

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: LCA 41/2015

In the application between:

APPLICANT

GOTTFRIED GOABAB

and

MUNICIPAL COUNCIL OF WINDHOEK

RESPONDENT

Neutral citation: *Goabab v Municipal Council of Windhoek* (LCA 41/2015) [2017]
NALCMD 12 (18 April 2017)

Coram: UNENGU AJ

Heard: 27 March 2017

Delivered: 18 April 2017

Flynote: Labour Law – Application to condone late noting and reinstatement of lapsed appeal – Alternatively leave to appeal – Court previously declined to grant

same relief to applicant/appellant – Court now *functus officio* cannot revisit or reconsider its previous order – Application, therefore, refused.

Summary: Applicant, after his application for condonation for non-compliance with the *Rules of the Court* and the reinstatement of the lapsed appeal was declined, has returned to court with a similar application, seeking the same relief with leave to appeal in the alternative. In view of the previous order, the court held that it was *functus officio*, therefore, the applicant should approach the Supreme Court for the relief sought. In the result, the application for relief sought in the main and in the alternative is refused.

ORDER

The application for relief sought in the main and in the alternative is refused.

RULING

UNENGU AJ:

Introduction

[1] In this application, the applicant has approached this court to grant him an order in the following terms:

- “(1) Condoning the non-compliance with the rules of the above Honourable Court.
- (2) Reinstating the Labour Court Appeal under case number LCA 41/2015 (The appeal);
- (3) Granting leave to the respondent to deliver a statement in terms of Rule 17(16)(b) within 21 days of the date of order.

Alternatively:

- (4) Granting applicant leave to appeal to the Supreme Court of Namibia against the entire judgment of his Lordship, Justice Unengu AJ delivered on 17 July 2016 in the above

mentioned Court of Namibia under Case Number LCA 41/2015 on the basis more fully set out in the notice of appeal attached hereto;

(5) Further and / or alternative relief,”

[2] On 11 March 2016, the applicant launched a similar application wherein he sought the same relief, minus the alternative relief being sought in the present application. A judgment in that application was delivered on 19 July 2016 with the following order being made:

- ‘(i) In view of the defect in the notice of motion of opposition filled by the respondent on 11 November 2015, the point in *limine* raised by the applicant/appellant is upheld, the application therefore, treated as unopposed;
- (ii) The order sought by the applicant/appellant in prayers 1, 2, 3 and 4 of the notice of motion is declined.’

[3] The order referred to in paragraphs 2 (ii) above is the order sought by the applicant which I referred to in paragraph 11 of my judgment of 19 July 2016. It is that order I refused to grant to the applicant/appellant which he wants me to revisit and reconsider and, if necessary, to set it aside and grant him the above-mentioned relief.

[4] The basis for the present application is stated in paragraphs 3.1, 3.2 and 3.3 of Mr Podewiltz’s affidavit attached to the notice of motion. Mr Podewiltz complains that my judgment did not explicitly indicate whether the application was merely struck from the roll or whether it was dismissed as the court merely declined the orders sought by the applicant/appellant.

[5] Mr Kasper, counsel for the applicant, took the same stance at the hearing of the application and argued that the phrase “declined” is foreign to him, therefore the order is ambiguous. He wanted the court to use the word “dismissed” instead of “declined” for him to regard the order as final.

[6] In support of his argument, Mr Kasper relied on the judgment of *Nakale v S*,¹ a criminal appeal where the court in paragraph (6) of the judgment stated that, it was trite, that where the merits of an appeal have not been dealt with there can be no scope for the dismissal of the appeal, but the appeal should be struck from the roll. He reasons, therefore, the same should have happened in the present appeal.

[7] I agree with all stated in paragraph 6 of the *Nakale* judgment. It is the correct thing to do i.e. strike an appeal from the roll if only condonation of the late noting of such appeal has been refused. It is, however, not leave to appeal alone the applicant is asking for in this application, but he also wants the court to reconsider its previous judgment and grant him the relief he sought in the previous application, because according to him, the order in the judgment was not worded properly.

[8] In my view, the order made in the judgment is competent, clear and comprehensive. It does not leave any room for doubt as to what is intended by the order. The applicant concentrated on what was said in paragraph 27 (ii) of the judgment, only ignoring the contents of paragraph 26 where I said, in the last sentence thereof on page 9 - that flowing from the above conclusion therefore, the relief sought in the notice of the motion will not be granted. With that, I had in mind the relief prayed for in prayers 1, 2, 3 and 4 of the notice of motion. Besides, phrases such as 'refuse', 'decline' and 'not granted' are not foreign to the vocabulary of court orders in our jurisdiction, as the applicant is alleging.

[9] Regardless the language used or how the order of the court was phrased, the court is *functus officio*, therefore, cannot reconsider the order made. The application for condonation of the late noting of the appeal and the reinstatement thereof had failed. That is the message conveyed to the applicant/appellant.

[10] When dealing with a similar situation, Damaseb, JP in the matter of *Telecom Namibia Limited v Michael Nangolo and Others*² had this to say:

¹ (SA 04/2010) [2011] NASC(20 April 2011).

² (LCA 18/2009) [2012] NALCM 4 (05 November 2012).

'The first question that arises is whether or not leave to appeal is required. In this prefatory remarks, Mr Heathcote SC, for the applicant, commented on whether or not, given that the court 'dismissed' the application for condonation as opposed to striking it from the roll, it was necessary to obtain leave. He implied in so submitting that only if the matter were struck was the leave required and that in the event it was dismissed, there was a right of appeal to the Supreme Court as of right.'

[11] Damaseb, JP went on to say that

'Mr Heathcote referred me to the matter (criminal case of) of *S v Nakale*³. In that case the Chief Justice, writing for the Court, held that where on an appeal noted to it, the high court did not consider the merits of the appeal other than in the context of the application, but only decided and refused the application for the late noting of the appeal, an appellant was entitled to appeal to the supreme court against the decision refusing condonation, as of right.⁴ Clearly, the Chief Justice meant such right inured in the situation where the high court on account of the order it had made—regardless of language used had become *functus officio* and could no longer revisit the previous order. I cannot conceive a circumstance where, after mere striking from the roll, there could, even with leave, be an appeal to the supreme court – because in such a circumstance the party whose application is struck has the right to ask the high court to have the matter relooked upon fresh papers. I dismissed the condonation and in that way this court has become *functus officio*. Based on the facts before me, I am not persuaded that the dichotomy of 'striking' versus 'dismissal' is a credible one. The applicant cannot pursue the application for condonation in the high court again. The door is closed'.

[12] I approve of the sentiments expressed in the *Telecom Namibia* matter above and same are applicable to the facts of the present application. I declined to condone the failure to prosecute the appeal within the prescribed time and to reinstate the lapsed appeal making this court *functus officio*. The applicant can only appeal to the Supreme Court against the refusal of the application for condonation.

[13] Therefore, in view of the conclusion I have arrived at as illustrated above, I do not consider it necessary to deal with the alternative relief of leave to appeal sought by the appellant as merits of the appeal was not dealt with in the previous application.

[14] With all stated above in mind, I refuse both the main and the alternative relief sought in the application.

The application for relief sought in the main and in the alternative is refused.

E P UNENGU

Acting Judge

APPEARANCES

APPLICANT:

G Kasper

of Murorua & Associates

Windhoek

RESPONDENT:

SR Philander

of ENSAFRICA | Namibia

(Incorporated as Lorentz Angula Inc.)

Windhoek