

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: LCA 5/2014

**THOMAS KASHIFELE**

**APPLICANT**

And

**IMPACTO AMUSEMENT CC**

**1<sup>ST</sup> RESPONDENT**

**THE LABOR COMMISSIONER**

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

**Neutral citation:** *Kashifele v Impacto Amusement CC* (LCA 5-2014) [2015] NALCMD  
19 (31 July 2015)

**Coram:** MILLER AJ

**Heard:** 10 October 2014

**Delivered:** 31 July 2015

**Flynote:** Labour Law – Appeal – Noting and prosecution of appeal outside the court rules – Principles restated – No reasonable explanation for the delay - Cumulative effect

of non-compliance – Application for condonation refused – Question of prospects of success irrelevant – Application dismissed.

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**ORDER**

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The application is dismissed.

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**JUDGMENT**

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MILLER AJ:

[1] The applicant, on 18 June 2014, brought an application before the Labour Court seeking the following relief:

1. Condoning the late nothing(sic) Appeal against the Award of the Arbitrator case number CRWHK 314-13 made on 11 December 2013;
2. Condoning late filing of the record of arbitration proceedings and failure to timeously prosecute the appeal;
3. Granting the Applicant leave to serve and file the complete record of arbitration proceedings in case CRWHK 314-13 and to prosecute the appeal out of time;
4. Ordering the respondents to pay the costs of this application only in the event of opposition of this application;
5. Further and/or alternative relief.'

[2] An arbitration award was granted on 11 December 2013 wherein the applicant's dismissal by the first respondent was confirmed by the second respondent. The

applicant immediately consulted the offices of Legal Aid and was granted a lawyer for purposes of lodging an appeal by 21 January 2014 when the first consultation was made with the current legal practitioners. The Notice to appeal was filed with the Registrar and delivered to the second respondent on 27 January 2014. The documents could eventually only be served on the first respondent on 26 March 2014. The explanation tendered was that the first respondent could not be traced until 18 March through a tracing agent, Daures Tracing Services CC, and that the applicant was at the village where there was no network coverage and he was unable to provide further information about the first respondent. After the first attempts on 4 and 5 March to have the record ready for filing, the record was only forwarded to the Registrar by the second respondent on 31 March 2014. Conflicting though is the explanation that between the 1-14 March 2014, the applicant's legal practitioners attended to the paginating and indexing of the record which was filed on 14 March 2014 with the Registrar.

[3] A notice to obtain trial dates was filed on 17 April 2014 but no trial dates were allocated because there was no record delivered and particulars in terms of rule 6 and the power of attorney authorising the legal practitioner to appeal on behalf of the applicant as required by rule 119(3)(4) and (10). Subsequent thereto, the second notice to obtain trial dates was only filed on 23 May 2014 and trial dates were granted on 4 June 2014 by the Registrar. The application for condonation was only filed on 19 June 2014.

#### Issues that falls for determination by the court

[4] The issue that falls for determination is therefore whether there has been a reasonable explanation tendered for the delay in noting and prosecuting the appeal and whether there are prospects that the applicant may succeed on appeal.

#### Applicable rules and principles

[5] This is an application for condonation and the rules and principles applied by the courts to these cases are trite. Fully set out by Damaseb, JP in *Telecom Namibia Ltd v Michael Nangolo and 34 others*<sup>1</sup> reinstated by Van Niekerk, J in *Primedia Outdoor Namibia (Pty) Ltd v Kauluma*<sup>2</sup>, and by Geier, J in *Cloete v Bank of Namibia*<sup>3</sup>, the party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. There must be an acceptable explanation for the delay or non-compliance which explanation must be full, detailed and accurate. It is a requirement that the condonation must be sought as soon as the non-compliance has come to the fore so that an application for condonation can be made without delay. The courts have further accepted that since the degree of delay is a relevant consideration the entire period during which the delay had occurred and continued must be fully explained. The applicant seeking condonation must further demonstrate good prospects of success on the merits. But where the non-compliance with the rules of court is flagrant and gross, prospects of success are not decisive. If there are no prospects of success, there is no point in granting condonation.

[6] In terms of s 89(2) of the Labour Act 11 of 2007('The Labour Act') 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 was served on the party. Rule 17 of the Labour Court rules deals with appeals noted in terms of the Act and subrule (25) of Rule 17 provides that an appeal, which had so been noted, had to be prosecuted within 90 days, from the date of its noting. Rule 15 grants the Labour Court the power to condone any non-compliance with the rules on 'good cause' shown, including non-compliance with time periods set by the rules of labour court. In order for the court to grant condonation, the applicant must satisfy the court that such non-compliance was not as a result of a flagrant non-compliance with the rules of the court.

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<sup>1</sup> (LC33/2009, Unreported - 28 May 2012, at paras. [5] – [8]).

<sup>2</sup>(LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

<sup>3</sup>(LCA 86/2013) [2015] NALCMD 8 (22 April 2015) para (37).

Explanation offered for the delay

[7] The applicant submits that the failure to note the appeal within the prescribed time limit had not been willful and that such failure was brought about by circumstances beyond his control, in that legal aid could only be obtained by January 2014 but the prompt application for legal aid should be seen as an indication of his desire to enforce his right and this is supported by the fact that the application was made a day after learning of the outcome of the arbitration proceedings. The applicant is of the view that 17 days after the expiry of the 30 days prescribed limit is not unreasonable and condonation should therefore be granted. He further pointed out that during the period between 27 January 2014 and 4 June 2014 when a trial date was eventually secured, the legal practitioners diligently acted in complying with the Rules. As regards the record, the applicant merely states that the service of the notice was more crucial than the delivery of the record as the latter would not have addressed the issue of lapsing. On the prospects of success, the applicant submits that the arbitrator's award is bad in law in that there was no procedural disciplinary hearing before his dismissal and that the appellant would suffer great injustice if the award is allowed to stand.

[8] First respondent's opposition to the application for condonation is primarily based on the non-compliance of the court rules. It is submitted on behalf of the first respondent that the applicant knew very well the address of the first respondent since the dispute that was referred to the second respondent was served at that address and that the allegations that the first respondent could not be found are not truthful. Other attempts such as a simple phone call or a search at the Registrar of Companies would have solved the problem. As regards the record, it is submitted that enquiries on 4 and 5 March ought to have been made with the second respondent and not with the Registrar of the High Court and that continuous effort to ensure that the record is before the relevant parties was not done. The first respondent thus submits that the delay was

wilful since the noting of appeal has nothing to do with obtaining legal representation, and certainly the service of the notice of appeal on the first respondent had nothing to do with the responsibility of the second respondent, ie to deliver the record within 21 day of service thereof. The first respondent further pointed out that there are no prospects of success and emphasised that the need for a disciplinary hearing did not arise since the applicant's abscondment from work led to the termination of his employment contract. The first respondent has accordingly suffered prejudice and costs occasioned by the opposition to this appeal.

[9] Relying on the authorities stated above, the period of delay must be explained which explanation must be full, detailed and accurate. The award was granted on 11 December 2013 and the noting of the appeal was only done on 27 January 2014. There is no explanation as to why a period of over a month passed without noting the appeal. The explanation of securing legal representation is lame as the notice could be done by the applicant himself and it does not take a month to prepare a simple notice. No other explanation was offered. No other effort was made to even compel the second respondent to provide the record within the 21 days after the service of the notice and no explanation is before court why this was not done. I agree with the first respondent that the record had nothing to do with the service of the notice on the first respondent because it is the second respondent who is obliged to deliver the record of proceedings.

[10] No explanation was further provided as to why it took another delay to prosecute the appeal in that the trial dates were only obtained on 4 June 2014 when the record was, on applicant's version, delivered to the Registrar already on 14 March 2014. More complicated is the fact that the applicant could not get trial dates on the request of the 17 April 2014 because of non-compliance with rule 119 (3) (4) and (10) of the High Court Rules. This implies that there was no record before the Registrar and in terms of rule 119(10) the registrar may not set down the appeal. That period of delay is not satisfactorily explained either.

[11] I am inclined to concur with Geier, J in *Cloete v Bank of Namibia*<sup>4</sup>, that ultimately also these considerations become part of the overall consideration whether or not to grant condonation, in which equation, also the general factors, such as the length of the delay, the respondent's interest in the finality of the case, the convenience of the court, the compliance with the rules of court and the avoidance of unnecessary delay, play an additional role.

[12] I am therefore not convinced that the delay has been satisfactorily explained and condonation cannot be granted. The duty to consider whether there are prospects of success or not therefore becomes irrelevant.

[13] Accordingly, the application is dismissed.

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PJ Miller  
Acting

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<sup>4</sup>Supra, para (57).

APPEARANCES

APPLICANT:

Of

C Kavendjii

Kangueehi & Kavendjii-Inc, Windhoek

1<sup>st</sup> RESPONDENT:

Of

JPR Jones

Mueller Legal Practitioners, Windhoek