REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2021/00006

In the matter between:

MARTINUS MARIUS RHEEDER **APPELLANT**

and

CIC HOLDINGS (PTY) LTD **RESPONDENT**

Neutral Citation: *Rheeder v CIC Holdings (Pty) Ltd* (HC-MD-LAB-APP-AAA 2021/00006) [2022] NALCMD 40 (21 July 2022)

Coram: MASUKU J
Heard: **On the papers**
Delivered: **21 July 2022**

Flynote: Labour Law - Labour Appeal – s 86(2)(a) of the Labour Act (No. 11 of 2007) – Applicability of rule 132 of the High Court Rules.

Summary: The appellant was employed by the respondent. A dispute arose between the parties that resulted in the appellant being dismissed by the respondent. The appellant approached the Office of the Labour Commissioner in seeking compensation.

At arbitration, the respondent raised a preliminary issue, namely that the referral of the dispute was made contrary to the provisions of s 86(2) (*a*). The arbitrator issued an award upholding the point of law regarding prescription and dismissed the matter. It is on that basis that the appellant lodged an appeal against the award on 27 January 2021. There was a delay in filing the record of the proceedings of the arbitration resulting in the record only being lodged on 9 May 2022.

The matter was inactive for more than 6 months. The registrar issued a notice in terms of rule 132 regarding the inactivity. The appellant's legal practitioner filed an affidavit in terms of rule 132 explaining why the appeal had not been prosecuted within the relevant timelines. The respondent opposed the application on technical legal contentions.

Held: That the force and validity of the present weighty contentions made on the respondent's behalf will be ripe for determination with finality at the point where the appellant makes applications directed at ensuring that the appeal proceeds in earnest.

Held that: The appellant's explanation for the inactivity of the matter is accepted.

Held further that: The appellant was, by an order of court required to deal with the matter in terms of rule 132(7), which he did. That order was not set aside and as such the appellant was in duty compelled to deal with it.

ORDER

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1. The appellant's explanation for the inactivity of the matter is accepted.
2. There is no order as to costs.
3. The matter is postponed to 4 August 2022 for determination of the further conduct of the matter.

4. The parties are ordered to file a status report, together with a draft order regarding the proposed further management of the matter on or before 1 August 2022.

JUDGMENT

MASUKU J:

Introduction

[1] The question for determination in this matter amounts to this – does this case constitute a proper case in which the matter should be struck from the roll and not to be reinstated in terms of rule 132(10) of the High Court Rules?

[2] The parties to the matter have returned discordant answers to the question. Predictably, the appellant adopts the position that the court is well within its rights, considering certain factors to be traversed in the course of this judgment, not to strike the matter from the roll. The respondent argues contrariwise to the effect that the matter has not been active for a period in excess of 6 months and that there is, in the circumstances, not reason why the matter should not be struck from the roll with finality that excludes re-enrolment of the matter.

The parties

[3] The appellant in this matter in Mr. Martinus Marius Rheeder, an adult Namibian male of Otjiwarongo. The respondent is CIC Holdings (Pty) Ltd, a company duly incorporated with limited liability in terms of the company laws of this Republic. Its place of business is situate at Northern Industry, Windhoek.

[4] The appellant in this matter, was represented by Mr. Bangamwambo, whereas the respondent was represented by Mr. Dicks. The court is highly appreciative to both counsel for the insightful heads submitted to assist the court in cutting the Gordian Knot presently before court.

[5] For purposes of this judgment, I will refer to the parties as follows: Mr. Rheeder will be referred to as 'the appellant. CIC Holdings (Pty) Ltd will be referred to as 'the respondent.'

Background

[6] Briefly summarised, the facts relevant to the determination of this matter are the following, as gleaned from the papers filed of record: The appellant, was employed by the respondent. In the course of time, a dispute arose between the parties culminating in the appellant being dismissed by the respondent. This dispute arose on 19 December 2019.

[7] The appellant did not sleep on his rights. He approached the Office of the Labour Commissioner to report a labour dispute, namely, unfair dismissal and sought reinstatement, compensation for past loss of income and suffering. The matter does not appear to have been settled at conciliation. It was, as a result escalated to arbitration.

[8] At arbitration, the matter served before Ms. Julia Mutenda. It would appear that a preliminary issue was raised by the respondent, namely that the referral of the dispute was made contrary to the provisions of s 86(2) (*a*) of the Labour Act[1] (the Act) in that it was lodged more than 6 months from the date on which the dispute arose.

[9] The arbitrator, after listening to submissions made on behalf of the parties issued an award on 24 December 2020 in which she upheld the respondent's point of law regarding prescription and thus dismissed the matter, with no order as to costs. The

[1] Labour Act (No. 11 of 2007)

appellant on 27 January 2021 lodged an appeal against the award to this court. The appellant was represented by Messrs. Murorua, Kurtz and Kasper. The respondent opposed the appeal and appointed Köpplinger Boltman to represent it in the proceedings.

[10] It is not necessary, for purposes of this judgment to engage the grounds of appeal, considering the issue placed before court for determination. It would appear that there was a delay in the dispatching of the record of proceedings. On 1 March 2021, a notice was issued by the Registrar, dated 28 February 2021, to the appellant reminding the appellant to take the necessary steps to prosecute the appeal timeously. Another notice dated 6 September 2021 was issued by the Registrar in terms of rule 132 of the High Court rules, calling upon the appellant to show cause why the matter should not be struck from the roll for non-activity.

[11] On 13 October 2021, the appellant's legal practitioners of record withdrew their representation for the appellant. Messrs. F Bangamwambo came on the record on the appellant's behalf on 25 November 2021. On 8 March 2021, the appellant filed an affidavit in terms of rule 132 explaining the reasons why the appeal had not been prosecuted within the timelines set out in the relevant rules.

[12] The respondent opposed the application for the matter to continue being enrolled despite it not being prosecuted within the relevant timelines. In its affidavit filed in opposition, the respondent raised certain issues, namely that there is no appeal before court which is capable of being dealt with in terms of rule 132(7) of the rules of this court for the reason that the appellant's appeal lapsed on 30 April 2021. It was contended on the respondent's behalf that in view of the lapsing of the appeal, rule 132 find no application in this matter.

[13] In view of the position adopted by the parties, what the court is called upon to do is to consider and determine whether there is an appeal capable of being dealt with in

terms of rule 132, by making an order for the speedier conduct of the proceedings as envisaged in rule 132(7). I proceed to deal with the parties' relevant argument below.

The respective parties' cases

[14] The appellant submits that the reason why the matter did not proceed and invited the possible invocation of rule 132 is because the arbitrator failed to produce the record of proceedings timeously. It was his case that the court, on application by the appellant, postponed the matter on a few occasions to enable the appellant to obtain, serve and file the record of proceedings. For this reason, submits the appellant, the court should not strike the matter from the roll. It is worth pointing out that the record of proceedings was eventually lodged on 9 March 2022, some thirteen months after the launch of the appeal.

[15] The respondent's argument, is a different kettle of fish altogether. As intimated earlier, the respondent contends that the rule 132 provisions do not find application in the present matter because there is no appeal to speak of and which the court would be at large to strike from the roll in terms of rule 132. This, it is claimed is the case because the appeal lapsed after the appellant failed to take the necessary steps to continue its prosecution.

[16] It now behooves the court to decide, with reference to the argument presented by the parties and the relevant legislative enactments which argument should carry the day. I do so below.

Determination

[17] The timelines outlined earlier in this ruling become of importance at this time. As indicated, the dispute was lodged on 24 December 2020 and the appeal was noted on 29 January 2021. The respondent contends that the appeal was filed out of time when proper regard is had to the provisions of s 89(2) of the Labour Act, 2007, read with rule 17(4) of the Labour Court rules, which dictate that the appeal should be noted within a period of 30 days. It is the respondent's further contention that the appellant, in the light of the late noting of the appeal, did not apply for condonation therefor, which leads to the conclusion that there is no appeal to speak of in the present matter.

[18] Mr. Dicks further argued that rule 132 relates to 'cases' which are alive and in the conveyor belt of the court and which for one reason or another, have become inactive. This, definition, he further contended, does not apply to matters as the present, where there is no appeal for the reason that it was not noted on time, exacerbated by the fact that no condonation has been sought and therefor not granted.

[19] There is a further reason in this case why rule 132 should not apply further argued Mr. Dicks. It is that the appellant did not only fail to note the appeal on time but he also failed to prosecute the appeal within the period set out in rule 17(25) of the Labour Court Rules. That subrule provides the following:

> 'An appeal to which this rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.'

[20] Having established that the appeal was noted on 24 December 2020, it means that the 90 day period within which the appellant ought to have prosecuted it, was 25 March 2021. It is evident from the record that the appeal was not so prosecuted within that time frame. It must be noted in this connection that the wording employed by the rule maker in rule 17(25) connotes that it is imperative or mandatory. As such, where there is a failure to comply with that period, it results in the appeal lapsing as a matter of law. In the result, there is no appeal pending before the court as same is deemed to have lapsed.

[21] The appellant was not, however, without recourse in circumstances where the appeal lapses because it has not been timeously prosecuted. The appellant could and probably should have applied for condonation, again in terms of rule 17 and in which case it would have sought condonation and an extension of time for the prosecution of the appeal whilst waiting for the delivery of the record of proceedings. This again did not happen. The result is that the appeal was deemed to have lapsed in March 2021 more than 16 months ago.

[22] This means that a labour matter which has lapsed for the reason that it has not been prosecuted within the period of 90 days mentioned earlier, is deemed to have lapsed *ex lege*. The result of non-prosecution of the matter contrary to rule 17(25), is that it lapses.

[23] In *Namibia Press Agency v Katamila,*[2] the court reasoned as follows regarding matters that have lapsed as a result of non-prosecution contrary to rule 17(25):

> 'Based on the foregoing analysis and conclusions and on the facts of the case, I hold that the appellant has established nothing which will make rule 17(25) inoperable. Rule 17(25) says clearly and unambiguously that where an appeal has not been prosecuted within 90 days after noting the appeal, the appeal is deemed to have lapsed. . . This court must, accordingly, give effect to this rule 17(25) of the rules. In the instant case, the appeal lapsed *ex lege* when it was not prosecuted within 90 days after 14 December 2015. Consequently, as a matter of law and logic, there is no appeal before the court to determine.'

[24] In *Municipal Council of the Municipality of Windhoek v Esau*[3] Hoff J remarked as follows:

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[2] *Namibia Press Agency v Katamila* (LCA 68/2015) NALCMD 8 (9 March 2017), para 6.
[3] *Municipal Council for the Municipality of Windhoek v Esau* 2010 (2) NR 414 (LC), para 16.

‘Even if I were to rule that the respondent is not to be heard, through her legal representative, it would not detract from the undisputed fact, that *ex facie* the papers before this court, the appeal is deemed to have lapsed. If this is the case, it follows that there is no appeal before this court.’

[25] I am in full agreement with the sentiments expressed above. They accurately reflect the effect of an appeal that has not been prosecuted within the prescribed time. In essence, there is, in that regard, no appeal to speak of as it would have been deemed to have lapsed from the time the clock hit the 90 day mark from the date of noting of the appeal. Strictly speaking, there is no case before court that would be available for the court to exercise its powers in terms of rule 132 other than to officially certify it lapsed. In terms of the law, the lapsing will have happened from the date of non-prosecution of the matter and not necessarily from the date of certification that it has lapsed.

[26] It becomes clear that in the instant case, the appellant falls foul of the relevant provisions at two different levels. Firstly, he did not note the appeal timeously. This results in there being no appeal to speak of legally. Secondly, the non-prosecution of the appeal, which attracts the deeming provisions, leading to the conclusion that the appeal lapsed.

[27] Having said this, what cannot be denied or wished away is the fact that there is an order by this court dated 6 September 2021 in which the parties were called upon to show cause why the appeal should not be struck from the roll for inactivity. The parties have responded to this notice, adopting, as stated earlier, disparate positions. The appellant has made its representations on oath as to why the matter should not be struck from the roll in terms of rule 132. The respondent, as stated earlier, took the view that the application is incompetent in the premises.

[28] I am of the considered view that as the parties were ordered to show cause, the court is at large, notwithstanding the compelling submissions by the respondent

regarding whether there is in fact an appeal pending, to decide whether enough has been stated by the appellant in particular, to entitle the court to exercise its discretion in the appellant's favour. The issue as to what to do, if the court is satisfied with the explanation, with the matter, is what will occupy the court when an application for condonation and reinstatement is heard.

[29] I have considered the contents of the affidavit filed by the appellant. He contends that the delay was owed to two main factors, first, the sad passing away of his erstwhile legal practitioner's wife, which left the matter in the lurch for some time. He further raises the issue of the failure by the arbitrator to dispatch the record timeously despite, it would seem, a number of requests to do so. I am of the considered view that the appellant has stated enough to persuade the court to stave off the application of the provisions of rule 132(10) in the instant case.

[30] I should note that the opposition mounted by the respondent, was not necessarily confined to the factual position deposed to by the appellant on oath. The opposition is based on technical legal contentions. I am of the considered view, notwithstanding what I have stated above, that this would be a proper case in which to grant the application for the matter to continue and for the court to issue appropriate directions for the matter to proceed at an accelerated pace.

[31] It should be mentioned that although it appears that Mr. Dicks has cited good authority on the application of the Labour Act and the rules made thereunder, the appellant is yet to make the necessary applications, including condonation for the lapses that have been mentioned above. I am of the considered view that the appellant should be allowed to make its applications as will be advised and to which the difficulties pointed out by Mr. Dicks will be alive for engagement by the respondent and for final determination by the court.

[32] Although it may presently seem that the appellant may possibly have insuperable difficulties strewn in his path if the compelling argument by Mr. Dicks is anything to go

by, it must be mentioned that an open mind amenable to persuasion is the hallmark of a functioning judiciary. In this connection, the timeless words that fell from the lips of Megarry J in *John v Rees*[4] must be not lost to us. The learned judge said:

> 'As everybody who has anything to with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswered charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered change.'

[33] The force and validity of the present contentions made on the respondent's behalf will be opportune for determination with finality at the point where the appellant makes applications directed at ensuring that the appeal proceeds in earnest. At this juncture, it is only proper and fair that the appellant be granted an opportunity to take a bite at the rule 132(7) cherry. Whether he will eventually succeed in persuading the court that he should be allowed to further prosecute the appeal is a question that will be determined at the appropriate time.

[34] Properly considered, Mr. Dicks did not, in his heads of argument, contend that the matter must be dismissed in terms of rule 132(11). It would seem to me that he was enamoured to the application being struck from the roll, enabling the appellant, in the event, to file whatever applications he would consider necessary for the appeal to continue and be determined on the merits if the court is so satisfied[5].

Order

[34] In the premises, I issue the following order:

1. The appellant's explanation for the inactivity of the matter is accepted.
2. There is no order as to costs.

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[4] *John v Rees* [1970] Ch 345 at 410.

[5] In para 14 of his heads of argument, Mr. Dicks said, 'Appellant will not be denied any of the aforementioned applications, should the matter simply be struck from the roll, as it should be considering what is stated above.'

3. The matter is postponed to 4 August 2022 for determination of the further conduct of the matter.
4. The parties are ordered to file a status report, together with a draft order regarding the proposed further management of the matter on or before 1 August 2022.

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T. S. Masuku

Judge

APPEARANCES

APPELLANT:	G Dicks
Instructed by:	Kopplinger Boltman Legal Practitioners, Windhoek.
RESPONDENT:	F Bangamwambo
	Of FB Law Chambers, Windhoek.