



NOT REPORTABLE

CASE NO: SA 65/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NDJEMBELA ALUTUMANI & 63 OTHERS

Appellants

and

WALVIS BAY STEVEDORING CO (PTY) LTD

First Respondent

GERTRUDE USIKU N.O.

Second Respondent

LABOUR COMMISSIONER

Third Respondent

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: 3 July 2019

Delivered: 4 July 2019

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and MAINGA JA concurring):

[1] This is an appeal against a judgment of the Labour Court, upholding an appeal against an award of an arbitration on a preliminary point without dealing with the merits.

[2] The appellants referred a dispute of unfair dismissal to the Labour Commissioner's office for adjudication by way of arbitration under s 86 of the Labour Act (the Act).¹ They secured an award in their favour. The first respondent employer appealed to the Labour Court against the award under s 89 of the Act.

[3] At the hearing of the appeal in the Labour Court, both sides raised preliminary points. Only that of the first respondent is relevant for present purposes. It concerned the failure on the part of the appellants to file a statement setting out their grounds of opposition to the appeal within 21 days of the delivery of the record. After the expiration of that 21 day period, the first respondent approached the Labour Court for a date of hearing which was then allocated. There remained a failure to file any grounds of opposition until the hearing. The first respondent contended that the appeal should be dealt with on an unopposed basis.

[4] The Labour Court upheld the first respondent's preliminary point, finding that the appeal was unopposed and further stated that it was not necessary for it to consider the merits of the appeal. The Labour Court proceeded to uphold the appeal without determining its merits. The appellants applied for and were granted leave to appeal against that outcome.

¹ Act 11 of 2007.

[5] Mr S Rukoro argued on behalf of the appellants that it was incumbent upon the Labour Court to make a determination on the points of law and grounds of appeal and that the failure to do so should result in the appeal to this court being upheld and that the matter should be referred back to the Labour Court for the determination of the merits. Mr G Dicks, on behalf of the first respondent, conceded in his heads of argument that the Labour Court erred in failing to determine the merits and stated that the first respondent did not oppose the appeal. He accepted that the award could only be set aside once the Labour Court had determined the merits. He conceded that the matter should be referred back to the Labour Court for the determination of the merits of the appeal.

[6] This concession is correctly made on behalf of the first respondent. Even where an appeal against an award is to be decided on an unopposed basis, the Labour Court was required to 'determine the dispute in the manner it considers appropriate' under s 89(10)(a) of the Act. That could only occur if that court determined the merits of the appeal. The failure to do so means that the appeal is to be upheld for this reason and the matter referred back to that court to determine the merits of the appeal.

[7] There only remains the question of costs. Mr Dicks submitted that there should be no order as to costs as the appeal had arisen on account of a procedural error made by the Labour Court and not at the instance of the first respondent. The first respondent did not oppose this appeal and in its written heads of argument rightly conceded that it should be upheld and the matter referred back.

[8] In his heads of argument, Mr Rukoro stated that the appellants sought costs against respondents opposing the appeal. This the first respondent has not done. It would follow that no order as to costs of the appeal should be made.

[9] The following order is accordingly made:

1. The appeal is upheld.
2. The matter is referred back to the Labour Court for the determination of the merits of the appeal.
3. No order is made as to the costs of this appeal.

SMUTS JA

SHIVUTE CJ

MAINGA JA

APPEARANCES

APPELLANTS:

S Rukoro

Instructed by Harmse Attorneys

RESPONDENTS:

G Dicks

Instructed by Engling, Stritter &
Partners