

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-GEN-2019/00339

In the matter between:

HENDRINA THIRION

APPLICANT

and

**LOVEMORE MUGHANDIRA
LABOUR COMMISSIONER
UNIVERSITY OF NAMIBIA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Neutral Citation: *Thirion v Mughandira & Others* (HC-MD-LAB-MOT-GEN-2019/00339
[2021] NAHCMD 26 (26 May 2021))

CORAM: MILLER AJ

Heard: 05 February 2021

Delivered: 26 May 2021

ORDER

- (a) The application for condonation is granted.
- (b) The third respondent must file its notice to oppose not later than 16h00 on 04 June 2021.
- (c) The third respondent must file its answering affidavit not later than 16h00 on 11 June 2021.
- (d) The applicant must file, a replying affidavit, if so advised by not later than 16h00 on 25 June 2021.
- (e) Once the answering and replying affidavits are filed the Registrar is directed to allocate the matter to a managing judge.
- (f) There shall be no order as to costs.

Judgment

MILLER AJ:

[1] On 12 November 2020 the applicant launched an application in the Labour Court on the following terms:

1. To rescind the Labour Court Order handed down under Case Number LC 75/2017 (14 September 2018, Coram Geier, J.) and,
2. To nullify the parties' agreement that came into existence on 14 September 2018 and which was made an Order of this Court on same date, and
3. To rescind and nullify the Arbitration Award issued under Case Number CRWK 804-13 (22 March 2019, Mughandira, L.) resultant from the agreement in (b) above that was made an Order of the Labour Court, and
4. To order that the original Arbitration Award issued under Case Number CRWK 804-13 (11 April 2017, Mughandira, L.) shall stand and be made an Order of this Labour Court, and

5. To order that the arbitration Award in (d) above shall take full force and effect as on 11 April 2017, AND that the accompanying affidavit of the applicant THIRION (Naudé) H. will be used in support of the application'

[2] The third respondent now seeks condonation for its failure to timeously file the Notice of Opposition. The relief it seeks is formulated in the following terms:

- '(a) Grant condonation for late filing of Third Respondent's Notice to Oppose;
- (b) Grant relaxation and relief from any sanction as a result of the non-compliance of Third Respondent.
- (c) Grant relaxation to Third Respondent to file answering affidavit;
- (d) Further and/or alternative relief.'

[3] The applicant appears in person and the third respondent is represented by Mr de Beer.

[4] The issue between the applicant and the third responded has a long history dating back to the year 2013, when the third respondent sought to retrench the applicant. Following an initial skirmish before the Labour Commissioner, during arbitration proceedings presided over by the first respondent, the matter came to the Labour Court.

[5] On 14 September 2018 the Labour Court made an order under case No. LC 75/2019. The finding by the first respondent, that the applicant was wrongfully dismissed was confirmed. However, the issues of re-instatement or compensation was referred back to the Labour Commissioner for determination which was done.

[6] As is apparent the applicant now effectively seeks the rescission of Labour Court's order ordered dated 14 September 2018 and some consequential relief.

[7] The third respondent accepts it did not timeously filed the required Notice to oppose the main application, which should have been filed by 22 November 2020. In the founding affidavit which was deposed to by Professor Kenneth Matengu, seeks to

explain the circumstances which gave rise to the failure to oppose the matter timeously.

He explains the situation as follows:

'6. At this juncture I wish to briefly outline the history of the matter:

6.1 On 12 August 2013, the Human Resources Committee of the Council resolved that Prof Naudé will be retrenched, which decision was ratified during a meeting of Council on 21 November 2013.

6.2 Applicant applied for referral of the dispute based on allegations of unfair dismissal to the Office of the Labour commissioner and arbitration took place with case number CRWK 804-13.

6.3 The arbitration award was issued on 11 April 2017 in favour of Applicant.

6.4 On 10 May 2017 Third Respondent filed a Review Application to the Labour Court under case no. LC 75/2017 for the review and setting aside the arbitration award.

6.5 On 9 May 2017, the council of Third Respondent resolved inter alia that a Review and/or Staying application and or Appeal be initiated against the arbitration award. I refer the honourable Court to the content of a copy thereof attached hereto marked annexure "A".

6.6 On 11 May 2017 Dr. Ellen Ndeshi Namhila signed a Power of attorney appointing Pieter de Beer at De Beer Law Chambers. I refer the Court to the content of copy thereof marked as annexed as "B" attached hereto. I am informed that the original documents of "a" and "B" were filed under case number LC 75/2017.

6.7 On 14 September 2018, the honourable Mr Justice Geier issued an order based on an agreement reached between the parties with the effect that the conclusion of unfair dismissal stands but that the compensation and reinstatement parts were set aside and was referred back to the Arbitrator for adjudication.

6.8 Applicant and Third Respondent accepted the court order and participated in the arbitration process.

6.9 On 22 March 2019, the arbitrator (First Respondent) issued the arbitration award pertaining to the compensation to be paid to Applicant. Their Respondent accepted the outcome.'

[8] The facts stated by Prof. Matengu are confirmed by Ms Brinkman, who is the legal advisor of the third respondent.

[9] The applicant does not in essence dispute the facts stated by Prof. Matengu.

[10] The applicant in her answering affidavit raise a number of points *in limine*. Whatever the merits or otherwise of those are, they are in my view, best left to be considered by the court having the main application in the event that I am inclined to grant the condonation application.

[11] The court will grant condonation only in the event that an applicant seeking condonation shows good cause. What constitutes good cause depends in terms of the following consideration:

‘11.1 There must be a reasonable and acceptable explanation for the non-compliance and

11.2 The applicant must show good prospects of success.’

[12] In *Trentyre Namibia Limited vs Scholtz*¹ Gorbett AJ, stated that:

‘I am in agreement with Mr Barnard, who appeared for the applicant, that where a party has been in default the enquiry is not whether or not to penalise a party for failure to comply with the rules of court. In applications for condonation the factors usually weighed by the Court include –

“the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice... The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed”.’

[13] With reference to 11.1 above the explanation afforded by Prof. Matengu, although regrettable does not strike me as being unreasonable. It is quite conceivable that in a large institution such as the third respondent is, mistakes of this kind may occur from time to time. It is likewise of importance that the third respondent took prompt steps to seek condonation for the failure.

¹ *Trentyre Namibia Limited vs Scholtz* NLLP 2013 (7) LCN

[14] The applicant seeks the rescission of a court order made in consequence of an agreement between the applicant and the third respondent. It cannot be said that in those circumstances the third respondent has not prospect of success of the main application becomes opposed.

[15] I will therefore make the following orders

- (a) The application for condonation is granted.
- (b) The third respondent must file its notice to oppose not later than 16h00 on 04 June 2021.
- (c) The third respondent must file its answering affidavit not later than 16h00 on 11 June 2021.
- (d) The applicant must file, a replying affidavit, if so advised by not later than 16h00 on 25 June 2021.
- (e) Once the answering and replying affidavits are filed the Registrar is directed to allocate the matter to a managing judge.
- (f) There shall be no order as to costs.

K MILLER
Acting Judge

APPEARANCES:

APPLICANTS:

H. Thirion
17 Swembadweg
Otjiwarongo
Namibia

1st RESPONDENT:

LOVEMORE MUGHANDIRA
Office of the Labour Commissioner, Windhoek,
Namibia

2nd RESPONDENT

OFFICE OF THE LABOUR COMMISSIONER,
WINDHOEK, NAMIBIA

3rd RESPONDENT

Mr P de Beer
De Beer Law Chambers