

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2021/00032

In the matter between:

B2GOLD NAMIBIA (PTY) LTD

APPLICANT

and

HILENI SHITULA

1ST RESPONDENT

LAYHA DUMENI N.O.

2ND RESPONDENT

Neutral Citation: *B2Gold Namibia (Pty) Ltd v Shitula* (HC-MD-LAB-APP-AAA-2021/00032 [2021] NALCMD 42 (16 September 2021)).

CORAM: MASUKU J

Heard: 14 May 2021

Delivered: 16 September 2021

Flynote: Labour Law – The duty to dispatch the record of proceedings – Rule 17(7) – Steps that can be taken to avoid delays in the dispatching of the record discussed.

Summary: This is an application for a reinstatement of an appeal. The applicant's counsel brought to light the shortcomings of the Labour Act in so far as it relates to the provision of the record of proceedings. It is common cause that once an appeal has been launched against an award by an arbitrator, the arbitrator is in duty bound to

provide the record of proceedings. In this instance the Office of the Labour Commissioner failed in this mandate, as a result thereof the appeal lapsed. The respondents had no qualms with this application and as such, it was not opposed.

Held: that the onus of dispatching the record was dealt with in the matter of *Africa Personnel Services v Shipunda and Others* 2012 (2) NR 718 (LC) where the court reasoned that...the obligation to dispatch the record is upon the office of the Labour Commissioner, a labour inspector or arbitrator under rule 17(7). The delay in so doing does not lie at the door of the appellant who had timeously noted an appeal.

Held that: The record of proceedings plays a pivotal role in labour appeals. It is thus unfair for the appellant to be required to bring condonation applications, at a cost, for the appeal to be kept alive because of the absence of the record of proceedings to be filed by the Office of the Labour Commissioner. This is a costly exercise, and reimbursement of these costs would never ensue.

Held further that: there are various six (6) steps that may be taken by arbitrators altogether in ensuring that the record is delivered timeously.

Held: It is the opportune time to consider the rule to mitigate the harm an appellant faces in instances where there is a delay in the dispatch of the record.

In the result the court reinstated the appeal and stayed the operation of the arbitration award.

ORDER

1. The appeal under Case No. HC-MD-LAB-APP-AAA-2020/00061, be and is hereby reinstated.
2. The effects of Section 89(6) of the Labour Act, 11 of 2007 be and are hereby stayed, and the operation of the arbitration award under Case No. CROT 46-2019, be and are hereby stayed, pending the final determination of the appeal.

3. The period during which the Applicant/Appellant may prosecute the appeal, be and is hereby extended by a period of 60 calendar days from date that this order was made.
4. The Applicant is directed to invest the amount of N\$48 271.48 into an interest-bearing account, and subsequent thereto, on a monthly basis, to invest the said amount of N\$12 067.87 into the aforementioned interest-bearing account, pending the finalisation of the appeal.
5. There is no order as to costs.
6. A copy of this judgment is to be brought to the attention of the Office of the Labour Commissioner by the Registrar of this Court, with the former being directed to bring the contents of the judgment, to the attention of all arbitrators within this jurisdiction.
7. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] On Friday 14 May 2021, after hearing argument dutifully advanced by Mr. Vlieghe, for the applicant, I issued an order for the reinstatement of the applicant's appeal. The order was granted by the consent of the parties.

[2] Mr. Vlieghe requested an opportunity to address the court on the shortcomings of the present labour legislation and requested the court to write this judgment in a bid to make some suggestions regarding the possible amendment of the Labour Act, 2007, which may result in parties experiencing less nightmares in the prosecution of the appeals in cases where they derive no joy from the awards issued by arbitrators appointed by the Labour Commissioner.

[3] It is a fact that the bane caused by the non-delivery of records of proceedings in labour matters heralds untold hardship to the parties, especially the party dissatisfied with the arbitral award. It results in a serious loss of time and in some cases, compels the parties to resort to legal proceedings of one type or the other, sometimes with attendant astronomic costs associated therewith, which could have been avoided with efficiency in the delivery of the record of proceedings.

The parties

[4] There are three parties cited in this matter. I will, for ease of reference, refer to B2Gold Namibia (Pty) Ltd as 'the applicant'. Ms. Hileni Shitula, the 1st respondent, will be referred to as 'the respondent', whereas Ms. Layha Dumeni, the 2nd respondent, will be referred to as 'the arbitrator'.

Background

[5] The background to this matter is not one that raises much reason for serious disputation. The common cause facts giving rise to the present proceedings acuminate to this: the applicant employed the applicant in 2015 as an assistant security officer. This appointment was for the period 1 January 2015 to 30 June 2015.

[6] The respondent's fixed term contract came to an end and she was employed on a permanent basis in the same position from 1 August 2015 to 30 September 2015. From 1 October 2015, her designation changed to that of Store Person in the Supply Chain Warehouse Department.

[7] It would appear that the applicant, in the self-same year, 2015, carried out some restructuring exercise, which resulted in its workforce being reduced to meet operational and financial requirements. In October 2015, the respondent signed an addendum to her contract of employment in terms of which she agreed to be employed in the position of Store Person and would as a consequence, report to the Supply Chain Warehouse Department.

[8] The respondent, for the next three years reported for duty and rendered services in the position referred to above. In July 2019, the respondent wrote a letter to the Human Resources Superintendent of the applicant, requesting to be transferred back to her previous position. The respondent was advised to apply for the position, but her application was unsuccessful, and she remained in her current position as a Store Person.

[9] On 28 February 2019, the respondent referred a dispute of unilateral change of terms and conditions to the Office of the Labour Commissioner. She was successful, as an award in her favour was issued by the arbitrator. The propriety of the said award is subject of the appeal pending before this court. The appeal lapsed thus the applicant filed the present application for the reinstatement of the appeal.

[10] It will be seen, and there is no disputation on this, that the reason that the appeal lapsed is because, despite numerous requests by the applicant's legal practitioners of record for the Office of the Labour Commissioner, to dispatch the record to the Registrar of this court, the record was not sent. Correspondence from 13 November 2020, running through January 2021, shows that the record was not delivered. Even when it was, it was at first inaudible and later, it hopelessly incomplete for the purpose.

[11] It would seem that there is large hue and cry from litigants in the labour law sphere, together with their legal practitioners, regarding the issue of the timeous filing of the records and where filed at all, the state of the records. Mr. Vlieghe, as an officer of the court filed a supporting affidavit that details the frustration that he, and possibly other legal practitioners, face frequently in cases where an appeal has been lodged and can only be taken forward towards prosecution once a complete record has been filed.

[12] It has been stated authoritatively by this court in *Africa Personnel Services v Shipunda and Others*¹ that the duty to file the record, in terms of rule 17, lies with the Office of the Labour Commissioner (OLC). In dealing with the issue the court expressed itself in the following language:

¹ *Africa Personnel Services v Shipunda and Others* 2012 (2) NR 718 (LC), paras 20 to 22.

[20] Whilst it is correct that the rules require that appeals must be prosecuted within 90 days, the obligations to dispatch the record is upon the office of the Labour Commissioner, a labour inspector or arbitrator under rule 17(7). The delay in doing so does not lie at the door of an appellant who has timeously noted an appeal (and thereafter takes the further steps contemplated by Rule 17 within the required time periods). But the consequence of Rule 17(25) in its present formulation when an arbitrator fails to or is unable to provide a record within less than 90 days means that an appeal would lapse through no fault or non-compliance on the part of the appellant. Even where the parties agree upon extensions of the time limits, these do not involve the arbitrator(s) whose statutory duty is to file the record.

[21] Unlike the express provisions of the rule of the Supreme Court Rules, which effectively provide that an agreed extension for the filing of a record serves to extend the time period within which the appeal is to be filed, rule 17(25) does not contain a provision in similar terms. This is presumably because it is not the duty of an appellant to dispatch the record – but rather that of the arbitrator. Rule 17(25) in its current formulation unfortunately does not take into account the primary duty to provide the record rests upon the adjudicator and not the appellant. Yet it is the appellant, which faces the dire consequences of a lapsed appeal when this obligation is not timeously met.

[22] I have noted applications for condonation in other appeals where the late dispatching of a record (eminently understandable in this appeal) brought on the basis that there would otherwise be the lapsing of the appeal. This subrule in my view would requires reconsideration, given the harsh consequence visited upon a party where there is non-compliance with the rule would not necessarily be by reason of an act or omission on its part. The fact that condonation can be sought does not sufficiently address the inequitable consequence of the rule in its present formulation. It also gives rise to a multiplicity of condonation applications which can serve to delay the final outcome of an appeal and render litigation more costly – an outcome the rules are generally scrupulous in seeking to avoid.'

[13] It is accordingly clear what a central and pivotal role a record of proceedings plays in appeals. It is also clear that if the record is not filed timeously or at all, it detrimentally affects the rights of the appellant to appeal and may further result in the appellant having to bring a number of condonation applications in order to keep the appeal alive, on life support, so to speak. This costs money and a great deal time,

which goes against the interest of justice in speedy finality of matters, especially in the labour sphere.

[14] Employers, who are almost invariably in a stronger financial position than employees, may well be able to afford having to approach the court for the condonation of one or the other type, occasioned by the late dispatch of the record. In this regard, if the appellant is an employee, he or she may not have in his or her chest of drawers, the financial resources needed to keep the appeal alive because of the failure to timeously dispatch the record.

[15] For many employees, who may be women and men of straw, and who may have been dismissed, that might bring their appeals, regardless of brightness of the prospects of success, on appeal, to a screeching halt. This is totally unacceptable and must be avoided like a plague. Arbitrators should therefor understand that their dealing with the record becomes the backbone of justice in case a party is dissatisfied with the award issued.

[16] In the instant case, Mr. Vlieghe, gave an example of matters that he has dealt with on behalf of clients and where the record of proceedings were not dispatched on time and required his clients, in some cases and at a cost, to keep the appeal proceedings alive via the ventilator of condonation of the one type or the other. These include *B2Gold Namibia v Hileni Shitula and Another*², *Ohorongo Cement (Pty) Ltd v Kharuxab*³, *Nancy Lynne Brandt v Municipality of Windhoek*⁴, *FNB Namibia Limited v Edgar Murangi*⁵ and *Mediclinic Windhoek (Pty) Ltd v Alois Maximilian Ruider and Another*.⁶

[17] It would appear, from the synopsis of the cases referred to above that there is myriad of problems faced by the OLC and these, include the recording device being faulty, defective and thus does not record the evidence. This, it appears, is not detected at all due to human error or lack of diligence; recordings not being properly

² *B2Gold Namibia v Hileni Shitula and Another* HC-MD-LAB-APP-AAA-2020/00061.

³ *Ohorongo Cement (Pty) Ltd v Kharuxab* HC-MD-LAB-APP-AAA-2019/00038.

⁴ *Nancy Lynne Brandt v Municipality of Windhoek* HC-MD-LAB-APP-AAA-2019/00003.

⁵ *FNB Namibia Limited v Edgar Murangi* HC-MD-LAB-APP-AAA-2019/00012.

⁶ *Mediclinic Windhoek (Pty) Ltd v Alois Maximilian Ruider and Another* HC-MD-LAB-APP-AAA-2020/00058.

stored to ensure they are readily found when required; no proper care is taken to ensure that the entire record of proceedings captured during proceedings is taken for transcription; failure and lack of urgency by arbitrators to ensure that the provisions of rule 17(25) requiring the dispatch of the record within 21 calendar days of a request, are complied with; incomplete records being dispatched although a certificate by the arbitrator suggesting otherwise is attached and late or no notification is given to the Registrar of this court that a record of proceedings has since been dispatched.

[18] As stated in the *Africa Personnel* case, the consequences of not providing the record in good time, can have perilous consequences to the appellant as the appeal may lapse in the interregnum. Where an order had been issued by the court, for instance, staying the execution of the labour award, this may fall away and even where the employer subsequently succeeds on appeal, the stable would be locked after horses have already bolted. It is to be noted in this regard, that the costs associated with labour matters are generally not recoverable, even if it can be plain that the costs incurred are the result of ineptitude of the arbitrator in not maintaining a proper and complete record of proceedings and then delivering the said record of proceedings on time or at all.

[19] How can the ill effects occasioned by the failure or delay in dispatching the record of proceedings be avoided, if not minimised at the least? I am of the considered view that the following may be the steps taken by arbitrators in ensuring that the pernicious effects of the delaying the dispatching of the record are avoided:

- (1) during the arbitration proceedings, the arbitrators should ensure that all proceedings are digitally recorded. In this regard, the proceedings occurring on each day of the proceedings must be separately and clearly marked so that same may be easily identified when subsequently required.
- (2) in cases where an appeal is noted against an arbitral award the officer responsible at the OCL must immediately bring this fact to the attention of the arbitrator concerned;
- (3) the arbitrator should identify the relevant case number of the arbitration and must immediately cause the full record of the proceedings to be delivered to the office of the transcribers. In *tandem* with this, the arbitrator must ensure that all

documentation, including exhibits, that form part of the record, are prepared and readied for dispatch, together with the transcribed record to the Labour Court without any delay;

- (4) the arbitrator should make efforts to ensure that the record of proceedings is transcribed within the period of 21 days stated in the rules. To this end, the arbitrator should also liaise with the representatives of the parties and advise as to when the record could possibly be ready for dispatch;
- (5) when a record of proceedings has been dispatched to the Labour Court, the OCL should immediately advise the legal practitioners involved of that fact and without delay; and
- (6) In the event that the record dispatched to the Labour Court is not complete, the arbitrators should not sign or confirm that the certificate indicating that the record is complete when it is, to their knowledge false. The arbitrators should studiously peruse the record and ensure that all the necessary material that forms part of the record that was transcribed, is dispatched without fail.

[20] The above suggestions are made in view of the fact that the duty to dispatch the record does not lie with the appellant but with the arbitrator in each case. It is when the arbitrator deals with the appeal record with requisite promptitude that the appellant may be able to comply with the provisions of rule 17(25), in particular. If not, the appellant normally bears the brunt and faces the real possibility that the appeal may lapse despite its best efforts to meet the deadlines set by the rule maker.

[21] In view of the foregoing, I am of the considered view that time may have arrived for a further consideration of the relevant rule so as to mitigate the harm that an appellant stands to face in instances where there is a delay in the dispatch of the record and which is not, in any way, shape or form, attributable to the appellant.

[22] In this regard time may have arrived, in view of the litany of applications that are made to this court, at the appellant's cost, to extend the period for prosecuting the appeal whilst still awaiting the record. It might, in this regard be useful to engage all the stakeholders for the purpose of curing the harsh effects the failure to timeously file a record may visit on appellants in particular.

[23] The noting of an appeal must be regarded by the arbitrator concerned, as a good one, with prospects of success. As such, a sense of urgency must attach to the dispatch of the record. I do not want to believe that arbitrators would feel personally affronted by the noting of an appeal against their awards and therefor seek to frustrate the process at every turn, by not co-operating in the dispatch of the record, to ensure that their awards remain untouched, by hook or by crook.

[24] In the meantime, the OLC is directed to bring the contents of this judgment, especially in paragraph 19 above, regarding how the issue of the dispatch of the record must be handled by the various arbitrators, to all arbitrators in this country. An element of urgency and conscientiousness must always accompany the dispatch of the record, with the arbitrators being acutely aware of how pivotal their diligence in maintaining a full and proper record is. Furthermore, they should be made alive to the deleterious consequences their tardiness in dispatching the record may herald to the interests of the parties, especially the appellant, and also, to the interests of justice in general.

[25] It may also be proper to draw the attention of the OLC, together with the arbitrators, the comments made by the court in the *Ohorongu Cement (Pty) Ltd v Kharuxab* case, (*supra*), regarding the importance of keeping the record of proceedings and what arbitrators need to do, even in cases where the arbitration proceedings are mechanically recorded.

Conclusion

[26] It was accordingly plain that this was a proper case, regard had to the applicant's papers, and with which the respondent could not quibble, that a case had been eminently made for the granting of the order.

Acknowledgment

[27] I should not attempt or be seen to attempt to steal the thunder as it were in this case. The court records its appreciation and gratitude to Mr. Vlieghe, for taking his time, and making it his personal business, to file an affidavit in which he suggested most of

the steps that need to be taken by arbitrators in ensuring that records of proceedings are dispatched without unnecessary delay. The court has benefitted from his experience and useful suggestions.

Order

[28] I accordingly issue the following order in the present matter, and which, as recorded above, is unopposed:

1. The appeal under Case No. HC-MD-LAB-APP-AAA-2020/00061, be and is hereby reinstated.
2. The effects of Section 89(6) of the Labour Act, 11 of 2007 be and are hereby stayed, and the operation of the arbitration award under Case No. CROT 46-2019, be and are hereby stayed, pending the final determination of the appeal.
3. The period during which the Applicant/Appellant may prosecute the appeal, be and is hereby extended by a period of 60 calendar days from date that this order was made.
4. The Applicant is directed to invest the amount of N\$48 271.48 into an interest-bearing account, and subsequent thereto, on a monthly basis, to invest the said amount of N\$12 067.87 into the aforementioned interest-bearing account, pending the finalisation of the appeal.
5. There is no order as to costs.
6. A copy of this judgment is to be brought to the attention of the Office of the Labour Commissioner by the Registrar of this Court, with the former being directed to bring the contents of the judgment, to the attention of all arbitrators within this jurisdiction.
7. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: S. Vlieghe
Of Koep & Partners

RESPONDENTS: No appearance