



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 68/2015

In the matter between:

NAMIBIA PRESS AGENCY

APPLICANT/APPELLANT

and

THOMAS KATAMILA

FIRST RESPONDENT

LOVEMORE MUGHANDIRA NO

SECOND RESPONDENT

THE LABOUR COMMISSIONER

THIRD RESPONDENT

Neutral citation: *Namibia Press Agency v Katamila* (LCA 68/2015) [2017]
NALCMD 8 (9 March 2017)

Coram: PARKER AJ

Heard: 3 February 2017

Delivered: 9 March 2017

Flynote: Labour law – Prosecution of appeal – Labour Court rules requiring prosecution of appeal within 90 days after appeal is noted – Failure to present appeal within time limit appeal is deemed to have lapsed in terms of rule 17(25) of the rules – Court held that the operation of rule 17(25) is not subject to rule 17(16) or any other rule of the rules.

Summary: Labour law – Prosecution of appeal – Labour Court rules requiring prosecution of appeal within 90 days after appeal is noted – Failure to present appeal within time limit appeal is deemed to have lapsed in terms of rule 17(25) of the rules – Court held that the operation of rule 17(25) is not subject to rule 17(16) or any other rule of the rules – Appellant noted appeal on 14 December 2015 but sought to prosecute appeal on 7 November 2016 – Court found that the appeal was not prosecuted within 90 days after noting of the appeal – Accordingly appeal lapsed and therefore in law and logic there was no appeal for the court to determine.

ORDER

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

JUDGMENT

PARKER AJ:

[1] We are here presented with one nice question: can rule 17(25) of the Labour Court Rules ('the rules') take effect if a respondent has not received a statement referred to in subrule 17(16) of the rules? Mr Khama, counsel for the applicant, submits that rule 17(25) of the rules cannot take effect if the appellant has not received the statement referred to in subrule 17(16), as is in the instant case. Mr Coetzee, counsel for the first respondent, submitted contrariwise.

[2] Rule 17 provides in relevant part:

'(16) Should any person to whom the notice of appeal is delivered wish to oppose the appeal, he or she must –

- (a) within 10 days after receipt by him or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends so to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and
- (b) within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice of oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.

(17) The appellant may, within 14 days after receiving the statement referred to in subrule (16), apply to the registrar on Form 5, on five days' notice to all other parties, to assign a date for the hearing of the appeal and the registrar must, after consultation with the judge-president, assign such a date and set the matter down for hearing on that date.

...

(19) On receipt of an application referred to in subrule (17) or (18) from appellant or respondent the appeal is deemed to have been duly prosecuted.

(25) An appeal to which this rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.'

[3] In the instant case the following is not disputed:

- (a) appellant noted the appeal on 14 December 2015.
- (b) first respondent has to date not delivered a notice to oppose the appeal as required by rule 17(16)(a) of the rules.
- (c) appellant has not received a statement referred to in subrule 17(16)(b) of the rules.

- (d) appellant applied for a hearing date for the hearing of the appeal by notice to the respondents on 7 November 2016 as required by rule 17(17) of the rules.

[4] Considering those undisputed facts against the rules, the following crucial conclusions emerge irrefragably:

- (a) The appeal is deemed to have been prosecuted on 7 November 2016.
- (b) The appeal has lapsed *ex lege* in terms of rule 17(25) of the rules.

[5] But then; Mr Khama says rule 17(25) cannot take effect until appellant has received the statement referred to in subrule (16). With the greatest deference to Mr Khama, counsel's argument has no merit for the following reasons:

- (a) A person to whom a notice of appeal is delivered is not bound by law to oppose the appeal willy nilly. Rule 17(16) says so clearly and unambiguously in these words in the chapeau of rule 17(16):

‘Should any person to whom the notice of appeal is delivered wish to oppose the appeal’.

(Italicised and underlined for emphasis)

- (b) It is only a person who ‘wishes to oppose the appeal’ who must -
 - (i) ‘deliver notice to the appellant that he or she intends to oppose the appeal’ under rule 17(16)(a); and
 - (ii) deliver a statement referred to in para (b) of subrule (16) of rule 17.
- (c) If a person to whom a notice of appeal has been delivered has decided to ignore the notice, I can see no reason why he or she would deliver a statement in terms of rule 17(16)(b). In any case, he or she must do both – ie deliver a notice to oppose and a statement stating the grounds

on which he or she opposes the appeal – if he or she wishes to oppose the appeal.

- (d) If the intention of the rule maker was to make rule 17(25) inoperable until the respondent has received a rule 17(16)(b) statement, the rule maker would have made such of its intention known by express words by subjecting subrule (25) to subrule (16) of rule 17 of the rules, or to any rule.

Accordingly, I accept Mr Coetzee's argument that the operation of rule 17(25) is not subject to rule 17(16).

[6] Based on the foregoing analysis and conclusions and on the facts of this case, I hold that the appellant has established nothing which will make rule 17(25) inoperable. Rule 17(25) says clearly and unambiguously that where an appeal has not been prosecuted within 90 days after noting the appeal, the appeal is deemed to have lapsed. (*Municipal Council of the Municipality of Windhoek v Esau* 2010 (2) NR 414 (LC)) This court must, accordingly, give effect to rule 17(25) of the rules. In the instant case, the appeal lapsed *ex lege* when it was not prosecuted within 90 days after 14 December 2015. Consequently, as a matter of law and logic there is no appeal before the court for the court to determine.

[7] In the result, I make the following order:

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

C Parker
Acting Judge

APPEARANCES

APPELLANT: D Khama
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST RESPONDENT: E E Coetzee
Of Tjitemisa & Associates, Windhoek