the very recent case of *Standard Bank Namibia Ltd v Maletzky* (SA 15/2013) [2015] (24 June 2015), para 17, 'It is a fundamental principle of fairness in litigation that litigants should be given proper notice of legal proceedings that are instituted against them'. I should say that this

principle lies at the root of the *audi alteram partem* rule of natural justice. In my opinion, where there has been a failure of proper service of process on a party, there is surely unfairness in the proceedings.

[6] To bring the enquiry home; in terms of the rules of court and the Conciliation and Arbitration rules, a respondent is given 'proper notice' if the notice of appeal is served on him in compliance with the provisions of those rules. In the present proceeding, since the appellant has not applied to the court to give the direction referred to rule 5(5) of the rules and the court has not on its own volition given any direction as aforesaid, the noting of the appeal is a nullity on the basis that it was not served on the respondent as required by the aforementioned rules.

[7] I note that there is no statement indicating that the improper service complained of is a ground on which the respondent opposes the appeal as required by rule 16(b) of the rules of court. Mr Cupido's response was that the issue has been raised as a point *in limine*. That may be so; but that does not satisfy the requirement of rule 17(16)(b) of the rules of court. Nevertheless, I have allowed the issue of defective service to be raised as a preliminary point and argued as such *only* – and I emphasize 'only' – because the non-compliance with rule 5(2) and rule 17(5)(c) of the rules of court and rule 23(3) of the Conciliation and Arbitration rules goes against 'one of the fundamental principles of fairness in litigation' and the non-compliance is so material and pervading that it should not be overlooked; for, the overlooking of such material non-compliance with the rules would render the proceedings unfair, and, therefore offensive of art 12(1) of the Namibia Constitution. In sum, the defective service of the notice of appeal is a nullity; and it has been said by Damaseb JP in *Knouwds NO v Josea and Another* 2007(2) NR 792, para 17 that -

'Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it.'

APPEARANCES

APPELLANT:

S Horn

Instructed by MB de Klerk & Associates, Windhoek

RESPONDENT:

B Cupido

Instructed by Clement Daniels Attorney, Windhoek