

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-GEN-2021/00291

In the matter between:

ROADS AUTHORITY

APPLICANT

and

SAKARIA L. HANGULA

FIRST RESPONDENT

DIONYSIUS LOUW

SECOND RESPONDENT

Neutral citation: *Roads Authority v Hangula* (HC-MD-LAB-MOT-GEN-2021/00291)
[2023] NALCMD 43 (8 September 2023)

Coram: USIKU J

Heard: 9 May 2023

Delivered: 8 September 2023

Flynote: Labour law – Labour Act 11 of 2007 – Application for condonation – Failure to prosecute an appeal within 90 days after the noting of the appeal – Appeal deemed to have lapsed.

Summary: The applicant noted a labour appeal on 22 October 2021 against an arbitrator's award. The applicant failed to prosecute the appeal within the period of 90 days prescribed under rule 17 (25) of the Rules of the Labour Court. The applicant applied for condonation for the default.

Held that: the applicant has failed to provide a reasonable and acceptable explanation for the default. The application for condonation is dismissed.

ORDER

1. The first respondent's condonation application for the late filing of his answering affidavit, is granted.
 2. The applicant's condonation application for its failure to prosecute its appeal within 90 days after the noting of its appeal, is dismissed.
 3. I make no order as to costs.
 4. The matter is removed from the roll and is regarded finalized.
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JUDGMENT

USIKU J:

Introduction

[1] There are two applications for determination before this court. The first one is a condonation application by the first respondent ('the respondent') for the late filing of its answering affidavit. This application is not opposed. The second one is an application by the applicant in terms of which it seeks the following orders:

- (a) condoning the late noting and prosecution of an appeal under case number HC-MD-LAB-APP-AAA-2021/00072;
- (b) reinstating the appeal under case number HC-MD-LAB-APP-AAA-2021/00072;
- (c) staying the arbitration award, pending the final determination of the appeal lodged under case number HC-MD-LAB-APP-AAA-2021/00072; and,
- (d) interdicting the respondent from proceeding with any proceedings or action aimed at executing the award against the applicant, pending the finalization of the appeal proceedings.

Background

[2] The respondent was employed by the applicant and dismissed following certain disciplinary proceedings. On 17 December 2020, the respondent referred a dispute of unfair dismissal to the Labour Commissioner.

[3] The dispute was heard by an arbitrator, who delivered his award on 8 October 2021. In the award, the arbitrator found that the applicant failed to discharge the *onus* of proving that it:

- (a) had a fair and valid reason to dismiss the respondent; and,
- (b) followed a fair procedure.

[4] The arbitrator, therefore, ordered that the applicant reinstates the respondent with immediate effect and that it compensates the respondent an amount of N\$531 390 as compensation for the loss he suffered.

[5] Aggrieved by the award granted, the applicant noted an appeal to this court on 22 October 2021, against the entire award.

[6] The applicant states that on 25 November 2021, it received legal advice that the appeal that it has noted is defective on account that it does not comply with the requirements of rule 17(3) of the Rules of the Labour Court ('the Rules').

[7] On 8 December 2021, the applicant brought the present application seeking the relief as set out in para 1 hereof.

[8] The respondent filed a notice of intention to oppose the foregoing application, on 17 December 2021. The respondent did not file his answering affidavit within the prescribed time. For that reason, the respondent filed a condonation application on 25 February 2022.

Respondent's condonation application

[9] In his condonation application, the respondent seeks an order in the following terms:

- (a) condoning the respondent's failure to timeously file his answering affidavit;
- (b) uplifting the automatic bar that ensued as a result of the late filing of the answering affidavit; and,
- (c) extending the time within which the answering affidavit may be filed.

[10] The respondent asserts that the reason for the failure to timeously file the answering affidavit is that his legal practitioner miscalculated the period within which the same was to be filed. The respondent states that, his legal practitioner calculated the period within which the answering affidavit should be filed, in terms of court days as opposed to calendar days required in terms of the Rules. According to the respondent, the legal practitioner diarised the answering affidavit as due on 4 February 2022. On 2 February 2022, the legal practitioner was informed by a counsel that was briefed in the matter that the time within which the answering affidavit was to be filed has expired.

[11] The respondent further states that his legal practitioner engaged the applicant's legal practitioner, in terms of rule 32(9) of the Rules of the High Court, on 4 February 2022.

[12] As regards the issue of prospects of success on the merits, the respondent submits that the prayer for condonation of the late noting of an appeal by the applicant is not competent, since the applicant alleges in his founding affidavit that the appeal was noted on time. The respondent further contends that the applicant may only allege, either that:

- (a) there was an appeal noted that has lapsed and the applicant seeks to reinstate such an appeal, or that;
- (b) there was no appeal noted and the applicant seeks condonation for late noting of an appeal.

The respondents argues that the applicant cannot allege the above proportions at the same time.

Applicant's condonation application

[13] In its condonation application, the applicant states that it filed its notice of appeal on 22 October 2021. Sometime later, the applicant realised that its notice of appeal was defective, and it filed a substituted notice of appeal. On 25 November 2021, the applicant's instructed counsel concluded that even the substituted notice of appeal may be defective because it was not accompanied by form LC 41 and form 11.

[14] The applicant asserts that a notice of appeal is required to be filed within 30 days of the grant of the arbitrator's award. The applicant states that at this point an amended notice of appeal is out of time, necessitating the bringing of this condonation application for the applicant to file its amended notice of appeal.¹

Analysis

[15] In an application for condonation, the court is required to have regard to two general considerations. Firstly, there must be a reasonable and acceptable explanation for the non-compliance. Secondly, there must be reasonable prospects of success on the merits of the main application.² There is some interplay between these two considerations, eg good prospects of success may lead to the granting of the condonation application even if the explanation is not entirely satisfactory. Where there is a flagrant breach of the rules and there is no acceptable explanation therefor, condonation may be refused whatever the prospects of success are.³

[16] In regard to respondent's condonation application, the substance of his explanation is that the answering affidavit was not timeously filed because his legal practitioner miscalculated the period within which same ought to have been filed. It is not acceptable for the litigant to place reliance on the ineptitude of his/her legal practitioner in conducting the litigation. A legal practitioner is obliged to acquaint himself or herself with the rules of the court in which the litigation concerned is being conducted. Having had regard to the provisions of rule 6 (16) of the Rules, I am of the view that the respondent's answering affidavit was due on or about the 3 February 2022. It is not disputed that the respondent's legal practitioner engaged the applicant's legal practitioner in terms of rule

¹ Paragraph 18 of the founding affidavit.

² *Sun square Pty Ltd v Southern Sun Africa SA 26/2018* [2018] (9 December 2019) para 13.

³ *Ibid.*

32(9) of the rules of the High Court on 4 February 2022. The application for condonation was brought on 25 February 2022. The period of the default is not entirely unreasonable. The foregoing consideration, together with the respondent's prospects of success on the merits on the main application (as discussed below) warrant the grant of the respondent's condonation application.

[17] In regard to the applicant's condonation application, the applicant seeks condonation of the late noting of its appeal under case number HC-MD-LAB-APP-AAA-2021/00072. In the same vein, the applicant also seeks condonation of the late prosecution of its appeal under the same case number stated above. I agree with the contention by the respondent that it is either that there is an appeal noted and that it has lapsed and the applicant seeks reinstatement of such an appeal or there is no appeal noted and the applicant seeks condonation for the late noting of an appeal. It cannot be both.

[18] On the facts of the present matter, it is common cause that the arbitration award was issued on 8 October 2021. The applicant noted the appeal against that award on 22 October 2021 and case number HC-MD-LAB-APP-AAA-2021/00072 was allocated to that appeal. The appeal under the foregoing case number was noted within a period of 30 days of the handing down of the award. The relief sought by the applicant for condonation of the late noting of the appeal under the above case number appears to me to be misplaced and stands to be declined.

[19] In regard the condonation application for failure to prosecute the appeal under the abovestated case number within 90 days after the noting of the appeal, the applicant has not furnished explanation for the default. It appears that when the applicant concluded, on 25 November 2021, that its appeal is defective, it took no further steps to prosecute the appeal, and the appeal lapsed on 20 January 2022.

[20] In the meantime, the applicant brought the present application on 8 December 2021. The deponent to the applicant's founding affidavit asserts that, having concluded that the appeal noted is defective, it is now necessary to bring the present condonation application in order to allow the applicant to file an amended notice of appeal.

[21] It is important to note that, the present application is not an application for leave to amend the notice of appeal. In other words, in the present application, the court is not called upon to consider whether or not to grant an amendment to the notice of appeal. Therefore, the legal principles applicable to applications for amendment of pleadings are not relevant to the present case.

[22] Condonation cannot be had for the mere asking. The applicant is required to make out a case entitling it to the court's indulgence by showing sufficient cause for having not prosecuted the appeal within the prescribed period of 90 days. I am of the opinion that the applicant, in the present matter, has failed to put forth a reasonable and acceptable explanation for having failed to prosecute its appeal within 90 days. In the circumstances, I am of the view that without a reasonable and acceptable explanation for the default, the prospects of success are immaterial in the present case, and that the applicant's condonation application for failure to prosecute the appeal within the period of 90 days, stands to be refused.

[23] In conclusion, I am of the view that the respondent's application for condonation of the late filing of his answering affidavit should succeed. The applicant's condonation application for its failure to prosecute its appeal within 90 days stand to be refused. Having reached the foregoing conclusion, it is not necessary to deal with the remainder of the reliefs sought in the applicant's notice of motion.

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

1. The first respondent's condonation application for the late filing of his answering affidavit, is granted.
2. The applicant's condonation application for its failure to prosecute its appeal within 90 days after the noting of its appeal, is dismissed.
3. I make no order as to costs.
4. The matter is removed from the roll and is regarded finalized.

APPEARANCES:

APPLICANT: E Shifotoka
Instructed by Adv. SS Makando Chambers, Windhoek

RESPONDENT: LK Ihalwa
Instructed by Kadhila Amoomo Legal Practitioners, Windhoek