NOT REPORTABLE

REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2017/00024

In the matter between:

TRANSNAMIB HOLDINGS LIMITED **APPELLANT**

and

BEN DANIEL NAKAMBONDE **FIRST RESPONDENT**

PHILLIP MWANDINGI N. O. **SECOND RESPONDENT**

Neutral citation: *Transnamib Holding Limited v Nakambonde* (HC-MD-LAB-APP-AAA-2017/00024) [2019] NALCMD 7 (28 February 2019)

Coram: UNENGU, AJ

Heard: **5 October 2018**

Delivered: 28 February 2018

Flynote: Labour Appeal – Appeal against an award issued by the arbitrator – First respondent filing statement with grounds for opposing the appeal late – Application for condonation of the late filing of statement refused – No good cause shown for the delay – Labour appeal – Evidence presented during arbitration proceedings does no support the finding of the arbitrator – Another arbitrator in the place of the arbitrator would have come to a different conclusion.

Summary: Labour appeal in terms of s 89(1)(a) of the Labour act 11 of 2007. Appellant lodged an appeal against an award issued in favour of the first respondent. Even though first respondent filed notice to oppose the appeal timely, he delayed to file the statement with grounds for opposing the appeal. The court declined to accept the explanation offered for the delay and *held* that the first respondent failed to show good cause therefore, the condoning of the non-compliance thus rejected and dismissed the application. Further, the court *held* that the award was wrong because the evidence presented in the arbitration proceedings does not support the conclusion reached by the arbitrator. The appeal upheld and the arbitrator award set aside.

ORDER

(i) The application for condonation for the late filing of the statement in terms of rule 17(16)(b) is declined and as such dismissed.

(ii) The appeal against the whole award by the arbitrator issued on 16 October 2017 is upheld.

(iii) The whole award issued by the arbitrator on 16 October 2017, specifically paras 1, 2. 3 and 4 of the award is hereby set aside.

JUDGMENT

UNENGU, AJ:

[1] The appellant is appealing against the award issued by the second respondent on 16 October 2016 in favour of the first respondent, Mr Ben Daniel Nakambonde.

[2] The appeal is directed against the whole award by the arbitrator when he found that the first respondent's dismissal was not effected for a valid and fair reason and ordered the re-instatement of the first respondent by the appellant.

[3] The appellant in its notice of appeal also asks the court to be granted the following order as relief, namely:

'1. Setting aside the arbitrator's finding/ruling that the first respondent's dismissal was unfair;

2. Setting aside the arbitrator's finding/ruling that the appellant failed to prove that the first respondent was dismissed for a fair and valid reason;

3. Setting aside the arbitrator's finding/ruling that the first respondent's dismissal was unfair;

4. Setting aside the arbitrator's finding/ruling that the first respondent be reinstated into the employ of the appellant; and

5. Setting aside the arbitrator's finding/ruling that the appellant should pay the first respondent an amount of N$207 755.24.'

[4] The questions of law for the appeal relied upon by the appellant as required by s 89 (1)(a) of the Labour Act, are the following:

'(a) Whether the dismissal of the first respondent was unfair, particularly in circumstances where the employer (appellant) placed evidence implicating the first respondent in the commission of the transgression for which he was charged and dismissed;

(b) Whether the finding of the arbitrator that the first respondent's dismissal was not for a valid reason is, in law, sustainable or correct;

(c) Whether the finding of the arbitrator that the dismissal of the first respondent's was not for a valid reason is, sustainable and or correct; and

(d) Whether the finding of the arbitration that the appellant did not follow a fair procedure is, in circumstances of this matter, legally sustainable and or correct; and

(e) Whether the decision of the arbitrator to order reinstatement of the first respondent was reasonable, particularly where the first respondent, *mero motu,* placed direct evidence of his hostility towards to appellant by amongst others alleging that his superiors are corrupt, they are criminals and that they have engineered a conspiracy against him'

[5] Meanwhile the questions of law indicated above, are supported by the grounds that the arbitrator erred in assessing the evidence by and not applying the direct evidential principles that Dikuua, the young passenger on the train paid a total amount of N$120-00 to the first respondent for the trip, that the learned arbitrator failed to properly take cognisance of this direct evidence notwithstanding the fact that this direct evidence was not challenged in any reasonable manner, that the learned arbitrator ignored undisputed evidence to decide the dispute that was before him namely, whether the first respondent was dismissed fairly and for a valid reason, the arbitrator incorrectly held that when deciding the issue in dispute before him he also has to consider peripheral allegations such as conspiracy and corruption against senior officials of the company; the company itself and the relationship between Dikuua and his mother which irrelevant considerations had influenced him to ignore direct, uncontroverted and admissible evidence, thereby failed to correctly consider and apply the rules of evidence; that the arbitrator incorrectly found that the appellant failed to prove that the dismissal was for a fair reason; incorrectly found that there was conspiracy against the first respondent by fellow employees in the employment of the appellant; to order re-instatement of the first respondent which order was unreasonable that a reasonable arbitrator would not have made considering the accusations of corruption of criminal

disposition and of a working environment marred by lawlessness and conspiracy and lastly, the arbitrator applying a standard of proof of beyond reasonable doubt which is a standard of proof applicable to criminal matters instead of a standard of proof on a balance of probabilities applicable to civil law.

[6] Briefly, the background of the matter is the following. The first respondent was an employee of the appellant. He was charged with three counts of misconduct, namely theft, misappropriation of funds and disobedience. He was found guilty of all three counts in a disciplinary hearing conducted against him and was dismissed.

[7] An appeal to the internal appeal body of the appellant failed and as a result the first respondent referred a dispute of unfair dismissal to the Office of the Labour Commissioner.

[8] The Labour Commissioner designated Mr Philip Mwandingi to conciliate and arbitrate the dispute. At the conclusion of the arbitration, Mr Mwandingi made an award in favour of the first respondent finding that the first respondent was unfairly dismissed and ordered the appellant to re-instate the first respondent. This was done after concluding that the dismissal of the first respondent was not in accordance with a correct and fair procedure and for a fair and valid reason.

[9] Mr Coetzee represented the first respondent in the arbitration hearing while the appellant was represented by Mr Visser.

[10] Aggrieved by the findings in the award, the appellant filed notice to appeal from the whole award on the questions of law and grounds indicated above in the judgment. This was done on 14 November 2017. No re-action was forthcoming from the respondent, even though notice of intention to oppose the appeal was filed.

[11] On 21 November 2018, the appellant filed its amplified questions of law and grounds of appeal, where upon the first respondent was supposed to file his statement

of opposition with grounds in terms of rule 17(16)(b) 21 days after receipt of the record on the 12 July 2018. This, the first respondent did not do. He only managed to file the statement of opposition with grounds thereof on 20 August 2018, a month and eight days later accompanied by an application for condonation for the late filing of the statement and the grounds.

[12] The appeal was argued before me on 7 September 2018 with Mr Pathela acting on behalf of the appellant and Mr Beukes for the first respondent. Both counsel filed comprehensive heads of argument for the convenience of the court. Counsel referred the court to various case law and legal principles relevant and applicable to the present appeal.

[13] As pointed out hereinbefore, the first respondent filed his statement with grounds opposing the appeal late, which was accompanied by an application asking the court to condone the late filing.

[14] The provisions of rule 17 (16)(a) and (b) read as follows:

‘(16) Should any person to whom the notice of appeal is delivered to oppose the appeal, he or she must-

(a) Within 10 days after receipt by his or her of the notice of appeal or any amendment thereof, deliver notice to the appellant that he or she intends so to oppose the appeal on Form 12, and must in such notice appoint an address within eight kilometres of the office of the registrar at which he or she will accept notice and service of all process in the proceedings; and

(b) Within 21 days after receipt by his 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 opposed the appeal together with any relevant documents.’

[15] It is clear from the word “must” used in the rule that it is peremptory that should any person to whom a notice to appeal is delivered wish to oppose appeal, he/she must comply with the provisions of paras (a) and (b) of sub-rule 17(16) above.

[16] To determine the appeal, this court had to consider it upon the basis of the record of the arbitration proceedings, the grounds of appeal and the respondent’s grounds of opposition[1].

[17] The grounds to oppose an appeal are important because they inform the arbitrator, the appellant and the court on which part of the arbitration award is been attacked and which the first respondent supports[2].

[18] In the appeal at hand, the first respondent defaulted to deliver and file the statement as required by rule 17(16)(b) with grounds opposing the appeal. The statement with grounds was filed with the application to condone the non-compliance with rule 17(16)(b) late as already stated.

[19] Non-compliance with the Rules of the Labour Court or the Rules of the Court, is a serious transgression of the law which can only be condoned by court on good cause shown by an applicant.

[20] The Supreme Court in the matter of *Arangies t/a Auto Tech v Quick Build*[3], O’Regan, AJA stated the following with regard to the applications for condonation:

‘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 reconsidered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. This 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*

[1] Benz Building Suppliers v Stephanus & Others 2014 (1) NR 283 at 288D.
[2] Benz Building Suppliers v Stephanus & Others above.
[3] 2014 (1) NR (SC) at 189-190 E-B.

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, the 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.'

[21] These factors are not individually determinative, but must be weighed, one against the other. The Supreme Court at times, has held, for example, 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. (See also *Fereira v Ntshingila* 1990 (4) SA 271 (A) at 2018 G.

[22] Questions which arise in the present application for condonation of the late filing of the statement with grounds for opposing the appeal are; did the first respondent in the application lodge his application for condonation without delay and provided a full detailed and accurate explanation for the delay or the non-compliance with rule 17(16)(b); is the explanation for the non-compliance with the rule in question reasonable and *bona fide*?

[23] The answer to the question as to whether the first respondent lodged his application for condonation without delay and whether he had provided a full, detailed and accurate explanation for it, is in my opinion, negative. Time was wasted unnecessary by the former legal representatives of the first respondent in the persons of Messrs Mbudje and Brockerhoff. Therefore, the application for condonation was not lodged without delay.

[24] Mr Mbudje failed to provide an explanation under oath nor did he provide a confirmatory affidavit to confirm what Mr Beukes attempted to explain in his affidavit. The fact that there were disagreements and squabbles between Messrs Mbudje and Brockerhoff in the running of the practice cannot, in my view, justify the non-compliance with rule 17(16(b) nor cannot it be regarded as good cause for the non-compliance or reasonable in the circumstances of this application.

[25] Similarly, this court cannot accept as good cause shown and reasonable explanation for the non-compliance with the rule for a legal practitioner (Mr Brockerhoff) to state that he does not know to file a statement with grounds for opposition in terms of rule 17(16)(b), because he practices in criminal cases therefore he lacks knowledge of civil practice.

[26] Lack of knowledge in civil practice or labour matters is his personal problem which cannot serve as an excuse for not performing one of his core-function as a legal practitioner practicing law. I reject that explanation.

[27] M Beukes when briefed by Mr Brockerhoff to represent the first respondent, also did not deem it urgent to lodge the application for condonation without delay. Instead wasted time on other matters. He knew that the first respondent did not file the statement with grounds for opposition but failed to act without delay to lodge the application. I am in agreement with what Mr Smith has stated in his answering affidavit and reject the version of the first respondent as painted in the founding and confirmatory affidavits on his behalf by his two legal practitioners.

[28] Mr Beukes knows well that it is trite law that condonation of the non-compliance with the rules of this court is by no means a formality. The applicant (first respondent) has to satisfy this court that there is sufficient cause for excusing him from compliance[4]. Mr Beukes failed to do that on behalf of his client. The first respondent has chosen Mr Beukes to represent him, so he has to stomach mistakes by Mr Beukes.

[29] I approve of and adopt the principles laid in the matter of *Indigo sky Gem (Pty) Ltd v Johstone*[5] by Gibson, J when the following was said:

'The crux of the matter is that there appears to have been a flagrant breach of the rules of Court. Given that course of conduct, my attitude is that the court can only ignore such attitude

[4] Saloojee NNO v Ministry of Community Development 1965 (2) SA 135 (A) at 138 E-H.
[5] 1997 NR 239 (HC).

at its peril and to its own prejudice in the running and administration of the court's business. Thus my view is that such failure cannot be overlooked in the circumstances of this case because to do so *would encourage laxity in the preparation of court pleadings. If rules are only to be followed when a legal practitioner sees fir to do so, then the Rules may as well be torn up.'* (Emphasis added)

[30] That being the case, I am not persuaded by the first respondent (the applicant) to exercise my discretion in his favour to grant him condonation for the non-compliance with rule 17(16)(b) of the Labour Court Rules. He failed to show good cause for the non-compliance.

[31] In the result, I decline to condone the non-compliance with the provisions of rule 17(16)(b) and dismiss the application.

[32] I will now proceed to consider the grounds of appeal raised by the appellant against the award on the basis that these grounds are unopposed.

[33] As pointed out before in the judgment, grounds of opposition are important and useful in the determination of appeal proceedings. The grounds inform the arbitrator, the appellant and the court of the grounds on which the arbitration award the appellant is attacking and which the respondent is supporting[6]. Such grounds are, however, absent in this appeal. One grounds of appeal the appellant raised against the findings of the arbitrator in the award is found in para 4 of the Notice of Appeal Form 11. In para 4 of the notice the appellant alleged as follows:

'4.1 There was no basis in law upon which the arbitrator could lawfully come to those conclusions, findings and/or decisions;

4.2 On a proper evaluation of the facts and factors placed before him, the arbitrator erred in law in failing to conclude that the appellant was dismissed fairly and for a valid reason;

[6] Benz Building Suppliers v Stephanus & Others above, para 13.

4.3 On a proper evaluation of all the relevant evidence placed before the Arbitrator, the aforementioned findings, conclusions, judgment and/order should not have been made as they are wrong and/or incorrect in law; and/or

4.4 In reaching the aforesaid conclusions, the arbitrator reached conclusions, findings which no reasonable arbitrator could have reached.'

[34] The analysis of the evidence in the arbitration proceedings is found in para 8 from para 129 of the record to para 142. In his assessment of evidence, in particular the evidence presented by witnesses who testified on behalf of the appellant, the arbitrator was quick to discredit a witness for this or the other reason. He accused them for conspiracy against the first respondent even though the witnesses denied conspiring against the first respondent.

[35] The arbitrator seems to have accepted the first respondent as a truthful witness among the several witnesses called by the appellant, including the boy Dikuua and Amunyela.

[36] Remember, the standard of proof in labour matters is one on the balance of probabilities and not beyond a reasonable doubt. The evidence of both Dikuua and Amunyela has not been challenged to deserve rejection by the arbitrator.

[37] The summary of the evidence of first respondent is found in para 120 of the award where it is stated: "The applicant is denying any knowledge of this young boy and only saw him when he came to testify at the disciplinary hearing". This is wrong and contrary to what the first respondent testified that he could have missed Dikuua on the train because he (Dikuua) is an opportunist, that he was planted on the train at Usakos by Eiseb. He conceded the possibility of Dikuua to be in the train and does not deny the possibility of Dikuua giving him the money either. Is Amunyela also an opportunist planted on the train to conspire against him with officials of TransNamib? If the answer is yes, by whom was Amunyela planted and in which town was he planted?

[38] The version of the first respondent cannot be a probable version of the events which happened on the train that night. To level adverse allegations against every witness who testified against him in the disciplinary hearing, the whole internal appeal body (committee) and those who testified against him in the arbitration proceedings *per se* is not enough to rebut strong evidence presented against him by the appellant.

[39] I find the version of the appellant in the arbitration proceedings more probable, in view of the unchallenged direct evidence of Dikuua and Amunyela than that of the first respondent. It is highly improbable that all people who were involved in the matter are his enemies who teamed up against him to get rid of him. I think they are correct in denying such a conspiracy against the first respondent.

[40] Therefore, and on the evidence as a whole presented before him, the arbitrator should not have come to the conclusion he came to. The conclusion reached is wrong, not supported by the evidence adduced in the proceedings and is against the legal principles of the law of evidence. Another arbitrator in his position, faced with the same evidence, would have come to a different conclusion than the one reached by Mr Mwandingi in this appeal.

[41] Having said that and for reasons coupled with authorities stated above, I am satisfied that on this ground of the appeal alone the appellant has managed to persuade the court on a balance of probabilities to grant him the order sought in para 1 Part A of the Notice of appeal. That being so, I do not deem it necessary to consider other grounds of appeal against the award.

[42] In the result, the following order is made:

(i) The application for condonation for the late filing of the statement in terms of rules 17(16)(b) is declined and as such dismissed.

(ii) The appeal against the whole award by the arbitrator issued on 16 October 2017 is upheld.

(iii) The whole award issued by the arbitrator on 16 October 2017, specifically paras 1, 2. 3 and 4 of the award is hereby set aside.

EP Unengu

Acting Judge

APPEARANCES

APPELLANT:	TC PATHELA Instructed by ENS Africa Namibia Incorporated as Lorentzangula Inc., Windhoek
FIRST RESPONDENT:	F BEUKES Metcalfe Attorneys, Windhoek