

**REPUBLIC OF NAMIBIA**



**LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-LAB-APP-AAA-2017/00016

In the matter between:

**AGRA LIMITED**

**APPELLANT**

And

**JUANITA DUNAAR**

**RESPONDENT**

**Neutral citation:** *Agra Limited v Dunaar* (HC-MD-LAB-APP-AAA-2017/00016) [2019]  
NALCMD 2 (1 February 2019)

**Coram:** MILLER, AJ

**Heard:** 25 January 2019

**Delivered:** 1 February 2019

**Flynote:** Labour Appeal – Appeal against the arbitration award issued by the arbitrator – Defective Notice of Appeal- Failure of respondent to deliver Notice of

opposition, Notice of cross appeal and Statement with grounds of opposition timeously – Condonation for the late filing filed, same was not granted- Appeal unopposed – No Appeal before the court- Appeal dismissed.

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### ORDER

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1. The condonation application is dismissed.
  2. The appeal is dismissed.
  3. There shall be no order as to costs.
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### JUDGMENT

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MILLER, AJ:

[1] This is an appeal by the appellant noted against the award issued by the arbitrator Ms Kyllikki Sihlahla dated 11 October 2017 under case number CRWK 681-17.

#### Factual Background

[2] This arbitration award was granted on the 11 October 2017 and the Appellants is appealing against the entire award. The award reads as follows:

1. That the Applicants dismissal was procedurally unfair;
2. That the respondent must pay the Applicant an amount equivalent to 2 months' remuneration amounting to N\$ 85 040.46 (N\$42520.23 x 2 ) less tax;
3. The said amount is payable on or before 31 October 2017;
4. There is no order as to costs'

[3] The Appellants delivered their Notice of Appeal on 1 November 2017, thus the appeal was noted on time. The Appellants further caused service of their notice of Appeal on the Respondents on the 2 November 2017 at the Offices of the Respondents' Legal Representatives.

[4] The record was made available on the 12 January 2018 being the last filing of the record on the 17 January 2018. Appellants requested for dates on the 17 January 2018 rendering the prosecution of the Appeal on time.

[5] The Respondent filed her Notice of Cross appeal on the 17 January 2018, followed by her Notice of opposition on the 18 January 2018 and finally filed her Grounds for opposing the Appeal on the 6 March 2018.

[6] The Respondent being in clear violation of the timelines as provided for by the rules filed her application for Condonation for the late filing of her grounds and noting of her cross appeal on the 6 March 2018.

### The Law

[7] Rule 17(2) of the Rules of the Labour Court requires that an appeal contemplated in sub rule (1)(a) and (b) must be noted by the delivery of a Notice of Appeal on Form 11. The rule also requires that an appellant has to set out concisely and distinctly against which part of the decision or order the appeal lies. The rule goes further in that it also requires an appellant to set out the grounds of appeal on which the appellant relies for the relief sought.

[8] *Namibia Dairies (Pty) Ltd v Alfeus and Another* 2014 (4) NR 1115 (LC) gives guidance where Parker AJ stated:

[8] In both form 11 and form LC 41 an appellant is required to set out not only the questions of law at issue but also the grounds on which the appellant relies in contending that

there is a question of law which, if the appeal court determined in the appellant's favour, should lead to the court upholding the appeal on that question of law. What the appellant has done in the instant case is essentially to tell the court that the question of law is also the ground relied on by the appellant. To say that an arbitrator has 'erred in law in finding that the first respondent's dismissal was substantively unfair' does not tell anyone, including the court and the respondents, the reason why or the basis upon which the appellant contends that the arbitrator erred in law, that is, the reason why or the basis upon which the appellant has raised the question of law. (See Shilongo.) All that the statement in item 1 (and the rest of the items) have done is to state a conclusion of the appellant. The appellant does not tell the court the basis on which or the reason why (that is, the ground) the court should hold for the appellant as regards the question of law raised. In sum, what I see is that the question of law also doubles as grounds. That is wrong: it does not satisfy the requirements of form 11 and form LC 41.' (Own emphasis)

[9] The appellants set out the following grounds in their notice of Appeal:

(i) The Respondent was charged with misconduct and received notification of the disciplinary hearing on 9 May 2017. Following notification as aforesaid, the respondents raised an objection against the chairperson, being an employee of the appellant, and appellant appointed an external chairperson.

(ii) At the commencement of the disciplinary hearing on 16 May 2017, the respondent did not object to the appointment of the external chairperson and raised preliminary points pertaining to external representation, contrary to the internal policy of the appellant, postponement of the hearing and disclosure of the documentary evidence. When the chairperson did not find in her favour, the respondent indicated that she would not participate in the continued hearing and would excuse herself from the proceedings. Despite being cautioned of the consequences of her intended act, the respondent elected not to participate in the disciplinary hearing and left the hearing on her own volition.

(iii) It is respectfully said that the principal inquiry in the disciplinary matters is whether the proceedings were fair and a clear distinction should be made between disciplinary matters and the rigid criminal model. Also the mere association between an external chairperson and the initiator (if any) is in itself not sufficient to prove disqualifying bias, also the personal

apprehensiveness on the part of the respondent that the chairperson ruled against the respondent in respect of the preliminary points raised does constitute sufficient apprehension of bias.

(iv) In the present instance, the relationship (if any event denied) did not infringe the natural justice rule bias.

(v) Further, if it to be found that the appellant did commit a procedural irregularity sufficient to render the respondents dismissal procedurally unfair, the amount of compensation granted by the arbitrator is discordant with the unfairness of the dismissal. The learned arbitrator failed to take into account the nature and extent of the deviation from the procedural requirements, the consequences to the parties if compensation is awarded and the consequences to the parties if the compensation is not awarded whether this is an instance where no remedy should be provided despite a wrong (which is denied) having been committed.'

[10] From the grounds recorded above, it is evident that the first and Second ground or alleged ground is a mere summary of what had occurred between the parties, whereas four and five constitute mere conclusions, the third ground from the reading seems to be laying out some sort of explanation however the court is not convinced of its formulation. Furthermore I am inclined to agree with the findings of the arbitrator that an irregularity has occurred. From the record of the proceedings it appears that the chairperson and he initiator had a consultation during the course of the proceedings in private and in the absence of the respondent. What was discussed is not evident. It is however sufficient to create a reasonable suspicion of bias.

[11] Rule 23 of the Rules relating to the Conduct of Conciliation and Arbitration before the Labor Commissioner (*Arbitration Rules*) provides the following in respect of cross appeals:

'A cross-appeal may be noted by the delivery to the Labour Commissioner of a notice of cross-appeal setting out the same information required in the notice of appeal, within seven days\_after the noting of the appeal.' (Own emphasis)

[12] The Supreme Court in *Telecom Namibia Ltd v Nangolo* (SA 62/2012) [2014] NASC (25 November 2014) summarized the jurisprudence on the subject of condonation applications in the following way:

‘[5] the application for condonation must thus be lodged without delay, and must provide a “full, detailed and accurate” explanation for it. This court has also recently considered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include -

“the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent’s (and where applicable, the public’s) interest in the finality of the judgment, prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been “glaring”, “flagrant” and “inexplicable”.’

[13] The Respondents filed a Condonation application for the late filing of the Notice of cross appeal and for the filling of the Grounds of opposition. I am not persuaded that condonation should be granted. The Respondents filed their Notice to cross appeal on the 17 January 2018 and the condonation was only filed on the 6 March 2018. A month and few days passed before the Respondents action.

[14] The condonation application in the courts opinion does not provide a “full, detailed and accurate” explanation for the delay. There are times when the Respondent would have acted and did not. Moreover there are in my view no prospects of success in the cross-appeal. The learned arbitrator, in the exercise of her discretion, did not it

appropriate to reinstate the Respondent. I cannot fault her reasoning and the conclusion she came to.

[15] Thus I decline to grant the condonation for the late filing of the grounds of Appeal as well as the noting of the Cross appeal.

[16] As a result, the following orders are issued:

1. The Condonation application is dismissed.
2. The Appeal is dismissed.
3. There shall be no order as to costs.

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K. Miller  
Acting Judge

APPEARANCES:

FIRST APPELLANT

SAMUEL PHILANDER

Of LorentzAngula Inc., Windhoek

RESPONDENT

CLEMENT DANIELS

Of FB Law Chambers, Windhoek