REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 61/2014

In the matter between:

THOMAS AMUKWELELE **FIRST APPLICANT**

AKSEL MAGONGO **SECOND APPLICANT**

And

TRANSNAMIB HOLDINGS LIMITED **RESPONDENT**

Neutral citation: *Amukwelele v Transnamib Holdings Limited* (LCA 61/2014) [2016] NALCMD 5 (25 February 2016)

Coram: PARKER AJ
Heard: **12 February 2016**
Delivered: **25 February 2016**

Flynote: Labour law – Leave to appeal – Labour court rules do not make provision for the procedure to be followed – Consequently, procedure prescribed in rule 115 of High Court rules apply – Ground of leave to appeal on the basis that the provision in Labour Act 11 of 2007, s 89(2), concerns both noting of appeal and prosecution of appeal has no merit – Court held that s 89(2) of Act 11 of 2007 concern noting of appeal only – Prosecution of appeal is regulated by the Labour

Court rules – Court held that noting of appeal and prosecution of appeal are two different procedural concepts – Court rejected applicants' counsel's contention that noting of appeal includes prosecuting an appeal – On the papers court found that applicants have not shown reasonable prospects of success on appeal existed – Consequently, application dismissed.

Summary: Labour law – Leave to appeal – Labour court rules do not make provision for procedure to be followed – Consequently, procedure prescribed in rule 115 of High Court rules to be followed – Applicants' counsel who deposed to founding affidavit contended that it was wrong for court in the appeal proceeding to rule that rule 17 of the Labour Court rules applies to Labour Court appeals when, according to counsel, s 89(2) of the Labour Act provides that appeals in Labour Court are to be noted in terms of the High Court rules – Court found that procedure for noting of appeal in the Labour Court is in terms of the High Court rules but procedure to be followed in prosecution of such appeal is that prescribed by the Labour Court rules, rule 17 – Consequently, Labour Court was correct when it held in the appeal proceedings that failure to file notice of intention to oppose the appeal and a statement stating the grounds on which the appeal was opposed in terms of rule 17(16) of the Labour Court Rules establishes that the applicants (respondent in the appeal) were not opposing the appeal – Appellants (in the appeal) were therefore entitled to pursue the appeal unopposed – Court instructed appellant's counsel to move the appeal and court after hearing counsel's submission upheld the appeal – Court found that applicants have failed to show reasonable prospects of success on appeal existed – Consequently, court dismissed application for leave to appeal.

ORDER

(a) Application to condone the late filing of the application for leave to appeal is dismissed.

(b) The application for leave to appeal is dismissed.

(c) I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] This is an application for leave to appeal by the applicants (ie respondents in the appeal). The respondent (ie appellant in the appeal) was the applicants' former employer before they were dismissed. The dispute between the applicants and the respondent was resolved by arbitration. The appellant successfully appealed from the arbitration (Case No. CRWK 146-14) in this court (the Labour Court) (judgment delivered on 17 September 2015).

[2] In that judgment the Labour Court set aside the arbitration award. Not being happy with the 17 September 2015 judgment, the applicants now apply for leave to appeal against that judgment. In the present application Mr Rukoro represents the applicants, and Mr Philander the respondent.

[3] The Labour Court rules have not made provisions for the procedure to be followed in the matter of leave to appeal. That being the case, in terms of rule 22 of the Labour Court rules, rules of the High Court apply with such qualifications and adaptations as the Labour Court may deem necessary. Leave to appeal is provided for in rule 115 of the rules of the High Court. In terms of rule 115, application for such leave must be made together with grounds for the leave to appeal within 15 days after the date of the order appealed against.

[4] In the instant proceeding, it cannot be disputed that the applicants must make such application on or before 8 October 2015. The applicants made an application

for leave to appeal on 16 October 2015, that is, some 13 days out of time. The applicants brought an application for the late filing of the application for leave to appeal on 11 February 2016. Thus the applicants gave the respondents shy of one day's notice of the hearing of the application on 12 February 2016 at 09h00 and yet the application was not brought on the basis of urgency or as an *ex parte* application. To condone the late filing of the application for leave to appeal in the face of the applicants' flagrant disregard for rules of court will not conduce to due administration of justice. For this reason alone the condonation application stands to be dismissed. In all this, it must be remembered that the applicants are legally represented.

[5] The application to condone the late filing of the application for leave to appeal stands to be dismissed on another basis. As Mr Philander submitted, it is trite that condonation is not granted for the mere asking for it. Such applicant must give sufficiently cogent and acceptable explanation for the delay.

[6] Mr Rukoro is the deponent of the founding affidavit. He states:

> '4.2 I am instructed by the Directorate of Legal Aid to act in this matter and needed to report to them before I could bring this application for leave to appeal.
>
> 4.3 I forwarded the judgment and my advice to the Directorate of Legal Aid but never received a reply until 13 October 2016 when I called to enquire and upon which I was given permission over the phone to proceed.'

[7] Mr Rukoro does not say when he reported to the Directorate of Legal Aid; and there is no documentation to support the statement. He states further that he forwarded the judgment and his advice to the Directorate of Legal Aid. He does not say when he did that and by what means of communication. There is not one grain of proof that he did what he says he did.

[8] I do not, therefore, find that the applicants have placed before the court sufficiently cogent and acceptable explanation for the delay. In any case, I do not think there are reasonable prospects of success on appeal.

[9] It has been stated in a long line of cases that in an application of this kind the applicant must satisfy the court that he or she has reasonable prospects of success on appeal. See *S v Nowaseb* 2007 (2) NR 640, and the cases there gathered. The principle was enunciated in criminal proceedings but there is no good reason why the principle enunciated in *Nowaseb* and those cases should not apply with equal force to civil proceedings.

[10] It was observed in *S v Nowaseb* that –

'[2] (Thus) an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view …. But, it must be remembered, "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal". (*S v Ceaser* 1977 (2) SA 348 (A) at 350E)'

[11] The court in *Nowaseb* approved the view stated by Diemont JA in *S v Sikosana* 1980 (4) SA 559 A at 562H-563A that –

'If he (the Judge) decides to refuse the application he must give his reasons …. It may be that his reasons for his refusal will appear from the reasons for convicting (*R v White* 1952 (2) SA 538 (A) at 540) but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.'

This is the manner in which I approach the determination of the present application.

[12] Having given considerable thought objectively to the application, and disabusing my mind, as far as humanly possible, of the fact that I had no doubt – none at all – concerning the upholding of the appeal, I should say that I am not at all satisfied that there is a reasonable prospect that the Supreme Court may take a different view about the decision. In my judgement, therefore, the applicant has failed to show that he has reasonable prospects of success on appeal. The application, therefore, fails; and it is rejected.

[13] The talisman on which the applicants hang their ground in the instant application is encapsulated in para 6.1 of the founding affidavit:

> 'When regard is had to the judgment as a whole it is evident that the Labour Court upheld the appeal without determining the merits of the case.'

[14] This ground has not one iota of merit. Mr Rukoro does not read all the paragraphs of the judgment intertextually as any reasonable and objective reader of a judgment should do. I do not, with respect, consider Mr Rukoro to be such reasonable and objective reader; for, '[I]t must be remembered that he is a stipendiary witness giving evidence (on oath) in a founding affidavit in such a substantial matter as' grounds of leave to appeal by the applicants, when he is not a 'person(s) seeking leaving to appeal'. (See *Greencoal (Namibia) (Pty) Ltd (Registration Number: 2010/0314) v Laicatti Trading Capital Inc* (A 273/2014) [2016] NAHCMD 1 (15 January 2016, para 19).) And what is more; Mr Rukoro is not, and cannot be, 'the person seeking leave to appeal' within the meaning of s 115(1) of the rules of the High Court.

[15] What Mr Rukoro forgets is that what the Labour Court *qua* appeal court should consider is not only the record of proceedings of the arbitration. It must consider also both the notice of intention to oppose the appeal and a statement containing the grounds on which he or she opposes the appeal in terms of rule 17(16) of the Labour Court rules. Indeed, there was no notice to oppose the appeal

and no statement containing the grounds on which the respondent opposed the appeal filed by the respondent. It followed then that the court had before it only the papers filed of record by the appellant and, of course, the record of proceedings of the arbitration. No matter how one looks at it; in such circumstances the appellant was entitled to pursue the appeal unopposed. This conclusion is borne out by the Labour Court rules and common sense. And even then, upon the *Christian* principle (see para 21 below) the appellant's counsel was instructed by the court to move the appeal and argue the appellant's case.

[16] These conclusions lead me to the next level of the enquiry; and it concerns the interpretation and application of s 89(2) of the Labour Act and rule 22 of the Labour Court rules.

[17] With the greatest deference to Mr Rukoro, I should say that Mr Rukoro misreads s 89(2) of the Labour Act 11 of 2007. Mr Rukoro argues that because one has to note an appeal in terms of the rules of the High Court, the prosecution of the appeal, too, must also be followed in terms of the rules of the High Court. In making such fallacious and self-serving argument, Mr Rukoro is arrogating to himself 'a better knowledge of what Parliament intended than what Parliament actually had in mind when it expressed itself clearly as it did' in s 89(2) of the Labour Act, 'and to put forward, without any justification, the unexpressed intention of Parliament'. See *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793, at 798D-E.

[18] I cannot see any basis in law or in the English language upon which Mr Rukoro so intrepidly submits that noting an appeal includes prosecuting an appeal. The following words in s 116(1) of the rules of the High Court debunks Mr Rukoro's argument:

'An appeal to the court against the decision of a magistrate in a civil matter must be *prosecuted* within 60 days after the *noting of the appeal*.' (Italicized for emphasis)

How then can Mr Rukoro argue that noting an appeal includes prosecuting an appeal. They are two different procedural concepts as, for example, s 116(1) of the rules of the High Court indicates.

[19] It follows irrefragably that, *pace* Mr Rukoro, the conclusion in para 5 of the 17 September 2015 judgment, concerning the applicants' failure to comply with the peremptory provisions of rule 17(16) of the Labour Court rules, is unassailable – as a matter of law and the English language. Accordingly, Mr Rukoro's ground 7 that 'the finding by this Honourable Court that the notice of appeal did not comply with rule 17 of the Labour Court rules is wrong as section 89(2) clearly requires such appeals to be noted in terms of the High Court Rules' has not a scintilla of merit. Counsel's contention does violence to the English language and the law. It is with firm confidence, therefore, that I reject counsel's argument. But that is not the end of the matter. Mr Rukoro, counsel for the applicant and deponent of the founding affidavit, states in the founding affidavit:

> 'When regard is had to the judgment as a whole it is evidence that the Labour Court upheld the appeal without determining the merits thereof.'

[20] I wrote the following in the chapeu of para 6 of the 17 September 2015 judgment:

> 'Based on these reasons, I hold that the appeal is not opposed on any grounds and there is no good reason to reject it. The appeal should therefore succeed, and it succeeds …'

[21] As Mr Philander, submitted, it is clear from the judgment that the court was alive to the fact that the appeal, though unopposed, that did not 'entitle the appellant to judgment'. I am, and I was, familiar with the counsel of Maritz JA in *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753, para 15, that '[T]he absence of opposition, however, does not by itself entitle the applicant to judgment – as if by default'. The onus rests on the applicant to show that good

grounds exist for him or her to succeed. In the instant case, it is clear from the judgment that I only upheld the appeal after I had considered the papers filed of record and appellant's counsel's submission. Having done that, I concluded that I did not have any good reason to reject the appeal. As I have said previously, Mr Rukoro appears not to see the deductive reasoning that resonates in the judgment preceding the conclusion in para 6 of the judgment.

[22] In this regard, it must be remembered, *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706, per Greenberg JA and Davis AJA, tells us:

> 'An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not therefore follow that, *because something has not been mentioned, therefore it has not been considered*.'
> (Italicized for emphasis)

[23] Thus, because I did not mention that I had considered all the papers and counsel's submission, therefore I have not considered the papers and the submission by the counsel of appellant before I decided.

[24] Based on these reasons, I cannot say that the applicant has shown that there is a reasonable prospect of success on an appeal to the Supreme Court; and I have already, for reasons given, rejected the application to condone the late filing of the application for leave to appeal; whereupon I make the following order:

(a) Application to condone the late filing of the application for leave to appeal is dismissed.

(b) The application for leave to appeal is dismissed.

(c) I make no order as to costs.

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C Parker

Acting Judge

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APPEARANCES

APPLICANTS:	S Rukoro Instructed by Directorate of Legal Aid, Windhoek
RESPONDENT:	S R Philander Instructed by LorentzAngula Inc., Windhoek