



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 54/2015

In the matter between:

HANGANA SEAFOOD (PTY) LTD

APPELLANT

and

LUCIA XAWES

FIRST RESPONDENT

KURT E VON FRANCOIS

SECOND RESPONDENT

Neutral citation: *Hangana Seafood (Pty) Ltd v Xawes* (LCA 54/2015) [2016]
NALCMD 43 (17 November 2016)

Coram: PARKER AJ

Heard: 9 September 2016

Delivered: 17 November 2016

Flynote: Labour law – Labour Court – Appeals – Appeal noted against arbitral award – Appeal brought under s 89(1)(a) of the Labour Act 11 of 2007 is an appeal properly so called if the notice of appeal meets all the substantial and preemptory requirements prescribed in subrule (1)(c), read with subrule 3(a) and (b), of rule 17 of the Labour Court Rules – Court held that rule 17(2) is not a rule whose non-compliance with the court may lightly condone – If court were to condone non-compliance with rule 17(2) the court would in effect be taking away without

justification the respondents' entitlement to be informed of the case it has to meet – Accordingly court held that there was no appeal properly before the court for the court to consider – Consequently appeal was dismissed. *S v Kakolo* 2004 NR 7 at 8F-9A applied.

Summary: Labour law – Labour Court – Appeals – Appeal noted against arbitral award – Appeal brought under s 89(1)(a) of the Labour Act 11 of 2007 is an appeal properly so called if the notice of appeal meets all the substantial and peremptory requirements prescribed in subrule (1)(c), read with subrule 3(a) and (b), of rule 17 of the Labour Court Rules – Notice of appeal not accompanied by Form 11 in violation of rule 17(2) of the Labour Court Rules – Court found that rule 17(2) under which Form 11 is prescribed, is peremptory and serves to inform the respondent of the case it is required to meet making it a crucial aspect of labour appeals – Court concluded that failure to comply with rule 17(2)(c) is not condonable – Condonation of non-compliance of the rule has the effect of denying the respondent her entitlement to be informed of the case she has to meet – Consequently, court dismissed the appeal.

ORDER

- (a) The appeal is dismissed.
- (b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is an appeal against an arbitration award made by the arbitrator (second respondent) in case no CRSW 100–15 on 17 September 2015. The first respondent was the complainant and the appellant was the respondent at the arbitration hearing

conducted on 10 August 2015. The arbitrator found in favour of Ms Xawes, the first respondent, and now the appellant appeals against the arbitrator's award.

[2] The matter was set down on 17 June 2016 for hearing. However, Xawes asked the court for an adjournment in order for her to get legal representation. The court adjourned proceedings to 5 August 2016. On that date the court had to adjourn proceedings because counsel for the first respondent had to file heads of argument. The matter was adjourned to the 9 September 2016 for the hearing of the appeal.

[3] It is not disputed that the notice of appeal is not accompanied by Form 11. This failure must be fatal as was held in *Pathcare Namibia (Pty) Ltd v Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013). That holding has been followed in *Africa Consulting Services CC v Gideon* (LCA 60/2012) [2012] NALCMD 43 (26 November 2013). I accordingly uphold the preliminary objection raised by Ms Shikongo, counsel for the respondent, that on that score there is no proper appeal lodged before the court. But then, the appellant says that there is an application to condone the non-compliance with the rule, and they rely for support on rule 15(a) of the Labour Court rules which grants discretion to the court to condone non-compliance with the rules, on good cause shown.

[4] I refuse to exercise my discretion in that regard for the following reasons. Firstly, the appellant is not sure in its own mind whether Form 11 was delivered to the deputy sheriff or that Form 11 was not provided to the deputy sheriff. If the Form 11 was delivered to the deputy sheriff and he or she failed to attach it to the notice of appeal, then the deputy sheriff should have been joined in the condonation application for him or her to be given the opportunity, to which he or she is entitled, to confirm or contradict such serious allegation. That has not been done. If, on the other hand, Form 11 was not attached to the notice when it was filed, the appellant's legal representative should have noticed that fact if they were minded to comply with PD 48(1) of the Practice Directions. There is nothing in the papers indicating that the absence of Form 11 was noticed at the stage of complying with PD 48(1).

[5] Second, which is more important, rule 17(2) of the Labour Court Rules is not a rule whose non-compliance with the court may lightly condone. Rule 17(2) in peremptory terms provides:

'An appeal contemplated in subrule (1)(a) and (b) must be noted by delivery of a notice of appeal on Form 11, setting out concisely and distinctly which part of the decision, or order is appealed against and grounds of appeal (on) which appellant relies for the relief sought.'

Thus, it is under rule 17(2) and, therefore, in Form 11 that an appellant sets out concisely and distinctly which part of the decision or order (of the arbitrator) that is being appealed against, and, *a fortiori*, the grounds of appeal.

[6] Form 11 'serves to inform the respondent of the case it is required to meet'. See *S v Kakolo* 2004 NR 7 at 8F-9A. *Kakolo* was decided in the context of criminal appeal but the principles must have equal force in civil or labour appeals. If the court were to condone the non-compliance with rule 17(2), the court would in effect be taking away without justification the respondent's entitlement to be informed 'of the case it has to meet'. (*Kakolo loc. cit.*)

[7] Based on these reasons, I hold that there is no appeal properly before the court for the court to consider. The order I make is, accordingly, that –

- (a) The appeal is dismissed.

- (b) There is no order as to costs.

C Parker
Acting Judge

APPEARANCES

APPELLANT: B de Jager
Instructed by Malherbe Associates c/o MB de Klerk &
Associates, Windhoek

FIRST RESPONDENT: N N Shilongo
Of Sisa Namandje & Co. Inc., Windhoek