NOT REPORTABLE

CASE NO: LCA 25/2009

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF MUNICIPALITY

OF WINDHOEK APPLICANT

and

MARIANNA ESAU 1ST RESPONDENT

LABOUR COMMISSIONER 2ND RESPONDENT

CORAM: **HENNING, AJ**

Heard on: 24 September 2010

Delivered on: 29 September 2010

JUDGMENT

HENNING, AJ:

[1] The applicant was the employer of the first respondent. Before

the Labour Commissioner – the second respondent – the first respondent alleged that she was unfairly dismissed by the applicant and that the applicant had unilaterally changed the terms of her employment contract. She failed on the first issue and succeeded on the second issue. The applicant was ordered to pay the first respondent her final salary multiplied by six. On 15 June 2009 the applicant filed a notice of appeal to this Court.

[2] The appeal was heard on 5 March 2010. At the hearing of the appeal the first respondent *in limine* contended that rule 17(25) was not complied with and that the appeal had lapsed. The rule reads:

> *"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."*

In a judgment delivered on 12 March 2010 Hoff J found that the appeal was not prosecuted within the prescribed 90 day period and that the appeal was deemed to have lapsed. The appeal was accordingly struck from the roll. Subsequent to the adjournment of the matter, and pending judgment, a *"supplementary note"* was delivered to the chambers of Hoff J. The note sought belatedly to challenge the *locus standi* of the first respondent because of alleged non-compliance by the first respondent with rule 17(16). This issue should of course have

been raised *in limine*. The learned Judge held that it in any event appeared *ex facie* the papers that the appeal had lapsed. The applicant is now seeking condonation for its failure to timeously prosecute the appeal and applies for a reinstatement of the appeal. The second respondent did not participate in the appeal.

[3] A party seeking rescission of a judgment must show the absence of wilful default or gross negligence and *prima facie* some prospect of success on the merits. In order to establish the absence of wilful default or gross negligence the applicant must present a reasonable and acceptable explanation for the default.

> TransNamib Holdings Ltd v Reinhardt Gaeb (case no LC 15/2005) page 4, unreported, (NmHC).

[4] At the hearing of the application counsel for the applicant *in limine* questioned the *locus standi* of the first respondent. The applicant relied on non-compliance with rule 17(16) which reads:

> *"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 kilometers 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 to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents."*

Although this issue was referred to by Hoff J in his judgment mentioned above, the first respondent elected not to apply for condonation in terms of rule 15. Because this application assumes the absence of the appeal until it is reinstated, argument by counsel for the first respondent was heard. In view of the ultimate finding this issue does not seem to be significant.

[5] Between 15 June 2009 when the plea was noted and mid February 2010 when the appeal could have been enrolled some eight months have elapsed. This is a serious deviation from the 90 day period prescribed by rule 17(25). The applicant relied heavily on a delay by the second respondent to make a transcript of the audio proceedings available to it, the very late furnishing of the exhibits by the second respondent, and *"an oversight and workload on the part of the Legal Practitioners of the Applicant"*.

[6] It seems that not much pressure was applied to activate the second respondent. The applicant's in-house legal officer, Mr Josua, attended to the matter. He, in a rather leisurely fashion, communicated with Miss Nambinga representing the applicant's legal practitioners of record. The first enquiry from Mr Josua seems to have been on 20 July 2009, followed by an email on 19 August 2009. On 25 August 2009 – some 70 days after the noting of the appeal – the transcript of the record was received by Miss Nambinga, and was delivered to Mr Josua on 26 August 2009. Miss Nambinga then states:

> *"On the 02nd October 2009, at about 15H45, I request Mr. Josua by e-mail to read the record and to advise me whether the same were in order. I pointed out in that e-mail that a certificate had to be filed with the record confirming that the record were in order. I further indicated to Mr. Josua that the next date for legal practitioners to apply for dates of trials was on the 14th October 2009, and that the Applicant had only until the 06th October 2009 to file an application for the trial date. Mr. Josua indicated to me that he would revert to me by the following Monday."*

The date of 2 October 2009 was more than 2 weeks after the appeal was deemed to have lapsed.

[7] It seems that it was only by letter dated 27 October 2009 that Miss Nambinga conveyed to the second respondent that the record was incomplete since the exhibits were not part of the record. The next date mentioned by Miss Nambinga is 30 November 2009 when

she went on leave. Upon her return on 18 January 2010 she again by letter enquired from the second respondent regarding the exhibits which she *"During the last week of January 2010, on a date I cannot recall"* received. This is then followed by the overstated submission:

> *"I respectfully submit that the correspondence discussed in the preceding paragraphs show that the Applicant has been pursuing the appeal with vigour."*

[8] Further steps have to be taken after receipt of the record, which includes the exhibits – rules 17(15) and 17(16). Only thereafter can a date for hearing be assigned – rules 17(17) and 17(18). Rule 17(19) states:

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

[9] Much of the criticism expressed in Moraliswani v Mamili 1989 (4) SA 1 (AD) and Ondjava Construction CC and Others v HAW Retailers t/a Ark Trading, case no SA 6/2009 NmSC applies to this case. In the Ondjava case (page 10) the Supreme Court referred to a remark by a Judge of Appeal who said:

> *"Litigation is a serious matter and, once having put a hand to the plough, the applicant should have made arrangements to see*

the matter through."

[10] On a conspectus of the history of this matter, it appears that the appeal was grossly neglected by both the applicant's in-house legal officer and by the applicant's legal practitioners. According to a letterhead of the legal practitioners the firm consisted of *inter alia* 11 directors and 7 assistants. Their emails to the applicant were copied to De Kock (JS) and Smith (HC). It would not be appropriate for the applicant to shield behind the legal practitioners. In summary then the following from the Moraliswani case (10B-F) applies to this matter:

"In these circumstances the extent of the delays, and the failure of the plaintiff or his attorney to give a satisfactory explanation for them, are such that condonation ought, in my view, to be refused. The fact that much of the blame may be attributed to the plaintiff's attorneys does not, in my view, detract from this conclusion. As was stated in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141C:

'*There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.*'

See also Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A) 824A - B and P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799F - in fin.

In what I have said above, I did not deal with the plaintiff's prospects of success on appeal. There are two reasons for this. Firstly, there is the form of the petition. As was stated in Rennie v Kamby Farms (Pty) Ltd (supra at 131E) it is advisable, where application for condonation is made, that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. This was not done in the present case: ... But secondly, and in any event, the circumstances of the present case are such that the Court should, in my view, refuse the application irrespective of the prospects of success (Rennie v Kamby Farms (Pty) Ltd (supra at 131I - J and earlier authorities there quoted)).”

In this matter some prospect of success was not in issue.

[11] In the result the application for condonation and reinstatement of the appeal is dismissed with costs.

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HENNING, AJ

ON BEHALF OF APPLICANT: Adv S Akweenda

Instructed by

LorentzAngula Inc

ON BEHALF OF 1ST RESPONDENT: Miss Schultz

Frieda Schultz Attorneys