

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2021/00042  
INTERLOCUTORY NO: INT-HC-EXTTIME-2021/00370

In the matter between:

LEWIS STORES NAMIBIA (PTY) LTD

APPLICANT

and

ASHLEY DRAGHOENDER

FIRST RESPONDENT

LUCIA AMUPADHI N.O.

SECOND RESPONDENT

THE LABOUR COMMISSIONER

THIRD RESPONDENT

**Neutral citation:** *Lewis v Draghoender* (HC-MD-LAB-APP-AAA-2021/00042 (INT-HC-EXTTIME-2021/00370)) [2022] NALCMD 41 (22 July 2022)

**Coram:** UEITELE J

**Heard:** 29 April 2022

**Delivered:** 22 July 2022

**Flynote:** *Labour Law - Rules of the Labour Court* - for the court to consider the merits of an application for the reinstatement of an appeal, the court must first determine and grant condonation, where such appeal lapsed. An application to reinstate an appeal is not singular in its nature, where not prefaced by an application for condonation for the non-compliance with an order of court or the

rules of court, and as such, only once condonation is granted, can reinstatement follow.

**Summary:** The applicant, on 30 June 2021, noted an appeal against an arbitration award of the second respondent. In terms of rule 17(25), the applicant had 90 days within which to prosecute the appeal, and the 90 days would have prescribed and lapsed on 30 September 2021. On 17 August 2021, the applicant for the first time approached the court seeking relief encompassing an extension of the time period within which to prosecute the appeal, that the timelines in terms of rule 17 only start to run upon the furnishing of the record by the second and third respondents, and that in the event the application being heard after the prescription of the 90 days, that the appeal be reinstated.

On 10 September 2021, the court granted certain relief in the application, particularly: that the time period in terms of rule 17(25) is extended for 85 days, and that the applicant must prosecute the appeal, if it so wished, within 85 days from 10 September 2021; the 85 days would thus have lapsed and prescribed on 03 December 2021.

On 15 November 2021, the applicant returned to court, seeking the same orders initially sought in the initial extension application of 17 August 2021.

The matter was unopposed and enrolled on 26 November 2021, when the first respondent opposed the application on 23 November 2021. The court on 26 November 2021 postponed the matter to 21 January 2022, as the court was conflicted, but not before regulating the exchange of affidavits. The first respondent then filed answering papers on 07 December 2021, and the applicant replied by 14 December 2021.

As of 21 January 2022, the matter appeared before the court on the residual court roll, and after a number of hearings, successive erroneous orders were issued on this file (interlocutory applications), and on 10 March 2022, the registrar of this court issued an order that the application will be heard on 25 March 2022, before this court as constituted in this judgment.

On 25 March 2022, the court sat for the first time to hear the application and a specific legal question arose. The court directed the parties to address it on the court's power to reinstate a lapsed appeal, in particular, does the court have the power to reinstate an appeal that has lapsed? The court postponed the matter to 29 April 2022, for the continuation of hearing of the applicant's application, and for the parties to address the court on the legal issue.

*Held that*, for the court to consider the merits of an application for reinstatement of an appeal, it must first consider a preceding application for condonation.

*Held that*, only once condonation is granted, can reinstatement follow.

*Further held that*, where an extension of time to comply with the rules of court is sought, where the appeal has lapsed, in the absence of the condonation application the question of extension is of no moment, as there exists no appeal before the court.

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## ORDER

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- 1) The applicant's application for the extension of time to prosecute the labour appeal under case number HC-MD-LAB-APP-AAA-2021/00042 is refused.
- 2) The applicant's application for the reinstatement of the labour appeal under case number HC-MD-LAB-APP-AAA-2021/00042 is removed from the roll.
- 3) A copy of this judgment must 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.
- 4) There is no order as to costs.
- 5) The matter is regarded as finalised and removed from the roll.

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## JUDGMENT

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UEITELE J:

### Introduction

[1] The applicant is Lewis Stores Namibia (Pty) Ltd, a furniture and appliance store operating in the Republic of Namibia. The first respondent, Mr Ashley Draghoender, was employed by the applicant as its branch manager, at Rehoboth, until his dismissal on 14 June 2019.

[2] The second respondent, Ms Lucia Amupadhi, was employed by the Ministry of Labour as an arbitrator in the office of the Labour Commissioner, who is the third respondent in this matter. Both the second and third respondents were cited in their official capacities, the second respondent, by virtue of her having presided over the arbitration proceedings in which she rendered the arbitration award and the third respondent by virtue of his capacity as the person entrusted to arbitrate and conciliate labour disputes in Namibia. Both the second and third respondents have not taken part in the proceedings in this court.

[3] I will, for ease of reference, refer to the applicant as Lewis, the first respondent as 'Mr Draghoender', the second respondent as the arbitrator and the third respondent as the Commissioner. Where I need to refer to both the arbitrator and the Commissioner I will refer to them as the respondents.

### Background

[4] This application has as its origin in a dispute concerning the alleged unfair dismissal of Mr Draghoender. As I indicated earlier on, Mr Draghoender was employed by Lewis as its branch manager at its Rehoboth branch. Following the alleged surfacing of irregularities regarding stock losses and non-compliance with stock control procedures at its Rehoboth branch, Lewis on 10 June 2019 suspended

Mr Draghoender from his position and instituted disciplinary proceedings on 14 June 2019.

[5] Following a disciplinary hearing Mr Draghoender was found guilty of the charges levelled against him and a sanction of dismissal was imposed on him. Alleging that his dismissal was both procedurally and substantively unfair Mr Draghoender referred a complaint of unfair dismissal to the office of the Commissioner. The Commissioner designated Ms Lucia Amupadhi to conciliate and arbitrate the dispute. Following the arbitration of the dispute during January 2021 the arbitrator on 18 June 2021 rendered her arbitration award. In terms of that award she found that the dismissal of Mr Draghoender was both procedurally and substantially unfair and ordered that Lewis reinstate Mr Draghoender and pay him the amount of N\$ 207 648.

[6] Lewis was aggrieved by the award and on 30 June 2021 noted an appeal to the Labour Court against the arbitration award. Based on rule 16(7) of the Labour Court Rules and rule 23(4) of the Rules relating to the Conduct of Conciliation and Arbitration, Lewis called upon the Commissioner to:

‘... dispatch to the Registrar of the above Honourable Court at the High Court, Private bag 13179, Windhoek, within 21 days after service upon his or her of this notice the record of proceedings relating to the above matter together with such reasons as he or she, is by law required to give and to notify the appellant in writing that this has been done.’

[7] The Commissioner was, in terms of the rules of the Labour Court read with the rules of the High Court, supposed to have delivered the record of proceedings in the arbitration to the Registrar by not later than 21 July 2021. But on that date, which is 21 July 2021, the Commissioner had not yet dispatched the record of the arbitration proceedings.

[8] As a result of the Commissioner’s failure to deliver the record of the arbitration proceedings as contemplated in the rules of court, Lewis, on 16 August 2022, launched an application for the extension of the time periods as provided for in rule 17(25). This Court, on 10 September 2021 extended the period within which Lewis, was to ‘... *prosecute its appeal “if it so wishes” within 85 days from 10 September*

2021'. It follows that Lewis had to prosecute its appeal by not later than 03 December 2021.

[9] On 10 November 2021, the Commissioner dispatched an incomplete and inaccurate record of the arbitration proceedings to Lewis' legal practitioners. On 15 November 2021, Lewis launched another application for the extension of the period within which it must prosecute its appeal. (I will, in this judgment, refer to this application as the second application). The relief which it sought reads as follows:

'1. That the time period as provided in terms of Rule 17(25) of the Rules of this Honourable Court for the prosecution of the Applicant's appeal (under case number HC-MD-LAB-APP-AAA-2021/00042) be extended and shall only commence to run after the complete record of proceedings has been furnished by the Second/Third Respondent(s);

2. Further to prayer 1 above, that the time periods referred to in Rule 17 and dependent on the provision of the record of proceedings by the Second/Third Respondent(s), shall similarly only commence to run after the aforesaid full and complete record has been furnished by the said respondent(s);

3. In the event of this application being heard subsequent to the expiry of the 90 day period as per Rule 17(25) of the Rules of this Honourable Court, that the appeal be reinstated; and

4. Costs in favour of the applicant and payable by the third respondent; and

5. Further and / or alternative relief.'

[10] The second application was, until 23 November 2021 unopposed and enrolled on the unopposed first motion court roll of 26 November 2021 before Acting Justice Parker. On 23 November 2021, Mr Draghoender signified his intention to oppose the second application. As soon as the matter became opposed Justice Parker indicated that he became conflicted and could thus not hear the second application, he accordingly postponed the hearing of the application to 21 January 2022. Mr Draghoender then filed his answering affidavit on 07 December 2021, and Lewis replied by 14 December 2021. In the intervening period Lewis's appeal lapsed on 03 December 2021.

[11] For reasons that are not relevant to this matter the second application was on 21 January 2022 postponed to 25 March 2022 for hearing. On that date the court requested the parties to file supplementary heads of arguments on a matter they raised in argument which they had not covered in their heads of argument. The matter was then further postponed for hearing to 29 April 2022.

[12] Mr Draghoender opposes the relief sought by Lewis, on the basis that the relief which Lewis is seeking is allegedly not in accordance with the rules of court, more specifically the case management rules relating to the timelines in terms of which matters before court ought to be finalised. The first respondent furthermore oppose the relief on the basis that Lewis is allegedly seek an extension to prosecute the appeal for '*a life time*.' Mr Draghoender furthermore opposed the application on the basis that he allegedly stands to suffer real prejudice because if the orders are granted in the form sought, the appeal may not be heard even in ten years' time.

[13] Because the facts which relate to Lewis' application to reinstate and extend the time period within which to prosecute its appeal are not in dispute, I will briefly set out the facts which are not disputed, then set out the legal principles governing applications of this nature and finally embark on the discussion and findings on Lewis' application.

#### The facts which are not in dispute

[14] Lewis seeks its relief against the following common cause facts:

(a) On 30 July 2021, Lewis' legal practitioners addressed a letter to the Commissioner in which letter it confirmed that the record of proceedings remains outstanding and that the respondents are to, as a matter of urgency, advise on the status of the record. The respondents did not reply to this letter.

(b) On 05 August 2021, a certain Mrs Morinthea Vries in the office of Lewis' legal practitioner per telephone contacted the office of the Commissioner enquiring about the progress of the record of proceedings. A certain Ms "Jacky" in the office of the Commissioner informed Mrs Vries that the arbitrator resigned and that her laptop

was dispatched to an arbitrator in Swakopmund and that its office has been unsuccessful in reaching the said arbitrator in Swakopmund to enquire as to when the record of proceedings would be returned to Windhoek. Ms Vries contends that Jacky furthermore informed her that a certain “Mr Mainga”, who works with the records of arbitration proceedings, would return to the office on 09 August 2021, and upon his return, he would update Lewis’ legal practitioners regarding the status of the record of the arbitration proceedings.

(c) On 09 August 2021, Ms Vries again telephonically contacted the office of the Commissioner enquiring about the status of the record of the arbitration proceedings. Mr Mainga informed her that *‘it is still a challenge to reach Ms Lucia Amupadhi and the new arbitrator’*.

(d) On 10 August 2021, Mrs Vries after again enquiring from the office of the Commissioner about the status of the record of the arbitration proceedings, was informed that Mr Mainga was on compassionate leave and would return to office on 16 August 2021.

(e) On 16 August 2021, Lewis’ legal practitioners again telephonically contacted the Commissioner. On that day Mr Mainga informed them that he still had challenges reaching the arbitrators.

(f) On 02 September 2021, Lewis launched its application to extend the period within which it had to prosecute its appeal. As I indicated earlier the Court extended the period by 85 days and Lewis thus had to prosecute its appeal by not later than 03 December 2021.

(g) On 08 September 2021, Ms Vries was put in touch with a certain Ms Sihlala at the office of the Commissioner, who she had difficulty contacting and who – she was informed – was the only person who could assist her with securing the record of the arbitration proceedings. On 09 September 2021, Ms Sihlala informed Mrs Vries that she will write a letter to the Registrar as the arbitrator is refusing to cooperate with their office.



(h) On 10 September 2021, Lewis' legal practitioners received a copy of form LC 46 – Notice of Transmission of Record, and a letter indicating that the electronic records are unavailable as the arbitrator is not forthcoming with the record. Upon perusal of the record, Lewis's legal practitioners discovered that the record was incomplete and not correct in several respects.

(i) On 11 October 2021, Mr Mainga was again contacted – by who is unclear from the record before me – but that he informed Lewis' legal practitioners that the recording device was not working and he would confirm this with Mrs Sihlala and revert to them.

(j) On 18 October 2021 Lewis' legal practitioners contacted Mr Draghoender's legal practitioner and shared with them its concerns regarding the incomplete recording, and availed a courtesy copy of the incomplete and inaccurate copy of the record of the arbitration proceedings to them (Draghoender's legal practitioner).

(k) On 19 October 2021 Lewis' legal practitioners unsuccessfully (because the telephone calls went unanswered) attempted to telephonically reach the Commissioner's office.

(l) On 21 October 2021, Mr Mainga informed Lewis' legal practitioners that the recordings in the possession of the Commissioner were not clear and would have to be transcribed to reconstruct the record. It later in the day became evident that the record in question was for another matter.

(m) On 26 October 2021, Lewis' legal practitioners addressed another letter to Mr Draghoender's legal practitioner as regards the conversation of 18 October 2021, requesting their notes of the hearing to reconstruct the record. Lewis's legal practitioners avers that Mr Draghoender's legal practitioner did not reply to this letter.

(n) On 02 November 2021, Mr Mainga again confirmed to Lewis' legal practitioners that the recorder was damaged and the arbitrator had submitted her handwritten notes, which the applicant contended were insufficient, and incomplete.

(o) On 03 November 2021, Lewis' legal practitioners again unsuccessfully attempted to telephonically contact the Commissioner.

(p) On 04 November 2021, Lewis' legal practitioners addressed another letter to Mr Draghoender's legal practitioner requesting clarity on the status of the electronic recordings.

(q) On 05 November 2021, Lewis' legal practitioners engaged Mr Draghoender's legal practitioner and informed them that its (Lewis' legal practitioner) letter of 26 October 2021 remained unanswered and that it is thus accepted the first respondent was unable to assist with the reconstruction of the record.

(r) Mr Draghoender's legal practitioner answered and indicated that he, *via* a legal surrogate, contacted the arbitrator who confirmed the availability of the electronic record and that no one had collected the same from her, as such, the first respondent believes, no reconstruction is necessary. Lewis' legal practitioner replied stating that it remains the duty of the arbitrator to ensure that the complete record is dispatched to the Registrar within the prescribed time, and that the Commissioner previously indicated to them the arbitrator was not forthcoming with the record.

(s) On 15 November 2021 the applicant launched the second application for the extension of time limits seeking the relief that I have set out earlier in this judgment.

[15] Having set out the facts which are not in dispute between the parties, I now proceed to set out the legal principles governing condonation applications.

#### The law<sup>1</sup>

[16] I do not find it necessary to deal in much detail with the law applicable to applications for the condonation for failure to comply with rules of court or a court order, for the reason that the position of the law in this regard is well settled. To the extent necessary, the legal principles applicable to applications for condonation for non-compliance with the rules of court were conveniently summarized and set out in

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<sup>1</sup> I have reproduced the law from the decision of *Bokomo Namibia Pty (Ltd) v Shivute* (HC-MD-CIV-ACT-MOT-GEN-2020/00589) [2022] NAHCMD 345 (19 June 2022).

the matter of *Telecom Namibia Ltd v Nangolo and Others*<sup>2</sup> and also the case of *Channel Life Namibia (Pty) Ltd v Otto*.<sup>3</sup>

[17] In summary the principles amount to this. A party seeking condonation must furnish a satisfactory explanation for the non-compliance, explain the failure to act timeously and show the default was not willful. In the matter of *Beukes and Another v South West Africa Building Society (SWABOU) and Others*<sup>4</sup> this Court per Damaseb P held that:

‘An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. Accordingly, once there has been non-compliance, the applicant should, without delay, apply for condonation and comply with the Rules.... In seeking condonation, the applicants have to make out their case on the papers submitted to explain the delay and the failure to comply with the Rules. The explanation must be full, detailed and accurate in order to enable the Court to understand clearly the reasons for it.’ (Italicised and underlined for emphasis.)

[18] The court enjoys a very wide discretion. It is a matter of fairness to both sides. The condonation application must be *bona fide*, and the applicant must make a full and frank disclosure of all the relevant facts that led to the non-compliance.

[19] Every period of the delay must be explained and the application for condonation must be brought as soon as the non-compliance has become apparent, including setting out the prospects of success. In the matter of *Darries v Sherriff, Magistrate’s Court, Wynberg and Another*<sup>5</sup> the South African Court of Appeal stated that:

‘... an application for condonation for non-compliance with the law is not a mere formality but an application which should be accompanied with an acceptable explanation, not only, for example, the delay in noting an appeal but also any delay in seeking condonation.’

<sup>2</sup> *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC) at paras. [5] – [8].

<sup>3</sup> *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445, para 45.

<sup>4</sup> *Beukes and Another v South West Africa Building Society (SWABOU) and Others*<sup>2</sup> (SA 10/2006) [2010] NASC 14 (05 November 2010).

<sup>5</sup> *Darries v Sherriff, Magistrate’s Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41D.

[20] The factors that the court will place in the scale whether or not to grant condonation will include.<sup>6</sup>

‘The degree of delay in approaching the court for condonation, the adequacy of the reasons advanced for such delay, the prospects of Applicant’s success on appeal, and the Respondent’s interest in the finality of the judgment.’

[21] Although, generally, the court will consider the prospects of success in adjudicating an application for condonation it may dismiss the application if the breach of the rules is flagrant and gross. Where there was an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial. ‘Where non-observance of the rules has been flagrant and gross, an application for condonation should not be granted whatever the prospects of success might be, the prospect of success is important, but not decisive...’<sup>7</sup> See the case of *Tshivhase Royal Council and Another v Tshivhase and Another*<sup>8</sup> [where](#) Nestadt JA commented that:

‘... in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney.’

### Discussion

[22] Mr Haraseb counsel for Lewis argued that the delay in prosecuting the appeal was beyond Lewis’ doing, and the delay in and of itself was not unreasonable and urged the Court to reinstate the appeal. Mr Haraseb further argued that Lewis took all reasonable steps to secure the full and complete record, albeit unsuccessfully. It was argued that, at the time the first extension application was brought – during September 2021, no record was available but at the time the second application before the court was filed, part of the record was available. Mr Haraseb in his supplementary heads of arguments informs the Court that the record of the

<sup>6</sup> *Channel Life Namibia (Pty) Ltd v Otto* 2008(2) NR 432(SC) at 445, para 45.

<sup>7</sup> *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765; *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at 211 G-H; *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home* (2004) 25 ILJ 2195 (LAC) at para 23.

<sup>8</sup> *Tshivhase Royal Council and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at p 857.

arbitration proceedings was finally provided on 17 December 2021.

[23] Mr Haraseb further argued that the application to extend the period within which to prosecute the appeal was served and filed well in advance of the lapsing of the appeal, as such it could not make any allegations or submission in that regard when the application was initially drafted and implored the court to consider the circumstances as a whole when making its decision. He argued that Lewis has provided a full, detailed, satisfactory, and comprehensive explanation.

[24] Mr Ntinda counsel for Mr Draghoender on the other hand argued that, the facts and issues considered in the first application – comprising almost entirely of the second application have become *res*. He further argued that Lewis accepted the court order of 10 September 2021 that it *must* prosecute its appeal within 85 days of the court's order, but that the applicant has simply failed to do so. He continued and argued that the applicant seeks to circumvent the order by placing the same facts before the court, without much further action to obtain the record and prosecute the appeal since that order.

[25] Mr Ntinda, relying on the matter of *Cloete v Bank of Namibia*,<sup>9</sup> argued that the second application amounts to an abuse of process when the same cause of action is raised against a defendant for a second time.

[26] In the present matter Lewis' legal practitioners gave a detailed explanation why it could not prosecute its appeal during the initial period and also during the extended period. What is also clear from the explanation provided by Lewis is the fact that Lewis was throughout desirous to prosecute its appeal, but was hamstrung by the arbitrator's dereliction of its duty to dispatch the record of the arbitration proceedings to the Registrar. This court has stated in the matter of *Africa Personnel Services v Shipunda and Others*<sup>10</sup> that the duty to file the record, in terms of rule 17, lies with the Office of the Labour Commissioner. I therefore find the explanation provided by Lewis to be entirely satisfactory.

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<sup>9</sup> *Cloete v Bank of Namibia* (HC-MD-LAB-APP-AAA-2019/00071) [2020] NALCMD 34 (23 October 2020).

<sup>10</sup> *Africa Personnel Services v Shipunda and Others* 2012 (2) NR 718 (LC), paras 20 to 22.

[27] I find the argument by Mr Ntinda that the second application by Lewis is an abuse of court process to be baseless. I say so for the reason that in the matter of *Beinash v Wixley*<sup>11</sup>, Mahomed, CJ quoted with approval from the judgment in *Hudson v Hudson and Another*<sup>12</sup>, where the following was said:

'When...the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

The learned Chief Justice, as he then was, proceeded as follows:

'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective...'

[28] Lewis did not use the procedures permitted by the rules of the court, (particularly Rule 17(15)) for a purpose extraneous to the objective of the rule. I accordingly do not find that the application was an abuse of the court process.

[29] Despite the fact that Lewis provided a satisfactory explanation for its failure to prosecute its appeal within the time prescribed in rule 17(25) and as extended by the Court on 10 September 2021, the court cannot grant Lewis the relief that it seeks in paragraphs 1 and 2 of its Notice of Motion (that is the extension of the time period within which to prosecute the appeal).

[30] Why I cannot grant the relief sought by Lewis in paragraphs 1 and 2 of its Notice of Motion, is the simple reason that, as a matter of law and logic, when an appeal lapses there is no appeal before the court. In the matter of *Business Financial Solution v Andima and Another*<sup>13</sup>, Parker AJ said:

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<sup>11</sup> *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734 - 735.

<sup>12</sup> *Hudson v Hudson and Another* 1927 AD 259 at 268.

<sup>13</sup> *Business Financial Solution v Andima and another* (HC-MD-LAB-APP-AAA-2020/00009) [2021] NALCMD 28 (16 June 2021) paras [8] & [9].

'...nobody or no judge can abridge or extend the period of a process that is void or where the right in it has terminated. (See para 9 below.) This is so as a matter of common sense and logic.

[9] In law, lapse means 'the termination of a right or privilege through disuse or failure to follow appropriate procedures'. (*Concise Oxford English Dictionary* 12 ed) 'Lapsed' means something has become 'void' (Bryan A Garner *A Dictionary of Modern Legal Usage* 2<sup>nd</sup> ed (1995)). And '[P]roceedings lapse ... where no step is taken in an action within the appropriate time'. (Roger Bird *Osborn's Concise Law Dictionary* 7<sup>th</sup> ed (1983))'

[31] The court can therefore not extend a period to prosecute a nonexistent or void appeal.

[32] This brings me to the third paragraph in Lewis' Notice of Motion. Despite the fact that Lewis provided a satisfactory explanation for its failure to prosecute its appeal there is one aspect of this matter that I find disturbing. I indicated in the background facts of this judgment that this matter was initially set down for hearing on 26 November 2021, but was postponed to 21 January 2022, and on that day it was again postponed to 25 March 2022. It is also common cause that the appeal lapsed on 03 December 2021.

[33] The disturbing aspect is the fact that despite its knowledge that the appeal had lapsed Lewis did nothing between 04 December 2021 and 25 March 2022 to amend its application and seek an order condoning its failure to prosecute its appeal by 03 December 2021 as ordered by the Court on 10 September 2021.

[34] Mr Haraseb attempted to meet that concern by arguing that in its notice of motion in respect of the second application, Lewis sought an order to the effect that *'In the event of this application being heard subsequent to the expiry of the 90 day period as per Rule 17(25) of the Rules of this Honourable Court, that the appeal be reinstated.'*

[35] Mr Haraseb's argument overlooks the legal position that an application for condonation is not a mere formality; the trigger for it is the non-compliance with the rules of court or a court order. Accordingly, once there has been non-compliance, a

party who has not complied with the rule or court order must, without delay, apply for condonation.

[36] In this matter the rules of court require that an appeal must be prosecuted within a specified period (90 days from the date of noting the appeal). If the appeal is not prosecuted within the specified period there is a non-compliance with the rules and an application for condonation must be lodged. Only after the application for condoning the non-compliance with the rules of court has been filed can a court consider whether or not to reinstate a lapsed appeal.

[37] In the present matter it is common cause that Lewis did not apply to court for the court to condone its non-compliance with rule 17(25), it therefore follows that the court cannot, in the absence of an application for the condonation of the non-compliance with the rules of court, consider the question of whether or not to reinstate the lapsed appeal<sup>14</sup>.

[38] In view of the circumstances of this matter, the circumstances being the fact that Lewis set down its application to extend the period within which to prosecute its appeal before the appeal lapsed and the fact that Lewis was being hamstrung by the dereliction of duty by the Commissioner, it will be inequitable and unfair to out rightly dismiss Lewis' application to reinstate its appeal.

[39] Before I make my order in this matter, I find it appropriate to make a comment with respect to the question of dispatching of records of arbitration proceedings in appeals from arbitration awards.

[40] In the matter of *Africa Personnel Services (Pty) Ltd v Shipunda and Others*<sup>15</sup> Justice Smuts remarked that:

[20] Whilst it is correct that the rules require that appeals must be prosecuted within 90 days, the obligation to dispatch the record is upon the office of the 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

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<sup>14</sup> See the matter of *Tjiuna v Meatco Namibia* (LCA 6/2015) [2017] NALCMD 6 (16 February 2017).

<sup>15</sup> *Africa Personnel Services (Pty) Ltd v Shipunda and Others* 2012 (2) NR 718 (LC).



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 an appellant. Even where the parties agree upon extensions of the time limit, these do not involve the arbitrator(s) whose statutory duty it is to file the record.

[21] Unlike the express provisions of the rule of the Supreme Court Rules which effectively provides 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 under rule 17 to dispatch the record — but rather that of the arbitrator. Rule 17(25) in its current formulation unfortunately does not take into account that the primary duty to provide the record rests upon the adjudicator and not the appellant. Yet it is the appellant which faces the dire consequence of a lapsed appeal when this obligation is not timeously met.

[22] I have noted applications for condonation in other appeals where there has been the late dispatching of a record (eminently understandable in this appeal), brought on the basis that there would otherwise be the lapsing of an appeal. This subrule in my view requires reconsideration, given the harsh consequence visited upon a party where 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.’

[41] In the matter of *B2Gold Namibia (Pty) Ltd v Shitula*<sup>16</sup> Justice Masuku comments that:

‘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.

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

[42] In that same *B2Gold Namibia (Pty) Ltd v Shitula* matter Justice Masuku lists about six matters dealt with by one legal practitioner who had to on behalf of his clients, keep the appeal proceedings ‘alive through the ventilator of condonation of the one type or the other’ and at a great costs and delay, because the record of proceedings were not dispatched on time. These include the case *B2Gold Namibia v Hileni Shitula and Another*<sup>17</sup>, *Ohorongo Cement (Pty) Ltd v Kharuxab*<sup>18</sup>, *Nancy Lynne Brandt v Municipality of Windhoek*<sup>19</sup>, *FNB Namibia Limited v Edgar Murangi*<sup>20</sup> and *Mediclinic Windhoek (Pty) Ltd v Alois Maximilian Ruider and Another*.<sup>21</sup> To this list I must add that I have, in a space of one month dealt with two similar cases namely the present case and the case of *Bokomo Namibia Pty (Ltd) v Shivute*<sup>22</sup>.

[43] As stated in the *Africa Personnel* case, the result of not providing the record in good time, can have perilous consequences for a party as is testimony in this matter. The non-compliance with the rule 17(17) is not necessarily by reason of an act or omission on Lewis’ part. The non-compliance with the rule has furthermore given rise, and at a great costs, to a multiplicity of condonation applications which are evidently delaying the finalisation of this appeal. The respondent employee sits unemployed and walks the streets of this country with an empty award he cannot give effect to and the employer sits with an award that hangs like an albatross around its neck. Surely this state of affairs cannot be allowed to continue.

[44] I therefore suggest that the Registrar of the High Court invites the Labour Commissioner for a discussion on how to address the current situation and also to consider how to implement the suggestions made by Justice Masuku in his judgment in the matter of *B2Gold Namibia (Pty) Ltd v Shitula*.

[45] For the reasons set out in this judgment I make the following order:

<sup>17</sup> *B2Gold Namibia v Hileni Shitula and Another* (HC-MD-LAB-APP-AAA-2020/00061).

<sup>18</sup> *Ohorongo Cement (Pty) Ltd v Kharuxab* (HC-MD-LAB-APP-AAA-2019/00038).

<sup>19</sup> *Nancy Lynne Brandt v Municipality of Windhoek* (HC-MD-LAB-APP-AAA-2019/00003).

<sup>20</sup> *FNB Namibia Limited v Edgar Murangi* (HC-MD-LAB-APP-AAA-2019/00012).

<sup>21</sup> *Mediclinic Windhoek (Pty) Ltd v Alois Maximilian Ruider and Another* HC-MD-LAB-APP-AAA-2020/00058.

<sup>22</sup> *Bokomo Namibia Pty (Ltd) v Shivute* (HC-MD-CIV-ACT-MOT-GEN-2020/00589) [2022] NAHCMD 345 (19 June 2022).

- 1) The applicant's application for the extension of time to prosecute the labour appeal under case number HC-MD-LAB-APP-AAA-2021/00042 is refused.
- 2) The applicant's application for the reinstatement of the labour appeal under case number HC-MD-LAB-APP-AAA-2021/00042 is removed from the roll.
- 3) A copy of this judgment must 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.
- 4) There is no order as to costs.
- 5) The matter is regarded as finalized and removed from the roll.

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Ueitele S F I  
Judge

APPEARANCES

APPLICANT:

K Haraseb  
of ENSAfrica  
(Incorporated as LorentzAngula Inc.)  
Windhoek

FIRST RESPONDENT:

M Ntinda  
of Sisa Namandje & Co. Inc.  
Windhoek