

NOT REPORTABLE

CASE NO: SA 18/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MB TRUCK SPARES

Appellant

and

MORNE VAN NIEKERK

Respondent

Coram: SMUTS JA, CHOMBA AJA and HOFF AJA

Heard: 12 April 2016

Delivered: 19 April 2016

APPEAL JUDGMENT

SMUTS JA (CHOMBA AJA and HOFF AJA concurring):

[1] The appellant, as applicant, is the sole proprietor of a firm and approached the Labour Court to condone his non-compliance with rule 17 of the Labour Court Rules concerning the time period within which an appeal to that court is to be noted, reinstatement of the appeal in that court and for stay of execution of an arbitrator's award in favour of the respondent.

[2] The appellant's application followed two earlier applications for stay of execution of the award. In the earlier applications, procedural points were successfully taken against them and they foundered as a consequence. It is not

necessary for the purpose of this judgment to recount in detail what occurred in those applications.

[3] This appeal has as its origin a dispute concerning the alleged dismissal of the respondent. The appellant contends that the respondent orally resigned after an altercation between the parties whilst the respondent claims that he was dismissed. After unsuccessful conciliation, the dispute proceeded to arbitration under the Labour Act 7 of 2011 (the Act). The arbitrator in her award found that the respondent had been unfairly dismissed by the appellant and ordered that the appellant pay five months' salary as compensation to the respondent in the sum of N\$112 481,45.

[4] The appellant sought to appeal against the award and brought his first application for stay of execution of the award pending the appeal. Although the appellant delivered a notice of appeal as per form 11 of the Labour Court Rules, a further notice of appeal as required by rule 17(3) of the Labour Court Rules read with rule 23(2) of the Rules relating to the conduct of conciliation and arbitration (CCA rules) in form LC 41 to the latter rules was not delivered. Rule 17(3)(6) requires that both these forms should be delivered together to the Registrar, the Labour Commissioner and the other parties. A point was taken that the appeal was thus incorrectly noted. This point found favour and that application was dismissed.

[5] The missing notice (as per form LC 41) was subsequently provided and another application to stay execution was launched. It was met with the point that

the second notice should have been given simultaneously with the first. That application was struck from the roll because the court found that the first notice should have been withdrawn before delivering the required two notices simultaneously.

[6] The appellant then withdrew both the form 11 and LC41 notices and simultaneously delivered two fresh notices and brought his latest application seeking condonation for the late filing of those notices and re-instatement of the appeal as well as staying the execution.

Proceedings in the Labour Court

[7] The appellant's latest application – which is the subject matter of this appeal – was again met with two preliminary points taken against it. The first point contested the urgency of the application because of the delay occasioned by the prior point taking. The Labour Court correctly brushed aside that point in the context of the history of the litigation. The second preliminary point took issue with the notice of appeal (embodied in form LC 41) – contending that it was a nullity because it sought to appeal against factual findings and was not in respect of questions of law alone. Section 89(1)(a) of the Act limits the jurisdiction of the Labour Court to appeals which raise questions of law alone.

[8] The respondent took the point that, by seeking to appeal against the factual findings of the arbitrator, the appellant's notice of appeal was a nullity and asked that the application be dismissed for that reason. Instead of having regard to the

notice of appeal in order to determine whether it raised questions of law or not, the Labour Court proceeded to address this question in the following way:

‘Therefore, for this Court to assess and resolve the problem at hand, needs a record of proceedings which took place before the arbitrator to look at the evidence presented before her to be in a position to determine whether or not the finding of fact made by the arbitrator is one which no court could reasonably have made or that the finding in question was so vitiated by a lack of reason to be tantamount to no finding at all.’

and

‘The record of proceedings held in the arbitration is very crucial in this application, therefore, in absence thereof, the court is not in a position to decide the issue of prospects of success on appeal of condonation of the late filing of the appeal’

[9] The Labour Court proceeded to uphold the respondent’s preliminary point on this basis and dismissed the application without considering its merits. The appellant appeals against that dismissal.

The respondent’s preliminary point

[10] As a starting point, the appellant would have need to satisfy the Labour Court that the appeal is on a question of law.

[11] Whether questions of law are raised should emerge from the notice of appeal in the context of the award and what is stated in the founding affidavit to the application. The record of the proceedings may be of further assistance but

would not ordinarily be required or needed by the Labour Court to determine this preliminary issue.

[12] The preliminary point taken was that the notice of appeal was a nullity because the findings attacked in it were of a factual nature. The Labour Court in its approach quoted above conflated this preliminary question with that of whether the appeal enjoyed prospects of success. These are two separate and distinct questions. Before the question as to whether an appeal enjoys prospects of success or not is to be considered, the Labour Court would first need to determine whether the notice of appeal raises questions of law alone.

[13] This preliminary point can only succeed if the notice of appeal does not raise questions of law. The notice of appeal was however not considered by the Labour Court.

[14] The notice of appeal refers to 6 questions of law appealed against. A consideration of the notice, which is attached to the founding affidavit, reveals that 5 of the 6 questions would essentially entail two questions of law applying the approach as to the meaning to be given to the phrase 'question of law alone' in s 89(1)(a) cogently set out in the very recent judgment of this Court in *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd.*¹

¹SA 33/2013 delivered on 11 April 2016.

[15] The first question in the notice of appeal takes issue with the arbitrator's conclusion that the respondent had in the circumstances been dismissed and had not resigned. This entails a conclusion of law drawn from the facts and would thus appear to involve a question of law.

[16] The formulation of the second question is convoluted and does not coherently raise a question of law.

[17] The third and fourth questions concern the interpretation to be given to s 30 of the Act. An interpretation of that section involves a question of law.

[18] The fifth and sixth questions both essentially raise a single question which is related to the first question. It concerns the application of established legal principles in determining the test as to whether it was established that the respondent had been constructively dismissed by the appellant. This issue raises a question of law.

[19] It follows that questions of law are raised in the notice of appeal and that the second preliminary point should not have been upheld. This means that the appeal should succeed and that the matter should be remitted to the Labour Court to determine the merits of the application for condonation, reinstatement and for stay of execution.

Costs

[20] The appellant has succeeded with this appeal. As s 118 of the Act only applies to proceedings in the Labour Court, the appellant should be entitled to his costs on appeal. The respondent's preliminary point was a bad one and the appellant has been required to appeal against the ruling of the Labour Court upholding it. The fact that the respondent latterly withdrew his opposition to the appeal, would be an aspect to be taken into account by the taxing master.

Order

[21] The following order is made:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and replaced by the following:

 'The respondent's points in *limine* are dismissed'.
3. The appellant's application dated 30 September 2013 is remitted to the Labour Court for determination.
4. The respondent is ordered to pay the appellant's costs of the appeal in this court.

SMUTS JA

CHOMBA AJA

HOFF AJA

APPEARANCES

APPELLANT:

R T D Mueller

Instructed by Mueller Legal Practitioners