



CASE NO.: LCA 03/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FIRST NATIONAL BANK NAMIBIA LIMITED

APPELLANT

VS

RONEL VAN DER WESTHUIZEN

1ST RESPONDENT

GERTRUDE USIKU N.O.

2ND RESPONDENT

CORAM: MILLER, AJ

Heard on: 09 November 2011

Delivered on: 15 November 2011

JUDGMENT:

MILLER, AJ: [1] The first respondent was dismissed on 23 March 2010 by the applicant following a disciplinary enquiry into an allegation that she had stolen or attempted to steal N\$300-00 from her employer, the applicant. That finding

was challenged by the first respondent pursuant to the internal appeal procedures of the applicant. The appeal was not successful.

[2] Thereafter on 02 April 2010, the respondent, who was of the view that she was unfairly dismissed, referred the matter to the Labour Commissioner for purposes of conciliation or arbitration.

[3] The second respondent was appointed as the conciliator/arbitrator to determine the dispute. A lengthy arbitration hearing ensued. On 12 January 2011 the second respondent issued a written arbitration award. The second respondent concluded that the applicant had unfairly dismissed the first respondent and ordered the applicant to pay to the first respondent an amount which would equal ten months of her salary including her pension or medical aid benefits for that period.

[4] The applicant on 19 January 2009 noted an appeal to this Court. The Notice of Appeal reads as follows:

1.

The Arbitrator erred in law and/or the facts in finding that Respondent was not guilty of theft of money despite evidence that Respondent stole money from Appellant.

2.

The Arbitrator erred in the law and/or facts in concluding that Appellant's representative submitted that there was uncertainty as to who was responsible for the theft of money.

3.

The Arbitrator erred in the law and/or the facts by dismissing clear video evidence, showing money falling out of the clothes of Respondent.

4.

The Arbitrator erred in law and/or on the facts by refusing and/or neglecting to consider the evidence before her in a fair and impartial manner.

5.

The Arbitrator erred in the law and/or on the facts by concluding that the conducting of the appeal hearing during the disciplinary hearing was procedurally flawed.

6.

The Arbitrator erred in the law and/or on the facts by concluding the Respondent's dismissal was substantively and procedurally unfair.

[5] The first respondent notified the applicant that she was opposing the appeal and the parties agreed to suspend the second respondent's award pending the final determination of the appeal.

[6] Although it was incumbent on the second respondent to dispatch the record of the proceedings within 21 days of the noting of the appeal, the second respondent did not do so timeously.

[7] Concerned by the fact that the second respondent did not dispatch the record and the fact that it would not be able to prosecute the appeal within the prescribed period of 90 days, whereupon the appeal would lapse, the

applicant's legal practitioner addressed the following letter to the Labour Commissioner on 01 April 2011.

"We address you on behalf of First National Bank of Namibia.

We noted an appeal on behalf of our client on 19th January 2011 and served the notices on your office on the same date.

The 21 day period within which your office was to despatch the record to the Registrar of the Labour Court, has expired.

We have to date, not received notice of the despatch of the duly certified record of the arbitration proceedings.

As you are aware, we are required to prosecute the appeal within 90 days, by meeting all the requirements of Labour Court Rule 17. These requirements include but are not limited to, inspecting the record despatched by your office; identifying the portions of the record necessary for the appeal; making copies of the appeal record; certifying those appeal record copies as corresponding with the duly certified record of the arbitration proceedings as despatched from your office; delivering various sets of the appeal record copies to the parties involved; considering the appeal record and amending the appellant's notice of appeal, where necessary, within 10 calendar days of filing the certified appeal record; and allowing the respondent 21 days within which to file her statement of opposition. Only once all these steps have been taken, will we be able to apply for a trial date and thus prosecute the appeal.

We are unable to meet the 18th April 2011 deadline for applying for a trial date, as we have to date not had sight of the record. We will accordingly bring an application for the extension of the 90 day period before 18th April 2011, as the appeal would otherwise lapse.

To enable us to place the full picture before the Court in our founding affidavit, kindly advise when your office intends to make the duly certified record available to the Registrar of the Labour Court.

Kindly also advise on the causes, if any, for the delay experienced thus far.

We will appreciate receiving your most urgent reply by ***Tuesday 5th April 2011.***

We attach hereto numerous correspondence(s) in this matter, the sum total of which is the requests for your client to undertake not to enforce the arbitration award.

Kindly advise our office, as to your client's position regarding same.

Yours faithfully

HENGARI, KANGUEEHI & KAVENDJII INC.

Per: CLIVE KAVENDJII

[8] It is apparent from the letter that the applicant's legal practitioner was fully aware of the fact that the appeal would lapse on 18 April 2011 and intended to bring an application to extend the 90 day period prior to that date.

[9] No application was instituted, however, with the consequence that the appeal was allowed to lapse.

[10] Thereupon the matter was left in abeyance until 10 May 2011, when the applicant by Notice of Motion approached this Court for the following relief:

1. Condoning the appellant's non-compliance with Labour Court Rule 17(25) read with Rule 17(19).
2. Reinstating the appellant's appeal.
3. Directing the second respondent to despatch the duly certified complete original record of the arbitration proceedings appealed against, to the Registrar of this Honourable Court, within 10 court days of the date of this order and to notify the appellant's attorney, in writing, immediately on having done so.
4. Extending the period within which the appellant must prosecute its appeal by permitting the appellant and/or its legal representatives:
 - 4.1. To take such reasonable steps as may be necessary to enable it or its representatives to certify the record of the arbitration proceedings conducted before the second respondent, once received, as correct and complete;
 - 4.2. To amend, add to or vary the terms of the notice of appeal within ten court days of filing the certificate referred to at 4.1 above;

4.3. To give notice to the first respondent, within five further court days and after:

4.3.1. Receiving the first respondent's statement in terms of Rule 17(16)(b) of the Labour Court Rules; alternatively

4.3.2. The *dies* for the first respondent's statement in terms of Rule 17(16)(b) has expired,

That application will be made to the Registrar on a Wednesday (on at least five day's notice) for the allocation of a date for the set down of the appeal in accordance with paragraphs 29(4) and 29(5) of the Consolidated Practice Directives.

5. Such further and/or alternative relief as this Honourable Court may deem fit to grant.

[11] The only reason advanced for not taking appropriate steps in time, is that the applicant's legal practitioners thought that they could save costs by not acting in time.

[12] Rule 15 of the Labour Court Rules allow me to condone the applicants failure to prosecute the appeal in time. I can do so in the exercise of my discretion and once good cause has been shown.

[13] In ***Peterson Diergaardt v Fischer 2008 (1) NR 307*** the headnote states the following:

“In considering an application for the condonation for the late prosecuting of an appeal the Court will take several factors into account. These include the degree of the delay, the reasonableness of the explanation, the prospects of success and the importance of the matter.”

[14] I respectfully agree with that statement of the law.

[15] I am also mindful of the approach adopted in ***Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC)***, which is to the effect that once there are good prospects of success a less than satisfactory explanation may suffice.

[16] In the instant the decision to allow the appeal to lapse was a conscious decision taken with a full appreciation of the consequences that will follow.

[17] The explanation given that consideration of costs had a bearing on that decision is entirely unconvincing. The dilemma facing the applicant always was to either bring an application for an extension of the 90 day period or to bring the present application once the appeal had lapsed.

[18] I do not see how in those circumstances the decision to allow the appeal to lapse could conceivably have saved costs. Nor did the applicant inform me on that score.

[19] The explanation given goes further than the terse statement that legal costs were an important consideration.

[20] As far as the prospects of success are concerned the applicant is on even shakier ground.

[21] I quoted the Applicant's Notice of Appeal in full earlier in this judgment. It is and remains in my opinion a nullity. The hackneyed phrase "... erred in the law and/or the facts..." cannot live in a statutory environment which permits appeal on points of law only.

[22] Moreover it is apparent that, despite the attempt to dress up the notice of appeal to in same way create the impression that the grounds of appeal are on points of law, the applicant in essence appeals against factual findings made by the arbitrator.

[23] Applicant's counsel was constrained to concede that in argument. He argued however firstly that once the appeal is re-instated the applicant will be in a position to amend the notice of appeal.

[24] The short answer to that is that a nullity is just that, and cannot be amended. ***Standard Bank Namibia v Francois Charles Grace (unreported judgment by Henning AJ delivered on 9 November 2010).***

[25] Secondly the applicant's counsel contended in the fifth ground of appeal raises a point of law. The difficulty I have with that argument is that the fifth ground of appeal is vague and wide to the extent that it is no ground of appeal at all.

[26] For the reasons I conclude that the application must be dismissed, and it is so ordered.

[27] There shall be no order as to costs.

MILLER AJ

ON BEHALF OF THE APPELLANT: Mr. Maasdorp
Instructed by: Hengari, Kangueehi & Kanvendjii Inc.

ON BEHALF OF 1ST RESPONDENT: Mr. van Zyl
Instructed by: Metcalfe Legal Practitioners