REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: LCA 86/2013

GERALD CLOETE **APPELLANT**

And

BANK OF NAMIBIA **1ST RESPONDENT**

PHILIP MWANDINGI **2ND RESPONDENT**

Neutral citation: *Cloete v Bank of Namibia* (LCA 86/2013) [2015] NALCMD 8 (22 April 2015)

Coram: GEIER J

Heard: **13 February 2015**

Delivered: **22 April 2015**

Flynote: Labour Law - Application for condonation for the late filing of an application for the re-instatement of a labour appeal and for the appeal to be re-instated. Applicable principles re-stated -

Summary: Labour Appeal — Appeal having lapsed - Application for condonation and re-instatement — Non-compliance with Rules — applicable principles re-stated - Application for condonation not there for the asking nor a mere formality — The explanation offered on behalf of the appellant in this instance – upon analysis - found

neither acceptable nor reasonable as the entire period of the delay had not been explained fully, detailed and accurately. In such circumstances the appellants prospects of success where no longer decisive, – Ultimately - and although the appellant was able to show some prospects of success - the cumulative effect of all the factors considered favoured the conclusion that the condonation sought should not be granted. – Application accordingly dismissed.

ORDER

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1. The application is dismissed

JUDGMENT

GEIER J:

[1] The appellant, in this labour appeal, seeks an order condoning the late filing of this application for the re-instatement of the appeal noted in case LCA 86/2013 and requests the court to re-instate the said appeal.

[2] Certain additional orders were also sought, which relief is no longer pursued.

[3] The condonation application is opposed.

[4] The parties were agreed that the determination of the applicant's prospects of success during this phase of the proceedings are to also determine the ultimate outcome of the appeal on the merits.

THE HISTORY OF THE MATTER

[5] The appeal which the appellant has allowed to lapse, and which he seeks to have re-instated, was noted on 29 November 2013.

[6] A notice in terms of section 89 of the Labour Act, calling on the office of the Labour Commissioner and second respondent, the arbitrator, to dispatch, to the Registrar, the record of the arbitration proceedings, was issued on the same date.

[7] On the 5th of December 2013 the first respondent file its notice of opposition to the appeal.

[8] In terms of Rule 17(25) of the Labour Court Rules the appeal, which had so been noted, had to be then prosecuted within 90 days, from the date of its noting.

[9] This period according, to the appellant's legal practitioner, expired on 2 March 2014.

[10] This computation is however not correct given the definition of "day" as contained in Rule 1 of the Rules of the Labour Court, which determines how any particular number of days – here 90 days – prescribed by the rules, for the performance of any act - must be calculated.[1]

[11] If one then re - calculates the applicable 90 day period in this instance it appears that this period expired on 27 February 2014 already.

[12] In terms of Rule 17(25) the appellants appeal thus lapsed on 27 February 2014.

[13] The application condoning the late filing of this application for re-instatement of the appeal was delivered on 20 June 2014.

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[1] "day" means any calendar day; and

(a) when any particular number of days is prescribed for the performance of any act, the same must be reckoned exclusive of the first and inclusive of the last day; and

(b) the last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday;

[14] It so became incumbent on the appellant, hereinafter referred to as the applicant, to explain why he allowed the appeal to lapse - during the initial period of 90 days - and also the further delay - of some 113 days – which it took to bring the required application for condonation to have the appeal re-instated.

THE BASIS ON WHICH CONDONATION WAS SOUGHT

[15] Mr Daniels, who appeared for the applicant, attempted to shoulder the blame for these delays.

[16] The first aspect which he placed before the court, by way of explanation, was that his firm closed during the December 2013 to January 2014 holiday period.

[17] He did not provide any dates in this regard.

[18] He went on to state that since the middle of January 2014 he personally and persistently called on the second respondent to dispatch the arbitration record.

[19] Again no specific dates where provided.

[20] It is also not disclosed how many calls were made.

[21] The second respondent apparently promised to dispatch the record on several occasions.

[22] Again no specifics where provided.

[23] In addition certain enquiries where apparently made with the Registrar’s office.

[24] Absolutely no detail was provided in this regard. It is, for instance, not disclosed with whom such enquiries were made, or on how many occasions and on what dates they were made.

[25] The applicant's legal practitioner then glibly states that - during the period February to June 2014 - he was inundated with work and that he travelled extensively in Namibia on work related matters.

[26] The applicant's inactivity during a period of about four months, i.e. from February to June 2014, is thus, superficially, glossed over in one sentence.

[27] Again it is conspicuous that no detail is disclosed.

[28] It is then explained that the applicant's legal practitioner suffered from a major depressive disorder of which Mr Daniels only became aware in early May 2014. He explains further that due to the said workload and his state of health he forgot to attend to certain of his responsibilities including the filing of this application.

[29] Mr Daniels also apologised to the court and submitted that no prejudice was suffered by the respondents. With reference to the grounds of appeal noted in the application he submitted that the sought condonation should be granted, keeping in mind also, his client's prospects of success.

[30] Prior to the hearing of the matter the parties filed the following agreement for the court's consideration:

'1. That the first respondent opposes the application for the reinstatement of the appeal only in so far as it pertains to the prospects of success of the appeal as per its grounds of opposition filed with the Honourable Court on 08 August 2014; and

2. That the application for re-instatement of the appeal filed by the appellant with the Honourable Court on 20 June 2014 be consequently heard with the appeal on 21 November 2014.'

[31] During the hearing the court however indicated to the parties that, in spite of their agreement, *'condonation was not just there for the mere asking'*[2] and that I thus required them to address this issue in full.

[32] At the hearing Mr Daniels accordingly addressed this issue by once again referring to the grounds for condonation advanced in the papers. He reiterated that he had made several attempts to obtain the record and that he even went personally to see the second respondent in this regard.

[33] He conceded that he had neglected to follow up these visits in writing.

[34] He also had to concede that he had failed to mention the various problems and excuses he was given by members of the staff and that there was always some sort of misfiling given as a reason by the second respondent for not providing the record.

[35] He repeated his submission that there was no prejudice.

[36] Mr Philander who appeared on behalf of the first respondent merely submitted that there was no evidence underscoring the allegations of no prejudice. He pointed out that the prejudice occasioned to the first respondent was not the only prejudice the court should take into account.

THE APPLICABLE PRINCIPLES

[37] In *Primedia Outdoor Namibia (Pty) Ltd v Kauluma*[3]*,* an unreported judgment of this court, delivered recently, van Niekerk J had to consider whether or not to grant

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[2]*Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC) where the learned Chief Justice explained *' … an application for condonation is not there for the asking or a mere formality nor is it a one-sided exercise. There are other interests involved, including the convenience of the court and the respondent's interest in the finality of the judgment. It is therefore of cardinal importance that practitioners who intend to practice at the Supreme Court and who are not familiar with its rules take time to study the rules and apply them correctly to turn the tide of applications for condonation that is seriously hampering the court's ability to deal with the merits of appeals brought to it with attendant expedition.'*

[3](LCA 95-2011) [2014] NALCMD 41 (17 October 2014)

an application for condonation and the reinstatement of a labour appeal. She conveniently summed up the applicable principles as follows:

'[12] The legal principles applicable to applications for condonation for non-compliance with the rules of court have been set out time and again. These were conveniently summarized and set out in *Telecom Namibia Ltd v Michael Nangolo and 34 others* (LC33/2009, Unreported - 28 May 2012, at paras. [5] – [8]) as follows:

'[5] The following principles can be distilled from the judgments of the Courts as regards applications for condonation:

1. It is not a mere formality and will not be had for the asking.[4] The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.[5]
2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.[6]
3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.[7]
4. The degree of delay is a relevant consideration;[8]
5. The entire period during which the delay had occurred and continued must be fully explained;[9]
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented.[10] (Legal practitioners are expected to familiarize themselves with the rules of court).[11]

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[4] *Beukes and Another v Swabou and Others* [2010] NASC 14 (5 November 2010), para 12
[5] *Father Gert Dominic Petrus v Roman Catholic Archdiocese* , SA 32/2009, delivered on 09 June 2011, para 9
[6] *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13
[7] *Ondjava Construction CC v HAW Retailers* 2010 (1) NR 286(SC) at 288B, para 5
[8] *Pitersen-Diergaardt v Fischer* 2008(1) NR 307C-D(HC)
[9] *Unitrans Fuel and Chemical (Pty) Ltd v Gove –Co carriers CC* 2010 (5) SA 340, para 28 See also *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* at [*7*]
[10] *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141B*; Moraliswani v Mamili* 1989(4) SA 1 (AD) at p.10; *Maia v Total Namibia (Pty) Ltd* 1998 NR 303 (HC) at 304; *Ark Trading v Meredien Financial Services Namibia (Pty) Ltd* 1999 NR 230 at 238D-I.
[11] *Swanepoel, supra* at 3C; *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432(SC) at 445, para 47

7. The applicant for condonation must 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.[12]

8. The applicant's prospects of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*[13], Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.

9. If there are no prospects of success, there is no point in granting condonation.[14]

Factors taken into account whether or not to grant condonation

[6] These factors are stated in *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445, para 45 as follows:

1. The importance of the case;
2. The prospects of success;
3. The respondent's interest in the finality of the case;
4. The convenience of the court;
5. The avoidance of unnecessary delay.

[7] In the case of *Darries v Sherriff, Magistrate's Court, Wynberg and Another*[15], the South African Supreme Court of Appeal stated:

'that an application for condonation for non-compliance with the law is not a mere formality but an application which should be accompanied with an acceptable explanation, not only, for example, the delay in noting an appeal but also any delay in seeking condonation.'

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[12] *Swanepoel, supra* at 5A-C; Vaatz: *In re Schweiger v Gamikub (Pty) Ltd* 2006 (Pty) Ltd 2006 (1) NR 161 (HC), para; *Father Gert Dominic Petrus v Roman Catholic Diocese*, case No. SA 32/2009, delivered on 9 June 2011, page 5 at paragraph 10.

10 1985 (4) SA 773 (A)

[13] 1985 (4) SA 773 (A)

[14] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 D - E

[15] 1998 (3) SA 34 (SCA) at 40I-41D

[8] Based on the authorities, before considering the prospects of success in the present case, I must be satisfied as to the following:

(a) That the applicant /appellant has offered an acceptable and reasonable explanation for the delay.

(b) That it has given a full, detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation.' [16]

SHOULD CONDONATION BE GRANTED

[38] If one then examines the explanation offered on behalf of the applicant in order to determine whether or not same is acceptable and reasonable and whether or not it is one for the entire period of the delay, which is also full, detailed and accurate, it will already have appeared that it is certainly not full, detailed and accurate. More particularly it is lacking in the following respects:

AD THE INITIAL 90 DAY PERIOD

a) the initial inactivity - during the period 29 November 2013 to when appellant's legal practitioner went on holiday on an undisclosed date, sometime in December 2013 - is not explained;

b) it is not stated whether anything was done at all during this period; it must be assumed that nothing was done during this initial period,

c) no detail is provided in regard to the efforts appellant's legal practitioner made - since the middle of January 2014 to 27 February 2014 - to procure the record, save to state that 'persistent calls' were made; it has already been pointed out that the frequency of these calls is not disclosed, nor the dates given on which these calls were made, or to whom they were made;

d) the court is not informed on how many occasions the second respondent

[16] *Primedia Outdoor Namibia (Pty) Ltd v Kauluma op cit* at [12]

promised to dispatch the record and on which dates these promises were made;

e) the same lack of detail pertains to the enquiries allegedly made with the Registrar's office; the court is not even informed to whom such enquiries were directed and how many enquiries were actually made and on which dates;

f) no fee note or file note or other documentary proof in regard to any of these services/attendances rendered by Mr Daniels, to his client, during this period, is annexed to the papers, which records surely must/should have been kept, at least for accounting and invoicing purposes;

AD THE FURTHER DELAY OF SOME 113 DAYS

g) this further delay, as has been mentioned above, was basically explained in a single sentence. The medical condition of Mr Daniels was then elaborated upon in one paragraph;

h) as far as the allegation is concerned that Mr Daniels was inundated with work it is conspicuous that absolutely no specifics were provided; surely it would, for instance, have been possible to annex an extract from Mr Daniels' diary in this regard from which, at least, the frequency of the work, the nature of the work and the name of the client and the date on which the work had to be performed could have become apparent;

i) as far as the allegation is concerned that Mr Daniels travelled extensively in Namibia, it is, once again, noteworthy that not even a single town or location is named, to which he had to travel, on work related matters; also this could quite easily have been evidenced by his diary, or a hotel reservation, or some relevant court document etc;

j) although it is generally stated that due to his workload and his state of health he forgot to attend to certain of his responsibilities it was not explained, why, and all of a sudden, he now totally forgot to attend to the applicants case, in respect of which he had alleged earlier that, at least, since the middle of January 2014, he had

‘persistently’ called on the second respondent to dispatch the arbitration record;

k) importantly it is also not explained when it dawned on Mr Daniels and appellant that the appeal had lapsed and how long it took, after that realization, to launch the necessary application. It thus cannot be established whether this application was made without delay.

[39] While I have sympathy for Mr Daniels’ medical condition, it needs to be pointed out however - and while I do not doubt that Mr Daniels underwent therapy in this regard for some time - that it was only underscored by a simple letter, Annexure ‘CD 5’, in which the clinical psychologist merely mentions that the ‘disorder affected Mr Daniels’ performance in the social and occupational domains’. No further detail is provided in this regard. It would have been most instructive and important for the consideration and understanding of this facet relating to condonation if the clinical psychologist would have explained what effects the disorder has on patients in general and on Mr Daniels in particular and to what extent such a person’s working capacity would be impaired. In any event it appears from the terminology employed by the clinical psychologist in Annexure ‘CD 5’ that the disorder merely ‘affected Mr Daniels’ performance in the social and occupational domains’. This seemingly deliberate qualification leaves open the question: to what extent? The letter is also not confirmed by an affidavit, which aspect of course detracts from the veracity of this aspect.

[40] As it is thus not stated that Mr Daniels was totally unfit for work, Mr Daniels does also not contend otherwise, or that he was booked off from work for any specific period, it is clear that he continued to work, and it must be assumed that was also able to work to some extent, during the affected period, being May to June 2014.

[41] All these aspects then fortify the realization that both Mr Daniels and his client have not fully and accurately explained why the appeal, which had been noted, was not meaningfully prosecuted.

[42] What compounds this problem is that it is common knowledge that a number of aids are available to modern legal practitioners and their clients to assist them in meeting the time lines imposed on them by the rules of court. Not only are conventional diaries, in hard copy, still available to assist in this task, but also the old – fashioned, time-tested diarisation practices followed in legal firms, which were designed to ensure compliance with the rules of court, the parameters within which a legal practitioner operates. Nowadays computers and cellphones all have calender and other functions which can, in addition, be effectively employed to timeously alert their users as to when particular actions by them are required. These alerts usually 'pop- up', so-to-speak, on the screens of computers and cellphones, where they usually will remain until deliberately closed, through the click of the mouse or the touch of a button or touch-screen. So even if one would have forgotten about a task these 'alerts' – if activated – would have remind a particular user that a particular action would be required at a particular time. It is not explained whether or not this technology was available to- and was employed by Mr Daniels and his client, and if not why not. It is unlikely though, in our society, that neither Mr Daniels nor his client would not have a computer and a cellphone. The question remains why then was the available technology not employed.

[43] Mr Daniels did also not explain whether or not he instructed his secretary or any other staff member to diarise the matter in order to prevent the noted appeal from lapsing. If such an instruction would have been given, and even if Mr Daniels would have forgotten, that would have ensured that the secretary or staff member in question could have alerted Mr Daniels that further action would be required in the case, even if such secretary or staff member would merely have done so by placing the particular file back on Mr Daniels' desk for further attention. The practice of the proper diarisation of files is as old as the attorneys' profession, and it does not take much to understand why diarisation of files has always been one of the fundamental cornerstones to conducting an efficient legal practice. It would appear that this fundamental rule was not applied and no explanation was offered in this regard,

particularly when it was known, as far back as November 2013, what would be required to prosecute the applicants case.

[44] In addition it should not be forgotten that it is unknown for how long Mr Daniels suffered from his disorder and whether or not this precluded him, as far back as November or December 2013, or January or February 2014, for instance, from timeously diarizing the required tasks for the prosecution of this appeal at that time already. In any event it is highly unlikely that his disorder played any role during this period. Also these aspects are simply not explained. Put differently: if the relevant tasks to be performed would have been diarized then already, either manually or in electronic format, the disorder, from which Mr Daniels suffered later, and the fact, that he was inundated with work and had to travel later, would never have played a role during May and June 2014.

[45] What weighs particularly negatively with me is that the applicant, who must have been advised, at the time that he gave Mr Daniels instructions to note the appeal on his behalf, what steps would have to be taken in order to prosecute same, failed to make contact with Mr Daniels in this regard. Even if he was not so advised it remains inexplicable why a former senior employee of a bank[17] would not have followed up on his case. Surely it is to be expected of an interested appellant to enquire, from time to time, from his legal practitioner how his or her case his progressing and if anything needs to be done in this regard. Accordingly, and even if one accepts that Mr Daniels altogether forgot to do anything about this appeal, he would have been so reminded, if the applicant would have enquired about the progress of his case from time to time. It must be concluded therefore - and there is also no affidavit from the applicant himself to the contrary – that also the applicant made absolutely no enquiries from his side during all this time - that is during the period November 2013 to June 2014 - which, in turn, begs the question, if he was at all interested and concerned about the progress of his case. One would think not.

[17] Ironically the appellant held the position of ‘Deputy Director IT: Technical and Network Services’ at the time of his dismissal

[46] It must for all these reasons be inferred from the applicant's conduct that the case was not important to him as otherwise he would have showed some interest in its progress, which in turn would have alerted Mr Daniels earlier that some or other action would have been required from his side.

[47] One can also not help but notice that the applicant and his legal practitioner, on their own version, must have been aware that the appeal was under threat of lapsing as the various attempts, to procure the record, proved fruitless. It is not explained why no application for the extension of the time period to prosecute the appeal and to compel the delivery of the record was timeously launched during January or February 2014, when this factor was known, or at least when this difficulty was experienced.

[48] If one then considers the overall picture that has so emerged it must be concluded that the applicant has not given a reasonable, accurate and acceptable explanation for the delay.

[49] In such circumstances the applicant's prospects of success can no longer be decisive.

[50] One of the grounds on which the appeal was based was that the arbitrator erred in finding that the applicants' dismissal was fair as the applicable internal grievance procedure had not been exhausted before the dismissal of the applicant.

[51] More particularly the applicant had instituted a grievance against his supervisor during December 2010 in regard to how the performance management process for 2010 was implemented. The grievance was initially dealt with by the former Deputy Governor of the respondent, Mr Paul Hartmann who found that there was compliance with the process. Applicant then escalated this grievance to the Governor and a proper grievance hearing was held on 20 April 2011. This process was never finalized.

[52] The first respondent's complaint against applicant was that his performance was not up to scratch in that he did not meet the performance standards set by the Performance Management Policy of the first respondent. The applicant had been given successive "needs improvement' ratings for the periods June to December 2010 and January to June 2011, as well as June to December 2011. These ratings then triggered the so-called PIP, being a 'Performance Improvement Programme'. It should possibly be mentioned that the applicant was also issued with two notices to improve his performance – 25 January 2012 and 9 March 2012 - and also a written warning – 7 February 2012 - in respect of his poor working performance.

[53] The applicant's complaint in turn was that the 1st Respondent implemented the Performance Improvement Plan (PIP) in October 2011 in contravention of its Performance Management Policy before the performance appraisal for the period July to December 2011 was finalised. More particularly it was alleged that the 1st Respondent failed to comply with its Performance Management Policy which requires it to implement a PIP only after two consecutive notices to improve work performance had been issued to an employee in one calendar year and within two distinct cycles: a calender year to commence in January of each year, the two cycles being the period January to June and July to December respectively. The evidence before the arbitrator indicated however that the performance assessments did not fall within the stipulated calendar year but into the period July to December of the previous year and into the period January to June of the following year. This constituted a breach of the set process, which founded the said ground of appeal.

[54] In any event it was in addition contended that the first respondent had also prematurely initiated the PIP on 11 October 2011, (while the grievance process, which the applicant had launched against his supervisor, with the Governor, remained pending), and before the appraisal, for the period July to December 2011, had even been started or was completed.

[55] The written warning and then a final written warning had thus arbitrarily been issued. As the 1st respondent's disciplinary code requires a fair disciplinary hearing,

before any disciplinary sanction can be imposed, this requirement had not been met and the second respondent thus erred in finding otherwise.

[56] I cannot say that, at least, this ground of appeal is without substance, albeit it is, essentially, technical in nature. An employee surely would be entitled to insist on the adherence of the disciplinary code by his or her employer On the other hand it emerges also that there must have been serious problems with the applicant's work performance, which, in principle, would have founded a valid cause for complaint on the part of any employer.

[57] 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.

[58] In the end result it is the cumulative effect, of all the factors, considered above, that drive me to the conclusion that the condonation sought in this instance should not be granted.

[59] The application is thus dismissed.

H GEIER

Judge

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APPEARANCES

APPLICANT:	Mr C Daniels Clement Daniels Attorneys, Windhoek
1st RESPONDENT:	Mr R Philander Lorentz Angula Inc, Windhoek

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