

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-LAB-APP-AAA-2020/00074

In the matter between:

THOMAS LEONARD AND 32 OTHERS

APPLICANT

and

NAMIBIA PORTS AUTHORITY (PTY) LTD

1ST RESPONDENT

MAXINE KROHNE

2ND RESPONDENT

Neutral Citation: *Leonard v Namibia Ports Authority (Pty) Ltd* (HC-MD-LAB-APP-AAA-2020/00074) [2022] NALCMD 52 (23 September 2022)

Coram: OOSTHUIZEN J

Heard: 25 August 2022

Delivered: 23 September 2022

Flynote: Labour Appeal — Labour Act 11 of 2007 — grounds for condonation considered — reasons for delay — prospects of success — no order as to costs — the applications are dismissed.

Summary: The applicants in this matter noted an appeal on 7 December 2020 against the arbitrator's ruling dated 30 November 2020. The appeal had to be prosecuted within 90 days from the date that it was noted, or else it would lapse on 7 March 2021. The applicants failed to prosecute the appeal within the stipulated time period and filed an application for the reinstatement, condonation and extension of the period for the prosecution of the appeal. The respondents opposed the appeal as well as the applications for reinstatement, condonation and extension.

Held that, the applicants failed to give a detailed explanation for the entire period of the delay. The applicants foresaw that the record would not be received in time and that the application would not be lodged within the prescribed period. The applicants rather than seeking an extension at an earlier stage, waited until such appeal had lapsed. The explanation provided by the applicants regarding the delay is not satisfactory.

Held that, In light of the arbitrator's ruling and the considerations noted in coming to such a ruling, I am satisfied that no other court would come to a different conclusion and interfere with the arbitrator's decision.

ORDER

1. The applicants' applications for reinstatement, condonation and extension of the time under case number HC-MD-LAB-APP-AAA-2020/00074 are dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] The applicants are the 33 members that were employed by the first respondent in this matter and who seek the relief as stated in the notice of motion as follows:

- '1 Reinstating the appeal under Case Number: HC-MD-LAB-APP-AAA-2020/00074;
- 2 Condoning the late delivery of the record of the proceedings appealed against under Case Number: HC-MD-LAB-APP-AAA-2020/00074;
- 3 Condoning the late filing of the Certificate due under Rule 17(12) of the Labour Court Rules under Case Number: HC-MD-LAB-APP-AAA-2020/00074;
- 4 Extending the time for compliance with Rules 17(12) to 17(16), to 60 days after the date of this Court's Order.'

[2] The first respondent is Namibia Ports Authority (Pty) Ltd, a statutory body established in terms of the Namibia Ports Authority Act 2 of 1994. The first respondent opposed the application on the grounds that the applicants appeal is deemed to have lapsed in terms of rule 17(25) of the Labour Court Rules and the application cannot succeed as it is wholly inadequate on its facts and condonation cannot be obtained as the ratification in respect of prohibited members, came after the lapse of the limitation period as prescribed by the provisions of section 86(2)(a) of the Labour Act 11 of 2007 (the Act).

Background

[3] On 6 August 2019, the applicants referred a dispute of unfair dismissal to the Labour Commissioner's Office, however, the arbitration did not succeed as the respondent raised a point *in limine* that the applicants form LC21 was defective in that the applicants' union representative who signed the dispute referral was not entitled to sign thereto. On 30 November 2020, the arbitrator upheld the respondent's point *in limine* and dismissed the dispute.

[4] After the arbitrator upheld the first respondents point *in limine*, on 7 December 2020, the applicants noted an appeal against the arbitrators ruling, and such appeal was noted within the stipulated timeline. Rule 17(25) of the Labour Court Rules provide that the appeal has to be prosecuted within a period of 90 days from the date that the appeal is noted. This meant that the appeal would lapse on 7 March 2021.

[5] The applicants contend that they appointed the offices of Tjitemisa & Associates, which closed for the December holidays on 15 December 2020. On 11 January 2021, Mr Coetzee (applicants' legal practitioner of record) at the said law firm requested the arbitrator to provide them with the record of the arbitration proceedings, but was not provided with the said record. A second letter was sent to the Deputy Labour Commissioner, Ms Kyllikki requesting the said record of proceedings as the arbitrator was on maternity leave. In terms of rule 23(4) of the Rules relating to Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007 it is provided as follows:

'When an appeal has been noted in terms of this rule, the Labour Commissioner must, within 21 days thereafter, transmit the record of the hearing of the complaint in question to the registrar of the High Court, together with the original arbitrators award.'

[6] The applicants received the complete record on 19 March 2021, which was beyond the date in which they were required to prosecute the appeal.

[7] The applicants contend that on 29 March 2021, Mr Coetzee, had to attend to a matter in Oshakati and had to self-isolate until 15 April 2021 after he returned. The application was only filed 43 days later on 28 May 2021.

[8] The first respondent opposed both the appeal and the applications of reinstatement, condonation and the extension of the time period in which to prosecute the appeal. The first respondent takes the view that, the applicant's explanation of the delay was not satisfactory. They note the following reasons. It should have been clear to the applicants already by February 2021 that the appeal would not be prosecuted by 6 March 2021. That the applicants only filed the application for condonation on 17 May 2021. Which was three months later.

Issues

[9] This court is tasked to determine whether or not the applicants met the requirements for condonation and whether this court can reinstate the appeal and extend the time period in which the applicants shall prosecute their appeal.

Grounds for condonation

[10] In light of the law and what was presented by both legal counsel for the applicants and the first respondent. It is quite correct that when the court is faced with the question of condonation and reinstatement the court must consider the two general considerations. The first one being the requirement of a reasonable and acceptable explanation for the delay and secondly, there must be reasonable prospects of success. This court is further alive to the fact that when there are good prospects of success, it may lead to the application being reinstated even if the explanation provided is not entirely satisfactory.¹

Reasonable delay

¹ *Namibia Power Corporation (Pty) Ltd v Kaapehi and Others (2)* (SA 41 of 2019) [2020] NASC 60 (29 October 2020) para 19.

[11] It is common cause that the applicants' appeal lapsed on 7 March 2021. When looking at the explanation of the delay that was provided by the applicants, it is noted that the applicant's legal practitioner received the record on 19 March 2021 and the application was only filed on 28 May 2021. During this period Mr Coetzee went to Oshakati to attend to a matter and was self-isolated until 15 April 2021. After such isolation, there was a delay of 43 days that remained unexplained. The explanation that was provided to this court was:²

'This last period is not explained. It is submitted that it may be accepted that it took a considerable period to prepare the affidavit and obtain all the supporting affidavits by the applicants who are no longer employed at the first respondent.'

[12] In *Arangies t/a Auto Tech v Quick Build*,³ O'Regan AJA stated as follows:

'The application for condonation must thus be lodged without delay, and must provide a "full, detailed and accurate" explanation for it. This court has also recently reconsidered the range of factors relevant to determining whether an application for condonation for the late filing of an appeal should be granted. They include – "the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.'

[13] It is clear that the applicants in their founding affidavit and during arguments failed to give a detailed explanation for the entire period of the delay. The applicants foresaw that the record would not be received in time and that the application would not be lodged within the prescribed period. The applicants rather than seeking an extension at an earlier period, waited to a point where such appeal had lapsed and even after the

² Applicants heads of argument para 5.

³ *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190 E-B, para 5.

appeal had lapsed, they waited for a considerable amount of time to pass before they filed their application. I therefore find that the explanation provided by the applicants for the delay is not satisfactory.

Prospects of success

[14] When considering the prospects of success on appeal, what the courts take into account is whether another court would come to a conclusion different from the one arrived at by the arbitrator.⁴

[15] The grounds on which the arbitrators award was appealed against by the applicants were noted in the notice of appeal as follows:

'2.1. Whether upon an interpretation of the constitution of the Mineworkers Union of Namibia and the provisions of the Labour Act and Rules relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner the Form LC21 was duly signed and the dispute validly lodged.

2.2 Whether the signing of the Form LC21 by Philleppus G Ampweya was duly ratified by the appellants rendering the lodging of this dispute lawful and valid.'

[16] The arbitrator in arriving at its conclusion that there was non-compliance with rule 5(1) of the Rules relating to Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007 stated as follows amongst other reasons:

'30. It is not disputed that the Applicants are members, however, the Respondents contention is that this membership is not eligible because of the MUN constitution, which only caters for members in the mining and energy sector as per clause 3 and clause 7 thus the MUN official was not the 'person entitled' to sign in terms of rule 5(1). It is further common cause that the Respondent is established under the Namibian Ports Authority Act 2 of 1994 in terms of section 3 of the Act state that;

⁴ *Hamuteta v Minister of Home Affairs and Immigration* (HC-MD-LAB-APP-AAA-2019/00072) [2021] NALCMD 29 (17 June 2021) para 6.

(1) It shall, subject to the provisions of this Act, be the object and general duty of the authority-

- (a) to manage and exercise control over the operation of ports and lighthouses and other navigational aids in Namibia and its territorial waters;
- (b) to provide facilities and services normally related to the functioning of a port; and
- (c) to conduct its business in accordance with sound and generally accepted business principles, but subject to subsection (2).

31. From these provisions and arguments advanced it is clear that the Respondent does not fall within the scope of mining and energy industry nor was this disputed by the Applicants. The MUN derives its rights to represent members from the Labour Act and its constitution.

33. I believe that the contention by Ms. Nyandoro is incorrect, I say this because accordingly the Respondent does not fall within the scope or activities defined within the MUN constitution. The Respondent has always been part of the transport and logistic industry with recognizing NATAU as its exclusive bargaining agent.'

[17] The arbitrator was quite thorough in its interpretation of the constitution of MUN and whether MUN or Mr Ampweya's signing of the form LC21 was in compliance with rule 5(1). It is indeed true that in terms of s 59(1) of the Labour Act, a registered trade union may bring a case on behalf of its members. However, with the abovementioned reasons it is clear that the applicants were not members of the union and could not have been represented by the union.

[18] The arbitrator then moved on to consider whether there was ratification by the parties. The arbitrator stated that the arbitration process had not taken place, because prior to the commencement of the arbitration process the respondents raised the point *in limine*. After the respondent had raised the point *in limine*, the applicants' representative submitted a ratification document signed by all the applicants to which they ratified the signing of the form LC21 by Ampweya and indicated that the defect had been cured and there was participation on behalf of the applicants.

[19] The applicants' representative at the conciliation stated as follows:

'my case is about participation of the applicants. They are here, they authorized during these conciliation proceedings Mr Ampweya to sign.'

[20] With regards to the ratification the arbitrator stated as follows:⁵

'39. In *Methealth Namibia Administrators (Pty) Ltd v Matuzee and others*,⁶ a union representative signed on behalf of the complainants in a joint referral and the process had reached an advanced stage when objections of non-compliance were raised. The court did not consider whether rule 5(2) and (3) are applicable as it found that the arbitrator's reasoning in refusing the point in limine at such an advanced stage of the arbitration proceedings was correct.

40. On the aforesaid, I find that the Applicants have not participated in arbitration and that the point raised by the respondent was raised before arbitration. Furthermore the ratification document does not provide the name of the person who is authorized in terms of the Rule 5(2) and (3) and I therefore do not consider this as ratifying the non-compliance of Rule 5(1) to the referral of the dispute.'

[21] The applicants during arguments stated that during the proceedings before the arbitrator, they had intended to file a joint complaint, but that they never intended the dispute to be dealt with by the union but by themselves. The applicants' argued that although Mr Ampweya signed the LC21, he signed same in his personal capacity and not his official capacity.

[22] The first respondent further took issue with the point that even if one could argue that MUN and Mr Ampweya (in his personal capacity) could represent the applicants, the question further arises whether same is possible in law. The cause of action arose on 19 July 2019⁷ and would lapse on 18 January 2020 after six months in terms of s

⁵ Record page 18.

⁶ 2015 (3) NR 870 (LC).

⁷ Record page 217.

86(2)(a) of the Labour Act which the first respondent acquired a vested right and the first respondent would be prejudiced by the ratification.

[23] In *Finbro Furnishers (Pty) Ltd v Peimer*,⁸ Watermeyer J stated that:⁹

'We are satisfied, however, that when an act has been done within a fixed time, performance of that act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time. The principle is illustrated in a number of cases referred to in Halsbury (vol.1, sec. 384, first edition). In the present case the respondent acquired a right under Rule 528 to claim that the appeal lapsed four weeks after it was noted unless application for a date for hearing was made in the meanwhile. Consequently on the principle stated above the appellant could ratify an authorized application for a date of hearing after such four weeks had elapsed.'

[24] The first respondent's argument is thus, that the applicant's ratification of the form LC21 is a nullity as it was done after the lapse of the cause of action and therefore the applicants do not have good prospects of success.

[25] The applicants' argument is that the arbitrator missed the point, as the ratification that was submitted was not for the actions of Thomas Leonard, but of Mr Ampweya who signed the LC21. I find that the applicants have contradictory versions of who was to be granted authority on their behalf, as before the arbitrator, it was stated that the authority was granted to Mr Ampweya to sign and during arguments before me, it was stated that the authority was intended for Thomas Leonard.

[26] In light of the abovementioned, I am inclined to agree with the arbitrator's conclusion that the applicants did not participate in the proceedings due to their non-compliance with rule 5(1) of the Rules relating to Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007. Even if this court were to conclude that the Mr Ampweya had authority to sign the referral order, the court would not come

⁸*Finbro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380.

⁹ Record page 279.

to a different conclusion as the applicants would not pass the hurdle of ratification within the prescribed period as provided for by s 86(2)(a) of the Labour Act.

[27] In light of the arbitrators' ruling and the considerations noted in coming to such a ruling, I am satisfied that no other court would come to a different conclusion and interfere with the arbitrator's decision.

Conclusion

[28] I find that the applicants have not given a satisfactory explanation for the delay in lodging the appeal within time. Furthermore, it is my considered view that the applicants do not have any prospects of success.

[29] In the result, I hereby make the following order:

1. The applicants' applications for reinstatement, condonation and extension of the time under case number HC-MD-LAB-APP-AAA-2020/00074 are dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

GH OOSTHUIZEN

Judge

APPEARANCES:

APPLICANTS: PCI Barnard
Instructed by Tjitemisa & Associates, Windhoek

RESPONDENT: R Heathcote SC
Instructed by Koep & Partners, Windhoek