REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between: Case no: HC-MD-LAB-APP-AAA-2020/00067

LANGER HEINRICH URANIUM (PTY) LTD **APPELLANT**

and

JOHN PAVEY FLOOK **RESPONDENT**

Neutral citation: *Langer Heinrich Uranium (Pty) Ltd v Flook* (HC-MD-LAB-APP-AAA-2020/00067) [2021] NALCMD 25 (23 April 2021)

Coram: GEIER J

Heard: **23 April 2021**
Delivered: **23 April 2021**
Released: 21 May 2021

Flynote: Labour court – Appeal - Rule 17(19) – deeming provision contained in rule 17(19) – application made for a hearing date 3 days before the expiry of the 90 day prosecution period set in rule 17(25) – such application made in the acute knowledge that the appeal had been noted out of time by a considerable period and in respect

of which a condonation application was pending, which had not yet been determined – application in terms of rule 17(19) also deliberately made in order to obtain the benefit of the deeming provision contained in rule 17(25) – for this purpose it was also not disclosed to the assistant registrar that the required condonation in terms of the pending condonation application was still pending and had not been obtained – when it became clear that the set down appeal could not be heard for those reasons appellant applied for directions that the matter be referred back to the registrar for the assignment of a new hearing date –

The court refused that request and struck the appeal from the roll with costs as a pre-mature request for the assignment of a hearing date simply made in order to obtain the benefit of the deeming provision contained in rule 17(19) did not result in an appeal that was 'in fact duly prosecuted' – particularly this was also so - as – to the knowledge of the appellants' legal practitioner's - such date would in all probability not have been assigned it the true facts pertaining to the pending condonation application would have been disclosed to the assistant registrar – it was accordingly held that the appeal had lapsed as the deeming provision contained in subrule 17(19) had not been effectively triggered –

The request to refer the matter back to the office of the registrar for the assignment of a new date for the hearing of the appeal was also refused for the additional reason that it was not even clear, whether there would be any purpose in such exercise because of the possibilities that arose from the outcome of the pending condonation application.

Summary: The facts appear from the judgment.

ORDER

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1. The appeal is struck from the roll;

2. The appellant is to pay the respondent's wasted costs occasioned as a result, such costs to include the costs of one instructed- and one instructing counsel.

JUDGMENT

GEIER J:

[1] The background to these proceedings, this morning. is an appeal which was struck by this court on the 13th of November 2020. No further activity seems to have occurred on that particular case.[1]

[2] Consequent to that striking, the appellant noted a fresh appeal. This is the one that was set down for hearing this morning.[2]

[3] A few days after the noting of the second appeal, the appellant, obviously realising that the second appeal had been noted out of time, also brought an application for the condonation for the late noting of the second appeal, together with certain additional relief.

[4] That application was brought as a substantive application under a separate case number, and, as it was opposed, it was assigned to Masuku J, who then managed that application further.[3]

[5] Although this aspect did not feature in argument before me this morning, it should possibly also be mentioned that, in the substantive application, brought under case HC-MD-LAB-MOT-GEN-2020/00282[4], even a further urgent application was launched during April of this year.

[6] Important for this matter is however that the parties to case HC-MD-LAB-MOT-GEN-2020/00282 eventually suggested a hearing date to the managing judge for May of this year. The managing judge disagreed as he apparently wanted the have the matter heard in March. The parties apparently then agreed that the issues which were brought before the court in case HC-MD-LAB-MOT-GEN-2020/00282 be

[1] HC-MD-LAB-APP-AAA-2020/00028.
[2] HC-MD-LAB-APP-AAA-2020/00067.
[3] HC-MD-LAB-MOT-GEN-2020/00282.
[4] i.e. The one pending before Masuku J.

determined on the papers, as a result of which the judge directed that he would deliver his judgment on the 1st of April 2021. As the judgment was not ready on 1 April 2021, the delivery date was postponed to a date in May 2021.

[7] Against this background it became clear that the appeal, that is the second appeal, which has been set down for hearing, before me, under case HC-MD-LAB-APP-AAA-2020/00067, could not proceed.[5]

[8] As a result, Mr Philander, on behalf of the appellant, filed two requests for directions[6]. In those requests he essentially requested that the matter be referred back to the Registrar for the allocation of new hearing dates.[7]

Argument

[9] Mr Muhongo who appeared on behalf of the appellant agreed that the matter was not ripe for hearing today and he urged the court not to strike the matter from the roll, as that would not be the appropriate order and that this would not be fair to the parties and that they should be granted the opportunity to be heard. He made much of the fact that the reason why the matter could not proceed this morning, was not of the parties' own making. He asked the court to also consider the effect of the striking of the matter, which would not be in the interests of justice.

[10] During argument the court raised the issue of the answers that were recorded in the 'Labour Check List' of the Registrar, in this case, the Assistant Registrar Ms Sikongo, and which check list is compiled on the occasion on which the parties come to the registrar to get a date assigned for the hearing of an appeal.

[11] The particular check list in this instance was compiled on the 17th of February 2021 – and - what was disconcerting to the court - were the answers that were recorded to the questions which must have been posed in terms of paragraphs 6 and 7 of the list and the answers that were recorded as a result.

[5] It had become clear that the condonation for the out of time noting of the second notice of appeal and the reinstatement of the second appeal had not yet been determined.
[6] The first request was made on 20 April 2021 and the second one on 21 April 2021.
[7] I suppose depending on what the outcome of the judgment, which is to be delivered by Mr Justice Masuku, would be.

[12] Here it was firstly indicated, under paragraph 5, in response to the question: 'How many calendar days had occurred between the noting of the appeal and its prosecution, that this was done within a period of 83 days.

[13] The next question was: *'Was the appeal timeously prosecuted or did it lapse?'* The answer there was a simple *'yes'*.

[14] In paragraph 7, and in response to the question: *'If it lapsed is there a court order reinstating the appeal',* the answer *'not applicable'* was recorded.

[15] It thus became relevant- and counsel where then requested to obtain instructions in this regard - how it came about, that the answers where recorded in the particular fashion that they were.

[16] After having obtained instructions from Mr Haraseb, Mr Muhongo, indicated to the court that Mr Haraseb had attended on the particular occasion at the registrar's office and that the request for the assignment of the hearing date, was made solely for the purpose of ensuring that the second appeal noted in this case, would be prosecuted within the prescribed 90 day period.

[17] Mr Muhongo then continued with argument and he then submitted to the court that the appellant really 'found itself between a rock and a hard place', given the background occurrences which had happened in this matter and he again emphasized that the appellant would not have been in the position that it found itself today, if Justice Masuku would have given his judgment on the 1st of April 2021, as was originally intended.

[18] Mr Barnard submitted in response that these problems where of the appellant's own making and could not be ascribed to Justice Masuku as at the time that notice was given to meet at the registrar's offices, for purposes of assigning a date on the 4th of February 2021 and also again on the 17th of February 2021, when the date was assigned, those problems where not yet known because it only became clear later that Judge Masuku initially intended to deliver his judgment on the 1st of April 2021 and then again in May.

[19] Mr Barnard then explained how it came about that the judgment was reserved for the 1st of April 2021 and extended to May 2021.[8] He then referred to *Namibia Seaman & Allied Workers Union v Tunacor Group Ltd* v 2012 (1) NR 126 (LC) in which Mr Justice Hoff had considered the meaning of the words 'frivolous and vexatious' in the context of the applicable labour legislation, for purposes of determining when a costs order, which in the normal course of events is not made in labour cases, should be made.

[20] Mr Barnard requested that the matter be struck from the roll with costs, as its setting down was frivolous as the appropriate mechanism, which should have been utilized, by the appellant, was to have applied for an extension of the time period set in the rules for the prosecution of appeals, instead of setting the matter down, when it was clear to all the parties, that condonation for the late noting of the appeal would first be required. The exercise of setting the appeal down on the 17th of February 2021 was thus an abuse of process which should attract a costs order.

[21] After taking instructions from Mrs Bazuin who also attended at the registrar's office on the occasion of the assignment of the hearing date, he informed the court that she did point out to the assistant registrar that the first appeal had been struck off the roll.

[22] In reply, Mr Muhongo submitted that as the *Namibia Seaman & Allied Workers Union v Tunacor Group Ltd* case was decided against different facts, it should be distinguished. He reiterated the request made on behalf of his client that the matter be remitted back to the registrar's office for the opportunity to obtain a new date for the hearing of the appeal. As far as the 'Labour Check List' and the answers recorded there was concerned, he repeated that the sole purpose for that was the obtaining of a date on that occasion in order to beat the '90 day deadline' which is set for the prosecution of appeals.[9]

[23] Importantly he agreed with the court that would the proper and full facts pertaining to this matter have been placed before the assistant registrar, in all

[8] These aspects have already covered in the introductory portion of this judgment.

[9] See Rule 17(25) as read with Rule 17(19) of the Labour Court Rules.

probability, no date for the hearing of this appeal would have been assigned on the 17th of February 2021. He submitted that the date was thus assigned rightly or wrongly, but that the purpose, for which this was done, was clear and he thus requested that the case should not be struck and that no order as to costs should be granted.

Resolution

[24] When it comes to the consideration of these arguments against the background facts of this matter, one thing becomes very clear - in fact that aspect is actually common cause – namely - that in all probability - the registrar would never have assigned a date for the hearing of this appeal if it would have been disclosed that such appeal would first require condonation for its late noting and also its reinstatement. This would particularly have been so as both parties' legal practitioners knew very well that the second appeal was noted way out of time by a substantial period, which aspect was also not disclosed.

[25] The other important aspect which must have a bearing on this matter, as was argued, is the fact that there was nothing that precluded the appellant to have sought an extension of the 90 day period prescribed in the rules, prior to the expiry of the 90 day prosecution period set in Rule 17(25) of the Labour Court Rules.

[26] It is not as straightforward as Mr Muhongo tries to make out, that the hearing date, in such circumstances, was applied for, rightly or wrongly. On the facts of the matter, it must have been clear - and it should have been clear - and probably was - to both Mr Philander and Mr Haraseb - (I am not entirely sure who played the bigger role in this) – that - when a date for the hearing of the appeal was deliberately requested some 83 days after the noting of the second appeal in order to beat the 90 day deadline, that an application for the extension of the 90 day prosecution period would really have been the appropriate route to follow. I say that this would have been the appropriate mechanism to follow because applications of this nature are very common.[10] They are brought for various reasons and they are normally brought on a Friday in the first motion court. Very often the reason for requesting an

[10] See for instance: *Katima Mulilo Town Council v Muyoba* (HC-MD-LAB-APP-AAA-2017/00019) [2019] NALCMD 39 (20 September 2019) at [53].

extension of the 90 day period is because the record is not available from the decision maker or from the Labour Commissioner's Office. In this case it would have been an easy matter for the appellant to have brought a simple application in the first motion court, requesting an extension of the 90 day period on the basis that an application for condonation was pending before Justice Masuku and that for that reason the 90 day period for the prosecution of the second appeal should be extended.

[27] It is further common cause - and this is the other crucial factor in the background of this matter - that the request for the assignment of the hearing date was made shortly before the 90 days period set by the rules would have expired and that the request was intentionally made in order to beat the 90 day deadline in the course of which it was also misrepresented that the appeal was not reinstated through a court order. Of course the rule which then kicked in resulted only in a seemingly duly prosecuted appeal. It is however only if such hearing date would have been applied for within the 90 day period, in compliance with all the other applicable rules, that this will actually result in a properly prosecuted appeal.

[28] In *Katima Mulilo Town Council v Muyoba* (HC-MD-LAB-APP-AAA-2017/00019) [2019] NALCMD 39 (20 September 2019) this court also had occasion to deal with a deliberate premature request for the assignment of a hearing date which request was made precisely for a similar purpose and where counsel in that case also, instead of requesting an extension of the 90 day period, rather opted to apply for a hearing date in order for the deeming provision to kick in. The court ruled in that case that the request for the assignment of a hearing date in such circumstances would not result in a properly prosecuted appeal. I believe that the same considerations, *mutatis mutandis,* apply in this case. [11]

[29] It is common cause that a date should never have been assigned and would not have been assigned if all the relevant facts would have been placed before the Assistant Registrar and the deeming provision for the prosecution of this appeal can obviously also not take effect for those reasons.

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[11] Compare: *Katima Mulilo Town Council v Muyoba* at [49] to [60].

[30] All this means, in the final equation, that the second appeal, which the appellant has launched in these proceedings, was noted and prosecuted out of time and was never properly prosecuted within the 90 day period and that the appellant is thus not shielded by the deeming provision of rule 17(25). On the basis of this conclusion it is already clear that this appeal should be struck for those reasons alone.

[31] Mr Muhongo has however pleaded with the court vehemently not to strike the appeal from the roll, but to rather remit the matter back to the registrar's office for the assignment of a new hearing date. Clearly such a remittal back would serve no purpose in the circumstances of this case, where this appeal was not prosecuted within the 90 day period and has lapsed, never mind the outstanding condonation which is required for the late noting of the appeal. Also this factor militates towards a striking of the appeal.

[32] Would such a referral back thus be in the interests of justice just because Mr Muhongo has urged the court not to strike the matter? Such argument can clearly not prevail in circumstances where the appellant is really, and deliberately so, the author of its own demise and where the benefit was procured through a misrepresentation and, where on the receiving end of all this, is a respondent, who is facing extensive litigation, by a powerful cooperate entity, as a private individual.

Costs

[33] In any event, Mr Barnard has requested the court to issue a costs order, and he does so on the basis of the submission that, when a hearing date was applied for in February of this year, that this was an abuse of process and that such conduct thus falls within the ambit of the statute[12] and the word 'frivolous' and the meanings that are assigned to that word.[13] I agree with that submission. Particularly I agree with the submission as the hearing date was applied for in the acute knowledge that condonation for the late noting of the appeal had not yet been obtained. In other words it was foreseeable if that condonation would not be obtained[14], that the date,

[12] Section 118 of the Labor Act 2007 " … the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.'
[13] See for instance: *Namibia Seaman & Allied Workers Union v Tunacor Group Ltd* at [16] to [21].
[14] or timeously obtained.

the effort and the costs that went into having a date assigned for the hearing of the appeal would have been futile.

[34] It is for the reasons given above that I decline the request to refer the matter back to the office of the registrar for the assignment of a new date for the hearing of this appeal and also for the additional reason that is not even clear at this stage, whether there would be any purpose in this exercise because of the possibilities that arise from the outcome of the case which is pending before Masuku J.

[35] Accordingly I strike this appeal from the roll - also for the additional reason that the appeal has lapsed - and I direct that the appellant pay the resultant costs, such costs to include the costs of one instructed- and one instructing counsel.

H GEIER

Judge

APPEARANCES

APPELLANT:	T Muhongo Instructed by LorentzAngula Inc., Windhoek
RESPONDENT:	PCI Barnard Instructed by Bazuin Legal Practitioners, Windhoek