

REPUBLIC OF NAMIBIA



**IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING**

CASE NO: HC-MD-LAB-MOT-GEN-2021/00115

In the matter between:

MATHEUS ELAGO JASON

APPLICANT

and

NAMIBIA INSTITUTE FOR MINING AND TECHNOLOGY

1ST RESPONDENT

ALEXINA MAZINZA MATENGU

2ND RESPONDENT

OFFICE OF THE LABOUR COMMISSIONER

3RD RESPONDENT

Neutral Citation: *Jason v Namibia Institute for Mining and Technology* (HC-MD-LAB-MOT-GEN-2021/00115) [2022] NALCMD 66 (28 October 2022)

Coram: OOSTHUIZEN J

Heard: 10 June 2022

Delivered: 28 October 2022

ORDERS

1. The application is dismissed.
2. No order as to costs.
3. The matter is finalized and removed from the roll.

RULING

OOSTHUIZEN J:

Introduction

[1] This application emanates from an appeal that was noted on 17 July 2020, by the Namibia Institute for Mining and Technology, the first respondent (in the current matter), under the case number of HC-MD-LAB-APP-AAA-2020/00041 against Matheus Elago Jason (applicant in current matter) and the Office of the Labour Commissioner's (third respondent in the current matter) arbitration award.

[2] Upon the appeal being noted by the first respondent, the applicant, on 7 August 2020, noted a cross-appeal against the appeal by the first respondent. On 16 August 2020, the Registrar filed a notice that the appeal would lapse in 60 days and with reference to rule 17(27) of the Labour Court Rules, the appellant's appeal would lapse on 15 October 2020. The applicant's cross-appeal would lapse on 4 November 2020 and on that same date the applicant had to file an application for a hearing date. This application was only filed on 9 February 2021, after the cross-appeal had lapsed as a result of the late filing of the application.

[3] The applicant then instituted this application seeking the relief as noted in the notice of motion as follows:

‘1 Condoning the Applicant’s non-compliance with Labour Court Rule 17 (27) read with Rule 17 (25) and Rule 17 (26); and

2 Extending the 20 day period in which to apply for a hearing date as provided for in Rule 17 (27) until 20 August 2021 or such date as this Honourable Court considers appropriate; and

3 Re-instating the cross-appeal;

4 Further and/or alternative relief;’

[4] The first respondent opposed the application.

Issues

[5] What this court has to determine is whether or not the applicant met the requirements for condonation and whether this court can reinstate the appeal and extend the time period in which the applicant can prosecute the cross-appeal.

Grounds for condonation

[6] The period in which to prosecute a cross-appeal is stipulated by rule 17(27) of the Labour Court Rules as follows:

‘If a cross-appeal has been noted , and the appeal lapses, the cross-appeal also lapses, unless application for a date of hearing for such cross-appeal is made to the registrar within 20 days after the date of the lapse of such appeal.’

[7] The court may grant condonation for non-compliance with its rules. Rule 15 of the Labour Court Rules states as follows:

‘The court may, on application and on good cause shown, at any time-

(a) Condone any non-compliance with these Rules;

(b) Extend or abridge any period prescribed by these Rules, whether before or after the expiry of such period.’

[8] 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 non-compliance and secondly, there must be reasonable prospects of success. I am 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

Reasons for the non-compliance with the rules of court

[9] The applicant gave an explanation as to the reasons for the delay. The deponent for the applicant stated that from the inception of the matter to 28 January 2021 he was represented by Ms Annethe Nyeyapo Jason who was employed by the instructed firm until she left on 28 January 2021. On the same date, the current legal practitioner from the same firm took over the matter. The current legal practitioner that took over the matter was under the impression that the application for condonation and reinstatement of the appeal was filed based on the brief provided to him by the previous legal practitioner. The current legal practitioner thereafter requested for a hearing date for the cross-appeal only on 9 February 2021, whereafter he and the first respondents legal practitioner were scheduled to meet the Registrar for dates on 17 February 2021. The first respondent's legal practitioner informed the applicant's legal practitioner that first respondent (appellant in the appeal) does not proceed with the appeal. The applicant's legal practitioner continued to meet the registrar in order to obtain dates, but was informed that the appeal record filed was incomplete.

[10] The applicant further stated that on 2 March 2021, the current legal practitioner filed the record and it 'emerged' that the application for reinstatement and condonation was not filed. It should be noted that it is not explained as to how it 'emerged'. On 3 March 2021, the applicant's representative met with the registrar and was informed that the certificate of completeness of the record was not filed and he filed it on the said date. The current legal practitioner contacted the previous legal

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

practitioner to obtain a further brief on 9 March 2021. The deponent states that the previous legal practitioner on 9 March 2021 realized that she mistook the pending case for another labour appeal. The previous legal practitioner believed that she filed a reinstatement application on 12 November 2020, it was allegedly prepared but was not filed. Then on 9 March 2021, the current legal practitioner consulted with the applicant and was instructed to file the condonation application. The application was brought under two different case numbers prior to it being brought under the current case number.

[11] The first respondent's argument as per the deponents answering affidavit is that, they do not believe that different people represented the applicant as the person's name that always appeared on the file was that of Mr Shikongo. Further; that the applicant already knew by March 2021 that a condonation application was not brought, but waited until the end of May 2021 to file the condonation application.

[12] In *Arangies t/a Auto Tech v Quick Build*,² 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] I am not satisfied with an explanation that the legal practitioner believed that the application was already lodged. The legal practitioner was at all material times able to acquaint himself properly with the file and did not need a briefing from another legal practitioner.

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at 189-190 E-B, para 5.

[14] The applicant's legal practitioner has e-justice filing on which he can follow the matter. Prior to the lapse of the cross-appeal the legal practitioner should have already filed the application for condonation and extension of time, knowing that he would not meet the requirements regarding the time period. I am not satisfied with the reasons provided to me by the applicant. Thus, the application does not succeed on the first ground.

Prospects of success

[15] 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.³

[16] The matter before me is that of condonation, reinstatement and extension of time of an appeal. As I have mentioned above, the applicant for condonation states that he was dismissed in December 2018 and a period of 19 months had passed from the date of dismissal to the conclusion of the arbitration proceedings and therefore the arbitrator should have compensated him for loss of income of 19 months and not 10 months, as the arbitrator did not calculate from the date of dismissal to the date of July 2020 and rather calculated from September 2019 to June 2020. The applicant further states that during this period he had to dispose of property to maintain the family and the conduct of the first respondent has caused damage to his career and livelihood. The arbitrator awarded the applicant an amount of N\$812 400 for loss of income and all benefits that would have accrued to him during this period. The applicant's contention is that he suffered loss for N\$1 823 238.43 and such have been awarded this amount.

[17] The arbitrator in her reasons for the award indicated as follows:

'In the applicants statement he claimed to be remunerated for 17 months of loss of income and according to the referral of dispute, the dispute arose on the 09th August 2019,

³ *Hamuteta v Minister of Home Affairs and Immigration* (HC-MD-LAB-APP-AAA-2019/00072) [2021] NALCMD 29 (17 June 2021) para 6.

there was no justifications that was submitted in the hearing to substantiate the applicant's claim of 17 months loss of income while his loss of income is from September 2019 to date.'

[18] The arbitrator then ordered that the respondent should pay the applicant for loss of income for 10 months from September 2019 to June 2020 and all other benefits that the applicant would have earned to the total amount of N\$812 400.

[19] The court is not guided in terms of what considerations would bring the amount to the claim of N\$1 823 238.43 in a period of 19 months. The applicant has not demonstrated any prospects apart from stating that the arbitrator should have granted relief for a period of 19 months instead of 10 months, which is a different figure from what was alleged before the arbitrator (17 months). The first respondent in opposition contended that the applicant has placed nothing before this court to consider and that stating that 'the arbitrator erred in that she did not consider that (applicant) suffered loss of income' does not constitute error in law with good prospects of success. The first respondent in its answering affidavit clearly states that applicant was dismissed in November 2019.

[20] The founding affidavit in respect of the prospects of success are lacking as the applicant did not refer this court to any part of the record on which he wishes to rely in his cross-appeal, in his attempt to convince the court that he has good prospects of success. As stated by the first respondent it is indeed true that an 'application for condonation must stand and fall by its founding affidavit', same as in any other motion proceeding. Cloete JA in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*⁴ stated that:

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts.... A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush is not permitted.'

⁴ *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) (28 November 2007) para 43.

[21] Furthermore, O'Regan AJA stated in *Standard Bank Namibia Ltd & Others v Maletzky & Others* 2015 (3) NR 753 (SC) at 771B-C para 43 that 'it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts in the annexure upon which the litigant relies.'

[22] Having considered the reason provided by the arbitrator and what was placed before me by both parties (including the first respondent's decision not to proceed with the appeal), I am of the considered view that the arbitrator's discretion in the award of compensation to the applicant was not capriciously exercised.⁵ The arbitrator had the benefit of assessing the evidence and assessing the period for which to grant loss of income. I am, therefore, not satisfied that the applicant demonstrated good prospects of success in its founding affidavit and that another court would come to a different conclusion from that of the arbitrator.

Conclusion

[23] In the result, I find that the applicant has not given a satisfactory explanation with regards to the delay in requesting a date for hearing of the cross-appeal, neither has the applicant made out a case whether the applicant enjoys good prospects of success. The court can therefore not condone, reinstate or extend the period of compliance with the rules of court as provided for in terms of rule 15 of the Labour Court Rules.

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

1. The application is dismissed.
2. No order as to costs.
3. The matter is finalized and removed from the roll.

⁵ *Jimmy-Naruses v DuikerInvestment 142 (Pty) Ltd & another* (HC-MD-LAB-APP-AAA 23 of 2020) [2021] NALCMD 8 (15 March 2021) para 34.

GH OOSTHUIZEN

Judge

APPEARANCES:

APPELLANTS: E Shikongo
Of Shikongo Law Chambers, Windhoek

FIRST RESPONDENT: P J De Beer
Of De Beer Law Chambers, Windhoek