

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: LCA 2/2016

In the matter between:

BARTHO VEJONA MATUZEE

APPELLANT

and

KYLIKKI SIHLAHLA

FIRST RESPONDENT

**METHEALTH NAMIBIA ADMINISTRATORS
(PTY) LTD**

SECOND RESPONDENT

Neutral citation: *Matuzee v Sihlahla* (LCA 2/2016) [2017] NALCMD 23 (5 July 2017)

Coram: PARKER AJ

Heard: 31 March 2017; 28 April 2017; 16 June 2017

Delivered: 5 July 2017

Flynote: Labour Appeal – Lapsed Appeals – Effect of Reinstatement of a Lapsed Appeal – The effect of the reinstatement is that an appeal is considered as if it had never lapsed – All steps previously taken under the lapsed appeal are revived.

ORDER

1. The respondent's non-compliance with the court order of 9 December 2016 to file its statements in terms of rule 17(16)(b) within 21 days from the date of such order is condoned.
2. The respondent is ordered to file its statement in terms of rule 17(16)(b) on or before 18 July 2017.
3. The matter is postponed to 19 July 2017 at 08h30 for a status hearing.

RULING

ANGULA DJP:

Introduction

[1] The question for determination in this ruling is whether, following the court order which reinstated the appeal which had lapsed due to lack of prosecution within the prescribed period, it was necessary for the appellant to re-serve the record of the proceedings pursuant to rule 17(13) on the second respondent.

[2] Mr de Beer, who appeared for the second respondent contends that it is necessary to re-serve the record. Mr Coetzee, who appeared for the appellant, contends that it is not necessary to re-serve the record.

Background

[3] Rule 17(4) of the Labour Court stipulates that a party who wishes to appeal must note the appeal within 30 days after an award, decision or compliance order appealed against has come to the notice of the appellant. In this case, the appellant noted an appeal outside the thirty-day period.

[4] On 13 May 2016, the court granted an order condoning the late noting of the appeal. Rule 17(25) provides that an appeal must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.

[5] Following an application by the appellant for condonation and re-instatement of the appeal which had lapsed, the court made an order on 2 September 2016 in the following terms:

- '1. The appeal under case number LCA 2/2016 is reinstated.
2. The Appellant is ordered to prosecute his appeal within 40 (forty) days from the date of this order.'

[6] On 12 October 2016, the appellant delivered the record to the respondents in terms of rule 17(13). There is a dispute between the parties whether the record was delivered within the prescribed period. According to the calculation the time period of 40 (forty) days to prosecute, the appeal expired on 12 October 2016. Mr Coetzee contends that the record was delivered within the prescribed time period, and therefore a valid appeal existed when the record was delivered to the second respondent. Mr de Beer on the other hand contends that the appellant did not deliver a complete record and that a complete record was only delivered after 12 October 2016 by which date the appeal had already lapsed. I should mention that this court would not be able to resolve this dispute at this stage, in any event I do not consider it necessary for me to do so for the purpose of this ruling.

[7] It is common cause that the appeal had lapsed after 12 October 2016, and the appellant then applied for the re-instatement of the lapsed appeal.

[8] On 24 October 2016, the appellant filed an application, set down for hearing on 4 November 2016 in which the following order was sought:

- '1. Condoning applicant's non-compliance with the court order dated 2nd September 2016 to prosecute this appeal within 40 days.
2. Cost of suit (In the event the Respondents opposing the application.)

3. Further and/or alternative relief.'

[9] The orders sought were not granted on 4 November 2016, but were eventually granted on 9 December 2016 in the following terms:

- '1. Applicant's non-compliance with court order dated 2 September 2016 to prosecute the appeal within 40 days is condoned.
2. The Appeal under case number LCA 2/2016 is reinstated.
3. Second Respondent to file its statement in terms of Rule 17(16)(b) of the Labour Court Rules within 21 days from date of this order.'(My underling for emphasis)

[10] It is further common cause that the respondent did not deliver the statement in terms of rule 17(16)(b) as directed by the court order of 9 December 2016. I pause here to mention that an argument in justification of the respondent's non-compliance with the order has been advanced by counsel for the respondent and will be considered later in this ruling. Rule 17(16) reads as follows:

'17(16) Should any person to whom the notice of appeal is delivered wish to oppose the appeal, he or she must –

(a) ...

(b) within 21 days after receipt by him or her of a copy of the record of the proceedings appealed against, or where no such record is called for in the notice of appeal, within 14 days after delivery by him or her of the notice to oppose, deliver a statement stating the grounds on which he or she opposes the appeal together with any relevant documents.'

Submissions on behalf of the second respondent

[11] Mr de Beer argues that after the appeal was reinstated, the appellant was obliged to re-serve and re-deliver the record of the arbitration proceedings to the

second respondent in order for the second respondent to file its statement in terms of rule 17(16)(b). Counsel points out further that in the Notice of Motion of 24 October 2016 applying for condonation for non-compliance, the appellant did not include a prayer for the re-instatement of the appeal; nor for an order or direction as to the delivering of the complete record, which was not part of the appeal proceedings prior to the appeal having lapsed. In this connection counsel further points out that the delivery of the complete record took place after the appeal had already lapsed.

[12] Counsel further refers to rule 132 which deals with lapsed summons and inactive cases and submits that the appellant should have sought directions in his notice of motion on how the process should proceed after condonation had been granted. Counsel points out that Rule 17(13) stipulates that the appellant has to supply the respondent with a copy of the record certified as correct, and that in this matter the record was delivered at the time after the appeal had already lapsed.

[13] Mr de Beer further points out that rule 17(19) of the Labour Court provides that an appeal is deemed to have been prosecuted if the appellant applied to the registrar to allocate a date for the hearing of the appeal. In this connection counsel argues that condonation for non-compliance to prosecute relates to the steps of applying to the registrar to allocate a date and has nothing to do with the delivery of the record. Furthermore, that condonation for non-compliance does not revive the record which was filed after the appeal had lapsed.

[14] Counsel submits further that once an appeal has lapsed it ceases to have effect in law.

[15] Mr de Beer argued in summary: that the condonation granted to the applicant does not have the consequence that the steps taken in respect of the lapsed appeal are revived automatically; that the appeal cannot proceed unless the record is re-delivered; and finally that the respondent can only exercise its right to file the grounds for opposition after delivery of the record.

[16] Accordingly, counsel proposed that the matter should be removed from the roll until such time as the appellant has delivered the record, or alternatively that the appellant should seek directions from this court in that regard.

Submissions on behalf of the appellant

[17] Mr Coetzee with respect to the delivery of the record submits that the record was delivered within the prescribed time on 12 October 2016. Counsel submits that a valid appeal existed when the appeal record was delivered to the respondent. Counsel further points out that the appellant only applied for the re-instatement of the appeal after the record had already been delivered.

[18] Mr Coetzee further points out that the court order of 9 December 2016 ordered the second respondent to file its statement within 21 days from the date of the court order, and that the second respondent did not comply with that court order. In this connection Mr Coetzee refers to the well-known principle of our law, namely, that an order of court must be complied with for it is valid and enforceable until and unless it is set aside by a competent court.

[19] Mr Coetzee submits further that it would be illogical and absurd to expect an appellant whose lapsed appeal is reinstated to re-serve his Notice of Appeal and re-deliver the record after the reinstatement of his appeal. Not only will it be costly, but it will run against the notion that labour disputes must be dealt with and finalised expeditiously.

[20] Mr Coetzee finally submits that once an appeal is reinstated, the 90 day period commences, within which period an appellant must prosecute his or her appeal in terms of rule 17(25) even if the courts does not give directions as to the re-service of the Notice of the Appeal or the delivery of the record. Accordingly, the second respondent failed to file its statement in terms of rule 17(16)(b) in defiance of the Court Order dated 9 December 2016 and as such, this appeal is unopposed he finally asserted.

Discussion

[21] I must confess that I have a problem with Mr de Beer's argument in that it is too restrictive. It makes the purpose of the reinstatement order almost meaningless. Furthermore, the interpretation is likely to lead to unintended and absurd consequences. Taken to its logical conclusion, it will mean that once the reinstatement order is granted the appellant would be required to uplift the original record from the court's file, take it to the Office of the Labour Commissioner, make copies and have such copies certified by an official of the Office Labour Commissioner, and thereafter serve a copy on the respondent. In the meantime, the respondent sits with the old record, which is exactly the same. The respondent will have to discard the old record. In my view the absurdity is glaring. The cost implications and the loss of valuable time are obvious and need not be elaborated on.

[22] I prefer Mr Coetzee's argument. The reinstatement order must be interpreted broadly in order to give practical effect thereto. In my view the order must be interpreted to mean that the appeal which had lapsed has been revived. A new life, so to speak, has been breathed into the lapsed appeal's limbs so that all the limbs are revived and alive – even those limbs of the lapsed appeal which are in possession of the respondent in the form of the record. In other words the reinstatement order must be interpreted to mean that the entire appeal, including the notice of appeal and the record is revived and is reinstated on the court's appeal roll. The appeal is considered as if it had never lapsed. Similarly, the copy of the record in possession of the respondent is revived so that there is no need to re-serve the record again on the respondent, after the reinstatement order.

[23] In my view, such a purposive, practical and results orientated interpretation is in line with the overriding objectives of the rules of this court: namely, to facilitate the resolution of the real disputes speedily, efficiently and cost effectively¹. Furthermore such an interpretation is also in accordance with the notion that labour disputes must be dealt with and finalised expeditiously.

¹ Rule 1(3) of the High Court Rules.

[24] It follows therefore from the above that the default position is that, once an appeal is reinstated, the period of 90 days stipulated by rule 17(25) commences to run and within which period an appellant must prosecute his or her appeal. Needless to say that the court which issues the reinstatement order is at liberty to issue such directions as it may deem fit. This serves therefore as an answer the question posed at the beginning of this ruling.

[25] Counsel assured me that they could not find any authority that deals specifically with the issue at hand. I was also unable to find any case law during my own research which dealt with this issue. In view of the fact that there has not been a pronouncement on this point, I will treat the second respondent's interpretation of the consequence of the reinstatement order as *bona fide* albeit reckless. I say the second respondent's attitude was reckless because it is a settled principle of our law that an order of court must be complied with – even if the affected party thinks it is wrong – until and unless it is set aside by a competent court. In this case the respondent sat idly and did nothing to comply with the order. There was nothing which prevented it from using the record in its possession to compile and file the prescribed statement as ordered by the court. Alternatively, if the respondent did not agree with the order it should have appealed against the said order it did neither.

Conclusion

[26] In the light of the view I have taken with regard to the second respondent's interpretation of the consequence of the re-instatement order, I am further of the considered view that the second respondent's non-compliance with the court order was not willful so as to result in the second respondent being subject to a bar to file its statement in terms of rule 17(16)(b). I am of the further view that this is an appropriate case where this court, in the exercise of its inherent jurisdiction and in the interests of justice, may condone the second respondent's non-compliance with the court order, which I accordingly do.

[27] In the result I make the following order:

1. The respondent's non-compliance with the court order of 9 December 2016 to file its statements in terms of rule 17(16)(b) within 21 days from the date of such order is condoned.
2. The respondent is ordered to file its statement in terms of rule 17(16)(b) on or before 18 July 2017.
3. The matter is postponed to 19 July 2017 at 08h30 for a status hearing.

H Angula
Deputy-Judge President

APPEARANCES

APPELLANT: E E COETZEE
Of Tjitemisa & Associates, Windhoek

FIRST RESPONDENT: No appearance

SECOND RESPONDENT: P J DE BEER
Of de Beer Law Chambers, Windhoek