



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 15/2009

In the matter between:

**EMMA IPINGE**

**APPLICANT**

and

**NAMIBIA PORTS AUTHORITY  
THE LABOUR COMMISSIONER**

**FIRST RESPONDENT  
SECOND RESPONDENT**

**Neutral citation:** *Ipinge v Namibia Ports Authority* (LCA 15/2009) [2013] NALCMD 45 (29 November 2013)

**Coram:** CHEDA J

**Heard:** 5 November 2013

**Delivered:** 29 November 2013

**Flynote:** Applicant failed to prosecute her appeal timeously and blames her legal practitioner for not doing so. She had always wanted to appeal – She asked for condonation of a late noting of appeal – The court found her explanation to be reasonable and excusable in the circumstances.

**Summary:** Applicant's failure to prosecute her appeal on time resulted in the appeal lapsing. Her late noting of appeal was not opposed. Her explanation is reasonable and acceptable as it was due to lack of diligence on her legal practitioners. All the parties desire that the matter reach finality. The Courts will not,

in certain circumstances punish an innocent party for the sins of her legal practitioner.

---

### ORDER

---

- 1) Applicant's non-compliance with the rules of the court be and is hereby condoned;
- 2) The late filing of the appeal be and is hereby condoned;
- 3) The appeal be and is hereby re-instated and should be set down in terms of the Rules of courts;
- 4) Each party to bear its own costs.

---

### JUDGMENT

---

**CHEDA J** [1] In this application, applicant seeks the court's determination as to whether or not the appeal lodged by applicant in this court has lapsed. The appeal in question is against a labour award granted on 25 March 2009.

[2] Applicant noted an appeal on the 20 May 2009 (30 days) out of the prescribed period in terms of section 89 (2) of the Labour Act 11/2007 of which section 89 (2) (hereinafter referred to as "the Act," which provides,

*"89 (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."*

An application for late filing of an appeal was noted on the 29 May 2009. This application was initially opposed, but, is however no longer opposed. There were

numerous postponements due to various reasons until the 16 September 2010 when this court ordered that it should not be set down again without the leave of the judge or court. The question before the court is whether the appeal has lapsed or not.

[3] After the matter was removed from the roll on the 16 September 2010. Applicant then applied to this court for an order that this application be enrolled on the first motion court roll and that the court condones her non-compliance with the Rules of the court, that her appeal be re-instated and that the late filing of the appeal be condoned.

[4] An appeal of this nature is governed by the Labour court rules, Rule 17 (4) as read with Rule 17 (1) (C) which provides:

*“The notice of appeal referred to sub-rule (2) or (3) must be delivered within 30 days after the award decision or compliance order appealed against come to the notice of the appellant.”*

Rule 17, therefore deals with the noting of the prosecution of an appeal. In particular and very relevant to this application is Rule 17 (25) which specifically directs that:

*‘An appeal to which this rule applies must be prosecuted within 90 days of the notice of such appeal and unless so prosecuted it is deemed to have lapsed’*

This position is quite clear, applicant argued that there was no appeal and therefore there is no question of its lapse.

[5] Mr Elago for the applicant has argued that the appeal has not lapsed as it was noted in terms of Rule 15 (a) and (b) which provides:

*‘(3) An appeal contemplated in subrule (1) (a) must be noted in terms of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner published in Government Notice 262 of 31*

*October 2008 (hereinafter “the conciliation and arbitration rules”), and the appellant must at the time of noting the appeal –*

- (a) complete the relevant parts of Form 11;*
- (b) deliver the completed Form 11, together with the notice of appeal in terms of those rules, to the registrar, the Commissioner and the other parties to the appeal.’*

He based his argument on the fact that it was not heard by the court and therefore it is pending. To him the question of lapse does not arise. What should happen therefore is that applicant’s failure to act timeously should be condoned.

[6] The application for condonation and re-instatement of appeal was filed at the High Court on the 16 November 2011 and it was not finalized. In that application, applicant clearly seeks condonation and re-instatement of the appeal. She deposed to a lengthy affidavit explaining her position. It is clear to me therefore that as far back as 16 November 2011, she knew very well that her appeal had lapsed hence her application for re-instatement. I do not agree with Mr Elago for applicant that the appeal has not lapsed, to do so would be to totally ignore the facts on the ground. In terms of Rule 17 (25) an appeal must be prosecuted within 90 days, if it is not, then, it lapses and to revive it, applicant must seek condonation for his/her failure to act timeously and re-instatement of the said appeal.

[7] Applicant noted her appeal on 20 May 2009, this late noting of appeal is no longer opposed by respondent. In light of this, therefore, she should have prosecuted it by the 18 August 2009. In light of the above and for the avoidance of doubt, the appeal lapsed on the 18 August 2009.

[8] What this court should determine, therefore, is whether or not it should be re-instated.

[9] Mr Coetzee for the first respondent has argued that applicant was reckless in her handling of this matter in that she filed her notice of appeal on the 20 May 2009 and her application for condonation for late filing of the appeal on 2 November 2009.

On 2 June 2011 first respondent filed its grounds of opposition, but applicant only filed her application for re-instatement of her appeal on 16 November 2011. This, he further argued was far, far out of time. She should have acted timeously.

[10] I agree with Mr Coetzee for first respondent that the Rules of this court demand compliance. This is essential as it enables the courts to resolve litigants' disputes in an expeditious and less expensive manner as possible. Rules of court and their practice directives are not merely additional reading material, but, are there to guide both the litigants and the courts in their prosecution and adjudication of matters before them respectively. In other words they are for the smooth running of the justice delivery system, above all they bring in certain predictability in the legal proceedings.

[11] I am fortified by the remarks by Levy J in the matter of *SOS Kinderdorf Intervation v Effie Lentin Architects*<sup>1</sup> where the learned judge stated:

*'The rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. See Herbstein and van Winsen The Civil Practice of the Superior Courts in South Africa at 19 and 20 and the cases there cited. The Rules of Courts therefore provide, inter alia, ways in which a plaintiff can obtain a judgment speedily and inexpensively in certain circumstances.'*

---

<sup>1</sup>SOS Kinderdorf International v Effie Lentin Architects 1993 (2) SA 481 (Nam) at 491 D-E

See also *Hudson v Hudson and another*<sup>2</sup>; *Viljoen v Federated Trust Ltd*<sup>3</sup>. Again the importance of adherence to the Rules was clearly stated by the full bench in the matter of *Swanepoel v Marais and others*<sup>4</sup> where the court stated:

*'The Rules of Court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Courts, which have been designed for that purpose, be complied with. Practice and procedure in the Courts can be completely dislocated by non-compliance. Where an attorney is instructed to appeal, he must comply with the Rules relating to appeals and if he is not familiar with the Rules, he 'is in duty bound to acquaint himself with such Rules'. Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281G, Moaki v Reckitt & Colman (Africa) Ltd and Another 1968 (3) SA 98 (A) at 101, Mbutuma v Zhosa Development Corporation Ltd 1978 (1) SA 681 (A) at 685.'*

[12] In order for applicant to succeed in her application for condonation aimed at the re-instatement of her appeal, she should explain her failure to act timeously. Applicant was previously represented by Messrs Metcalfe Legal Practitioners who filed an appeal for her, but, later renounced agency. The application for re-instatement was never heard to date. As it is before the court, that appeal indeed lapsed. Her erstwhile legal practitioner later on renounced agency and Tjombe-Elago Law Firm assumed agency on her behalf. After this, there was a series of inactions, omissions etc. between her legal practitioner and the Registrar's office which in all fairness applicant is not to blame.

[13] The fact that there was a delay in prosecuting this appeal admits of no doubt. What remains, to be decided, therefore, is whether or not applicant's appeal should be re-instated in the circumstances. Applicant had a legal practitioner to act for her, albeit of her own choice. He was mandated to act for her in his best ability.

---

<sup>2</sup>Hudson v Hudson and another 1927 SA 259 at 267

<sup>3</sup>Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O)

<sup>4</sup>Swanepoel v Marais and others 1992 NR 1 at 2J-3A

[14] In my opinion, the courts should not easily shut the door on the face of litigants who have failed to pursue their matters as a result of the ineptness or dilatoriness of their legal practitioner's handling of their matters. The court has a discretion to condone a litigant's non-compliance, but, of course under very stringent circumstances as is shown hereinunder. Legal practitioners should bear in mind that their failure to handle matters professionally will ultimately weaken a client's case and he cannot do much as he will have mandated the legal practitioner to do so.

[15] In the interest of justice, the court in the exercise of its discretion has, in certain circumstances reluctantly entertained applications where non-compliance was as a result of a fault other than that occasioned by the litigant.

In deciding whether or not the appeal which for all intents and purposes has lapsed the court should bear in mind the following factors laid down in *Federated Employees Insurance co. v Mckenzie*<sup>5</sup> which however are inexhaustive:

- 1) the degree of non-compliance;
- 2) the importance of the case to applicant;
- 3) the respondents' interest in the finality of the judgment of the court below, and
- 4) the inconvenience of this court in the avoidance of unnecessary delay in their administration of justice; and
- 5) the prospects of success

[16] This principle was also applied in *United Plant Hire (Pty) Ltd v Hills and others*<sup>6</sup>; *Pienaar v G North and son (Pty) Ltd*<sup>7</sup> and *S v Meredith*<sup>8</sup>.

[17] Applicant's explanation for the delay in prosecuting the appeal is that she changed lawyers and was all the time relying on their skills to prosecute the appeal. There is however, no affidavit from her erstwhile legal practitioners filed to support this assertion. In the absence of such explanation one can only conclude that they did not want to make an admission of negligence which would naturally attract the

---

<sup>5</sup>*Federated Employees Insurance co. v Mckenzie* 1969 (3) 360

<sup>6</sup>*United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717

<sup>7</sup>*Pienaar v G North and son (Pty) Ltd* 1979 (4) SA 523

<sup>8</sup>*S v Meredith* 1981 (3) SA 29

wrath of the court. This therefore leaves applicant in limbo. In my view, her explanation is not far from the truth as it cannot be controverted.

[18] Applicant's non-compliance is for an unduly long period. What is, however, clear is that, she had taken all reasonable steps to assert her rights by instructing a legal practitioner who unfortunately did not act timeously. In *casu*, the non-compliance cannot be attributed to applicant alone as she had mandated her legal practitioner to act for her and as such she could not do much, see *Food Allied Workers Union v Ngcobo NO and another*<sup>9</sup>

[19] Applicant was employed, charged with misconduct, was found guilty and was punished which punishment led to her discharge from work. In her mind, she did not receive a fair trial. A fair trial is one of the necessary ingredients of the rules of natural justice. She is of the strong view that she should be given a chance to defend herself. According to the facts before the court, the intention to defend was not formed recently, it was formed way back as evidenced by her instructions to her erstwhile legal practitioners. It cannot be gain said that she had no interest to prosecute her appeal. The matter was clearly out of her personal control as it was in the hands of her legal practitioners.

[20] On the other hand, the respondent as an employer also has its own interest in the finality of the matter as it cannot plan its personnel portfolio and administration on the basis of the award by the Labour Court in light of its challenge by applicant. From the parties' point of view this matter needs to be settled once and for all.

[21] These courts are desirous to finalize matters before them expeditiously. That objective will be defeated if the matters continue to linger on the roll without finality, see the matter of *Andjava construction cc and others v Haw Retailers t/a Ark Trading*<sup>10</sup> where Maritz JA remarked:

*'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'*

---

<sup>9</sup>Food Allied Workers Union v Ngcobo NO and another (CCT 50/2013)

<sup>10</sup>Andjava construction cc and others v Haw Retailers t/a Ark Trading 2010 (1) NR 286 (SC) at 291 CT



In as much as the above matter the court did not condone the application, the emphasis for a need for a speedy resolution remains.

[20] The prospects of success on appeal is an essential factor which needs to receive a serious consideration by the courts. Applicant has raised a point of law, whether she is correct or not, is a matter to be placed before the court at some stage. The Namibian constitution guarantees a fair hearing. One of this principle is that a litigant must be accorded a fair hearing wherein he/she can present her case and if she loses, she should do so with full knowledge that the judicial playing field was level and that way she together with others will respect the judicial system and will feel that they are part and parcel of it and it will forever protect their democratic rights.

In light of the above, this is the order of the court:

#### **ORDER**

1. Applicant's non-compliance with the rules of the court be and is hereby condoned;
2. The late filing of the appeal be and is hereby condoned;
3. The appeal be and is hereby re-instated and should be set down in terms of the Rules of courts;
4. Each party to pay its own costs.

-----  
M Cheda  
Judge

**APPEARANCES**

**APPLICANT:**

Mr PS Elago  
Of Tjombe-Elago Law Firm Inc.  
Windhoek

**FIRST RESPONDENT:**

Mr EE Coetzee  
Of Tjitemisa & Associates.  
Windhoek