REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: LCA 32/2013

In the matter between:

AGRIBANK OF NAMIBIA **APPLICANT**

And

NICOLAUS SIMANA **1ST RESPONDENT**

HAROLDT KAVARI N.O **2ND RESPONDENT**

Neutral citation: *Agribank of Namibia v Simana* (LCA 32-2013) [2015] NALCMD 9 (17 April 2015)

Coram: **Hoff J**

Heard: **17 April 2015**

Delivered: **21 April 2015**

Reasons: **22 April 2015**

ORDER

1. The condonatiion application is granted.
2. This Court grants the applicant leave to appeal against its judgment in case LCA 32/2013 delivered on 17 February 2014.

REASONS

[1] This is an application for condonation of appellant's late filing of the application for leave to appeal against this Court's judgment delivered on 17 February 2014 under case LCA 32/2013.

[2] In an appeal from an award by the arbitrator in arbitration proceedings it was decided that counsel should argue two *points in limine*.

[3] The first point raised was whether or not a referral document not signed in accordance with Rule 5 of the Rules pertaining to the conduct of Conciliation and Arbitration before the Labour Commissioner, was a nullity, and the second point raised was that there was no valid appeal noted against the arbitrator's award in that contrary to Rule 23 of the Rules pertaining to the conduct of Conciliation and Arbitration before the Labour Commissioner, the appellant did not complete form 11 and form LC 41. This Court upheld the first point *in limine* by finding that the referred document was a nullity, and it is against this ruling that the appeal lies.

[4] This Court in its ruling on 17 February 2014 referred to two decisions of this Court, namely *Waterberg Wilderness Lodge and Menesia User and 27 Other* (LCA 16/2011) (per Van Niekerk, J) and *Springbok Patrols (Pty) Ltd t/a Namibia Protection Services and Jacobs & Others* (LCA 702/2012) [2013] NALCMD 17 (2013) (per Smuts J) where it was held (in with both judgments) that non-compliance Rule 5 would result in the referral document being a nullity and the setting aside of the arbitration award. This Court held that although in the *Springbok Patrols* case Rules 5(2) and (3) were considered and whereas the present matter concerns consideration of Rule 5 (1), the same legal principle applies namely that non-compliance with the provisions of Rule 5 is fatal to a party's case.

[5] Mr Hinda who appears on behalf of the applicant submitted that the applicant has provided a reasonable and acceptable explanation for his failure to comply with the Rules of this Court and that there are reasonable prospects of success on appeal. In respect of the reasonable prospects of success on appeal this Court was referred to the matter of *Purity Manganese (Pty) Ltd v Katjivena and Others* (LC 86/2011) 2014 NALCMD 10 delivered on 26 February 2014 where this Court (per Smuts J) took a different view regarding non-compliance with Rule 5. This Court was also referred to *Auto Exec CC v Van Wyk* (LC 150/2013) [2014] NALCMD 16 (16 April 2014) in which the views expressed in *Purity Manganese* were confirmed.

[7] In respect of the explanation provided by the applicant for the late filing of the application for leave to appeal it is not disputed that the applicant filed his application for leave to appeal on 7 March 2014 but to the Supreme Court without the required leave from this Court. The applicant accepts that leave from this Court was required and that the application for leave filed was a nullity. Mr Hinda submitted in this regard that although the applicant approached the wrong forum it should be clear that the applicant just after the handing down of the ruling by this Court had the intention to prosecute his appeal.

[8] The applicant in his founding affidavit stated that after noting an appeal to the Supreme Court the record of the proceedings was duly requested from the transcription company. The record was paid for and provided on 25 April 2014. It was discovered that the full and proper appeal record was not provided. On 14 May 2014 applicant's attorney of record received an invoice from the transcription company which was only paid by applicant on 08 July 2014. The applicant stated that initially he was unable to raise the entire amount and made only part payment on 23 May 2014 of N$ 4000.00. The applicant eventually raised an amount of N$ 11 710.11.

[9] The applicant stated that he is unemployed since his dismissal on 23 November 2011 and was unable to secure any funds for the prosecution of his appeal. It was further stated that the applicant had been engaged, since the disciplinary hearing in 2011 up until the appeal ruling in February 2014, in litigation with the first respondent which seriously affected his financial standing and ability to pay for legal representation. On 07 August 2014 the appellant indicated to the attorneys of record telephonically that a family member has indicated his willingness to assist the applicant financially.

[10] Applicant stated that although this Court has dealt with the appeal from the arbitration proceedings, that in view of the conflicting judgments on the issue the matter has not yet been finally ventilated in our Courts.

[11] It must be stated that the respondent in its answering affidavit raised four points *in limine*. At the inception of this application Mr Rukoro on behalf of the respondent informed this Court that those points *in limine* had been abandoned by the respondent. Mr Rukoro submitted in the first instance that the applicant has not provided a reasonably acceptable explanation for the late filing of the application for leave to appeal and secondly pointed out that since the aim of the Labour Act and Rules is the speedy determination of disputes between parties, even in the event of the applicant being successful on appeal the matter would be referred back to this

Court to deal with the second point raised *in limine* as well as the merits of the appeal. This in turn, so it was submitted, would have the effect of prolonging this whole appeal process.

[12] Mr Hinda submitted that the explanation provided is a reasonable and acceptable explanation and that in view of the case law relied upon by him there are reasonable prospects that the Court of Appeal may come to a different conclusion in respect of the consequences for non-compliance with the provisions of Rule 5(referred to supra). I did not hear Mr Rukoro submitting that there are no reasonable prospects of success on appeal.

[13] I have had the opportunity to peruse the *Purity Manganese and Auto Exec* matters referred to by Mr Hinda. Both these judgments were delivered after the judgment in this matter. I am of the view that in view of these judgments another court may come to a different conclusion in respect of the consequences for non-compliance with Rule 5 in the circumstances of the present matter before me and that the applicant has accordingly established reasonable prospects of success on appeal.

[14] I is also hold the view that the applicant has presented a reasonably acceptable reason for the late filing of its application for leave to appeal and that condonation therefore should be granted.

[15] I must however comment on the fact that the notice of appeal was addressed to the Supreme Court without leave from this Court. The provisions of Rule 115 (2) of the Rules of this Court are clear and unambiguous namely that a person seeking leave to appeal must apply for such leave together with the grounds within 15 days after the date of the order appealed against.

[16] Mr Ronald Kurtz in his affidavit in support of the condonation application in explaining the fact that the notice of appeal was addressed to the Supreme Court stated the following at paragraph 19:

> "Upon closer scrutiny of the Rules I am of the respectful view that leave is required in this matter and that the Notice of Appeal to the Supreme Court filed on 7 March 2014 is a nullity."

[17] Mr Kurtz does not state when he closely scrutined the Rules. Mr Kurtz continues at paragraph 22 as follows:

> "The error occurred due to my erroneous interpretation of two unreported judgments of this Honourable Court, one delivered by Heathcote, AJ on 22 July 2011 in the matter of *Maureen Hinda Mbaziira*, Case No. LC 21/11 and the other a judgment of Damaseb JP delivered on 5 November 2012 in the matter of *Telecom Namibia v Michael Nangolo* and others, Case No. LCA 18/2009. Based on the above judgments, at the time, I formed the view that leave to appeal is not required in this matter. This turned out to be wrong during consultations with Counsel around middle August 2014 after instructions were obtained from the client on 7 August 2014 for us to proceed with the matter."

[18] In the matter of *Kleynhans v Chairperson of the Council for the Muncipality of Walvis Bay and Others* 2013 (4) NR 1029 (SC) Mtambanengwe, AJA referred to a number of cases in which the duty of a legal practitioners had been considered in application procedures. One of these cases referred to is *Ferreira v Ntshingila* 1990 (4) SA 271 (A) where Friedman, AJA said the following at 281 G."

> 'An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Coleman (Africa) Ltd and Another* 1968 (3) SA 98 (A) 101; *Mtutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685 A – B. In as much as an applicant for condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays have occurred."

[19] Another matter referred to was *Aymac CC and Another v Widgerow* 2009 (6) SA 433 where the following was stated by Gautschi AJ at 450 H-I:

> *"[36].....*An attorney is not expected to know all the rules, but a diligent attorney will ensure that he researches, or causes to be researched (by counsel if necessary), the rules which are relevant to the procedure he is about to tackle. And if he discovers at some stage that he has been mistaken or remiss, then it is doubly necessary that he study the rules carefully in order to ensure that further mistakes are not made, and that those that have been made are rectified. This is the least one expects of a diligent attorney.".

[20] Had an application for leave to appeal been brought within the time period prescribed in Rule 115 it would have been unnecessary for this Court to decide on a condonation application, and the application for leave to appeal would have been finalised much earlier. Legal practitioners must be aware, as stated in the *Kleynhans* matter, that "a casual and lackadaisical attitude" towards the Rules may have certain consequences which eventually may severely prejudice clients in the sense that the merits of an appeal may not be considered at all.

[21] In the result the following orders are made:

3. The condonatiion application is granted.
4. This Court grants the applicant leave to appeal against its judgment in case LCA 32/2013 delivered on 17 February 2014.

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Hoff

Judge

APPEARANCES:

APPLICANT:	Adv Hinda (SC) of **Murorua & Associates**
RESPONDENT:	Adv Rukoro of **Conradie & Damaseb**