

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: LCA 66/2015

In the application between:

LUDERITZ TOWN COUNCIL

RESPONDENT/APPELLANT

and

SHAANIKA N. KORNELIA

APPLICANT/RESPONDENT

Neutral citation: *Luderitz Town Council v Shaanika* (LCA 66/2015) [2017]
NALCMD 7 (24 February 2017)

Coram: UNENGU AJ

Heard: 02 February 2017

Order: 16 February 2017

Reasons: 24 February 2017

Flynote: Labour appeal – Application for the late filing of statement of grounds for opposition of appeal – oversight on the part of legal practitioner – cause of failure – condonation not granted – applicant cannot escape negligence and wrongdoing of her chosen legal representative – application for condonation of late filing of heads of

argument – negligence of legal practitioner to timeously file heads of argument – application dismissed.

Summary: The applicant applied for condonation for the late filing of the statement of grounds for opposing the appeal brought against the arbitrator's award by the appellant. In his founding affidavit, the applicant's legal practitioner alleged oversight on his part as the cause of the delay. *Held:* the delay not sufficiently explained. *Held further,* the legal practitioner to blame himself for the cause of the delay, will not assist the applicant to escape his wrongdoing or negligence. Similarly, the cause for the delay in filing the heads of argument in time given as negligence on his part, is also refused.

REASONS

UNENGU AJ:

Introduction

[1] The applicant, in these two applications for condonation of the late filing of the statement in terms of *Rule 17(16)(b) of the Rules of the Labour Court* containing grounds for opposing the appeal launched by the respondent/appellant and for the late filing of the heads of argument, will be referred to as the applicant for the sake of convenience.

[2] Similarly, the appellant/respondent will be referred to as the respondent to avoid any confusion.

Background

[3] As pointed out before, the respondent has appealed against the award issued by the arbitrator in favour of the applicant. The applicant gave notice to oppose the appeal, but failed to deliver the statement in terms of *Rule 17(16)(b)* stating the grounds on which she opposed the appeal together with any relevant document within the period prescribed by the Rule.

[4] The applicant, as a result of such failure to file the statement, has now applied for condonation of the non-compliance with *Rule 17(16)(b)* to be allowed to file the statement out of time. The application is accompanied by an affidavit deposed to by Mr Tjitemisa, counsel for the applicant, which application is being opposed by the respondent.

[5] The reason for having filed the application late as indicated in paragraph 6 of the founding affidavit by Mr Tjitemisa is as follows:

‘The hearing of the appeal was set down on 02 December 2016. Only on 01 December 2016, when I prepared for the said hearing, I realised that I did not, on behalf of the applicant, deliver the statement as required by Rule 17(16)(b) of the Rules of this Honourable Court. The non-compliance was purely due to an oversight on my part.’ (my emphasis)

[6] On 02 December 2016, the hearing of the appeal was postponed until 02 February 2017 to afford the respondent the opportunity to file their answering or opposing affidavit. The applicant tendered wasted costs for the postponement of the hearing.

[7] Again, Mr Tjitemisa did not file heads of argument timeously and in accordance with the *Rules* and has asked the Court to condone the late filing of the heads. Mr Philander did not oppose this application.

[8] Mr Tjitemisa justifies the late filing of the heads of argument as: “not due to *mala fides*, remissness or wrongful default on the part of the applicant but rather because of the negligence on his part as the legal practitioners of the applicant.”

[9] It is apparent from the affidavit¹ of Mr Tjitemisa that he was well aware that the authorities require him to provide a reasonable explanation for his non-compliance with the *Rules* in each application for condonation of such non-compliance.

[10] An oversight or negligence on the part of the legal practitioner of the litigant does not meet and satisfy the requirements for a reasonable explanation.

¹ Paragraph 6

[11] One does not need to go far to look for authority dealing with condonation applications and how the delay would be explained to persuade the Court to grant condonation, but to consider cases referred to by the respondent in the heads of argument.² The legal practitioner for the applicant, despite having the benefit of the guidelines in the written heads of argument of the respondent in his possession, failed to follow the authorities. Instead, chose to blame himself for the delay or for the non-compliance with the *Rules*.

General principles for condonation.

[12] In *Telecom Namibia Ltd v Nangolo and Others* above, the Court, among others, stated that condonation is not a mere formality and will not be had for the asking, that the party seeking condonation bears the onus to satisfy the Court that there is sufficient cause to warrant the grant of condonation and that there must be an acceptable explanation for the delay or non-compliance which must be full, detailed and accurate.

[13] Therefore, for Mr Tjitemisa to simply declare that the non-compliance was due to an oversight on his part, is far from satisfying the requirements explaining the delay or non-compliance with the *Rules* as stipulated in the case *Telecom Namibia Ltd v Nangolo and Others*.

[14] To heap the blame for the non-compliance on himself, as the legal practitioner for the applicant, will not be of assistance to the client. The reference to the matter of *Salooje & Another v Minister of Community Development*³ by the respondent at paragraph 5 of their heads of argument is on point with regard to negligence on the part of a litigant's legal practitioner, therefore, it is reproduced hereunder *verbatim*:

'In *Regal v African Superslate (Pty) Ltd.*, 1962 (3) SA 18 (AD) at par. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case,

² Father Gert Dominic Petrus v Roman Catholic archdiocese Case No. AS 32/2009, delivered on 09 June 2011. *Telecom Namibia Ltd v Nangolo and others* (33/2009)(2012) NALCA 15 (28 May 2012)

³ 1965(2) 135 at 141 B-E

debar the applicant, who was himself in no way to blame from the relief. I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burned with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.' (emphasis added)

[15] In the present matter, Mr Tjitemisa has not neglected to observe the *Rules* of this Court only once, but twice. These are in respect of the delay in delivering the statement with grounds of opposition of the appeal as required by *Rule 17(16)(b) of the Labour Rules* and the failure to file heads of argument in time.

[16] Therefore, judging from the pattern on how the *Rules* of this Court were defied, it is my view, that the applicant should not escape but reap the fruits of her legal representative's lack of diligence in handling her matter.

Conclusion

[17] Accordingly and for reasons mentioned above, I come to the conclusion that the delays in both the applications were caused by the lack of diligence and the inaptitude on the part of Mr Tjitemisa, the chosen legal practitioner of the applicant which delays he (Mr Tjitemisa) did not sufficiently explain. That said therefore, I decided that both applications (to condone the late delivering of the statement in terms of *Rule 17(16)(b)*, containing the grounds for opposing the appeal and for the late filing of the heads of argument) should be dismissed. The order made on 16 February 2017 that:

- '(i) Both applications for the late filing of heads of argument and for the late filing of statement with grounds of opposition of the appeal are hereby dismissed;
- (ii) No order as to costs made',

is hereby confirmed.

E P UNENGU
Acting Judge

APPEARANCES

RESPONDENT/APPELLANT: SR Philander
of ENSAfrica | Namibia, Windhoek

APPLICANT/RESPONDENT: JN Tjitemisa
of Tjitemisa and Associates, Windhoek