

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

JUDGMENT

Case no: LCA 01/2017

In the matter between:

**LESILIA ELIAS**

**APPELLANT**

and

**BANK OF NAMIBIA  
LABOUR COMMISSIONER**

**1<sup>st</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

**Neutral citation:** *Elias v Bank of Namibia* (LCA 01/2017) [2018] NAHCNLD 1 (09 February 2018).

**Coram:** CHEDA J

**Heard:** 23 January 2018

**Delivered:** 09 February 2018

**Flynote:** Where a party applies for condonation for the late noting of an appeal, it should do so after the said appeal has been noted. An appeal against a decision of the Labour Commissioner must be made within 30 days after the party has gained knowledge of the said award in terms of section 89 of the Labour Act. Where there has been no proper appeal noted, there cannot be an application to condone as there will be nothing to condone.

**Summary:** Applicant/appellant was aggrieved by the award from the Labour Commissioner Court. Applicant filed grounds of appeal and an application for

condonation for late filing of the said notice of appeal. The purported appeal was filed late. The appeal was not in accordance with section 86 of the Labour Act 11 of 2007 as there was no appeal filed, there was nothing to condone and application was dismissed.

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### **ORDER**

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Application for condonation is dismissed with costs.

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### **JUDGMENT**

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CHEDA J:

[1] This matter was set down as an appeal in relation to the decision of the Arbitrator who operates under the Office of the Labour Commissioner. The appellant, now applicant was an employee of first respondent, a bank registered according to the laws of Namibia while second respondent is the Labour Commissioner under which the Arbitrator was operating under.

[2] A labour dispute arose between applicant and first respondent which ended up before the second respondent. A determination in the form of an award was granted, which award was not in favour of applicant. Applicant decided to appeal that decision. On the 01<sup>st</sup> of September 2017, applicant filed a notice of motion for an order couched in the following terms:

- a) Condonation of applicants/appellants' failure to file an appeal against the Arbitrator's award in Form LC 14(30) thirty days after which the award was granted.
- b) Condonation of late filing of grounds of appeal and

- c) Extension of time upon which applicant must file the aforementioned grounds of appeal to 01 September 2017.

[3] On the same day applicant filed what it termed “Grounds of Appeal” which was attached to the said Notice of Motion. It should be taken note of that, the award was granted on 28 April 2017 and the first document filed by applicant was on the 01<sup>st</sup> of September 2017, four months after the granting of the award.

[4] It is clear from the documents filed that as of the 01<sup>st</sup> of September 2017 there was no notice of appeal filed by the applicant as she only filed grounds of appeal. Infact, a “Notice of Appeal” was filed on the 08<sup>th</sup> of January 2018.

[5] It is trite that appeals from the Labour Court are regulated by the Labour Act, Act 11 of 2007 section 89 (1) which reads thus:

'89 (1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 86 -

(a) On any question of law alone; or

(b) In the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.

(2) A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the Rules of the High Court, within 30 days after the award being served on the party.

(3) The Labour Court may condone the late noting of an appeal on good cause shown.'

[6] This section empowers and directs the aggrieved party to a dispute on a question of fact, law or missed fact and law to note an appeal within 30 days of the granting of the said award. In the event of being out of time, the said party is entitled as of law, to apply for condonation for the late noting of the appeal on a good cause shown.

[7] This was not done as all that was filed were grounds for appeal. The grounds for an appeal should have been filed after the filing of the notice of appeal. Most importantly the appeal should be filed within 30 days after receiving the arbitration award in terms of subsection 2 of the above section.

[8] A further point is covered by Rule 23 of the Regulations made under the Labour Act, 2007, GN 261, GG 4151, 31 October 2008; rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (Conciliation and Arbitration Rules) which reads thus:

'23 (1) Any party to an arbitration may, in accordance with subrule (2), note an appeal against any arbitration award to the Labour Court in terms of section 89 of the Act.

(2) An appeal must be noted by delivery, within 30 days of the party's receipt of the arbitrator's award, to the Labour Commissioner of a notice of appeal on Form LC 41, which, must set out

(a) whether the appeal is from the judgment in whole or in part, and if in part only, which part;

(b) in the case of appeals from an award concerning fundamental rights and protections under Chapter 2 and initially referred to the Labour Commissioner in terms of section 7(1)(a) of the Act, the point of law or fact appealed against;

(c) in the case of an award concerning any other dispute, the point of law appealed against; and;

(d) the grounds upon which the appeal is based.'

[9] What comes out of the above Act and rules is that for a notice of appeal to be valid the following requirements must be followed as the sections and rules are peremptory, namely that:

(a) An appeal must be noted within 30 days after receiving an award that is of a party acquiring knowledge of the award;

(b) The noting of the appeal must be completed on Form 11 Form LC 41;

(c) The duly completed Form must be delivered to the Registrar, the Commissioner and other parties to the appeal; and

(d) Form LC 41 must set, *inter alia*, the grounds of appeal and the scope of appeal.

[10] The determining question here is whether there was a proper notice of appeal and if the answer is in the affirmative, whether it was noted timeously. It is clear to me that applicant's filing of the Grounds of appeal on the 01<sup>st</sup> of September 2017, firstly before filing the Notice of appeal was unprocedural and was therefore improper. There was therefore no appeal that was noted at that stage. Even it had been which it was not, it would have been out of time and it would have required an application for condonation. Applicant's woes do not start and end there.

[11] In an attempt to cure her error she filed what she purported to be a Notice of appeal on the 08<sup>th</sup> of January 2018 which was dated the 18 December 2017, but, was not signed by a legal practitioner. What this means is that there is no appeal that was noted in that respect.

[12] An appeal in terms of the law, must be filed in compliance with the laws stipulated above. Section 89(3) of the Labour Act empowers the court to exercise its judicial discretion and condone the late filing of the appeal on good cause shown. In essence it occurs where the appeal has been already filed and not where it has not. Literally, it means that one cannot seek to condone an appeal which is not in existence, but, is to be filed at a later date. This makes logical sense in that, if the court grants condonation merely on the understanding that applicant will file at a later stage and he decides not to, the court would be left in an embarrassing position for having issued an unenforceable order. The order will become academic and ineffective. Courts are serious institutions and do not find pleasure in issuing ineffective orders.

[13] These courts have categorically pronounced themselves regarding the noting of appeals, see *Pathcare Namibia (Pty) Ltd v Du Plessis* (LCA 60/2014) [2013] NAHCMD 43 26 November 2013 paragraph 8, where Parker, AJ remarked:

[8] In all this it must be remembered that what s 89(3) of the Labour Act empowers the court to do – in the exercise of a discretion, as I have said previously – is to condone the late noting of an appeal. The statutory language admits of no other construction. And, I should say, ‘appeal’ in that subsection means indubitably a proper appeal, ... where there is no proper notice of appeal, and accordingly no appeal, as is in the present proceeding, it matters tuppence if what is masquerading as a notice of appeal was delivered within the statutory time limit. There is simply no appeal that has been noted; and as a matter of law and logic if there is no appeal there is nothing whose late noting the court may condone: there is simply nothing for the court to condone in terms of s 89(3) of the Act. (my emphasis)

[14] Further in *Theory Bobo v Ohorongo Cement (Pty) Ltd* (LC 81/2013) [2014] NAHCMD (19 February 2014, Smuts J (as he then was) paragraph 19 stated:

[19] This court has the power in s89(3) to condone the late noting of an appeal on good cause shown. The ordinary meaning of that statutory provision plainly presupposes and is premised upon the noting of an appeal which is late, as was held by Parker AJ. I agree that an application for condonation under s89(3) can thus only be brought once a notice of appeal has been filed out of time the purpose of seeking condonation for its late filing. (my emphasis)

[15] Applying the laid down principle in the above authorities it is clear, therefore, that the court can only condone an appeal that has been filed late and clearly not where an appeal is to be filed as there would be nothing to condone at that juncture. In *casu* there is nothing before the court to consider for condonation as no proper notice was filed and in any case the purported notice was the grounds for appeal. This procedure has not followed the logical sequence of presenting documents before the court. This, is a direct assault to both the statutory requirements and judicial case authorities.

[16] In light of the above, it remains for me to say that there is no appeal before me. The application for condonation is hallow as the court cannot by operation of

law condone a non-existent document. In the result the application is dismissed with costs.

Order:

1. Application for condonation is dismissed with costs.

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M Cheda  
Judge

## APPEARANCES

APPELLANT:

T. PHATELA

Instructed by Dr. Weder, Kauta & Hoveka Inc.,  
Ongwediva

1<sup>st</sup> RESPONDENT:

Mr. Phillander

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