

REPUBLIC OF NAMIBIA

LABOUR COURT OF
WINDHOEK

JUDGMENT



NAMIBIA MAIN DIVISION,

PRACTICE DIRECTION 61

Case Title: FP DU TOIT TRANSPORT (PTY) LTD // NICHOL VAN WYK & 2 OTHERS	Case No: HC-MD-LAB-MOT-GEN-2023/00179
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: PARKER, AJ	Heard on: 8 NOVEMBER 2023
	Delivered on: 22 NOVEMBER 2023
Neutral citation <i>FP du Toit Transport (Pty) Ltd v Van Wyk</i> (HC-MD-LAB-MOT-GEN-2023/00179) [2023] NALCMD 55 (22 November 2023)	
Order:	
<ol style="list-style-type: none">1. The application is dismissed.2. There is no order as to costs.3. The matter is finalised and removed from the roll.	
Reasons:	
PARKER AJ: [1] Before the court is an application to-	

- (a) condone the applicant's late filing of its appeal registered under Case No. MD-LAB-APP-AAA-2023/00026;
- (b) reinstate the appeal lodged under Case No. MD-LAB-APP-AAA-2023/00026;
- (c) extend the prescribed 90 days to prosecute the appeal.

[2] The applicant (the employer) is represented by Mr Horn. The first respondent, represented by Mr Ikanga, has moved to reject the application.

[3] For such application, I cannot do any better than to rehearse what the Supreme Court stated in *Balzer v Vries*:

[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.

[21] This court recently usefully summarised the jurisprudence of this court on the subject of condonation applications in the following way:

“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 considered 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.”

‘These factors are not individually determinative, but must be weighed, one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this court has held that it will not consider the prospects of success in determining the

application because the non-compliance with the rules has been glaring, flagrant and inexplicable.¹

[4] The overarching consideration which the court should not overlook when seized with an application to condone the non-compliance with a rule has been propounded by the Supreme Court in the recent case of *Solsquire Energy (Pty) Ltd v Luhl* where the court stated:

[68] In the determination of what constitutes “good cause”, the court would consider the facts and circumstances of each particular application in the exercise of its judicial discretion.²

[5] Keeping the foregoing principles and approaches in my mind’s eye, I proceed to consider the application. In the instant application, two superlatively important aspects ought to carry great weight in weighing the considerations in paras 3 and 4 above, one against the other. They are discussed in the succeeding para 6.

[6] The respondent’s interest in the finality of the award and the avoidance of unnecessary delay are paramount. The Supreme Court has stated categorically that labour disputes ought to be disposed of expeditiously.³ In the instant matter, the award sought to be appealed from was granted on 6 March 2023 and it came to the attention of the applicant employer the same day. The applicant noted its appeal on 6 April 2023. I hold that the appeal was noted out of time in terms of s 89(2) of the Labour Act 11 of 2007 (‘the LA’), read with rule 1 of the Labour Court Rules (‘the rules’), as Mr Ikanga submitted. The word ‘day’ in rule 1 of the rules means a ‘calendar’ day, and a ‘calendar day’ is reckoned according to the calendar.⁴

[7] I have carefully pored over all the passages in the applicant’s founding affidavit aimed at satisfying the first requisite of good cause.⁵ I find that not one iota of an acceptable explanation has been given to explain the applicant’s total inaction between 6 March 2023 (when the award was served on it) and 5 April 2023, that is, the last day of the aforesaid time limit within which the appeal ought to have been noted in terms of the LA.

[8] Thus, when the applicant allegedly made attempts to note the appeal on the ejustice system, the period for the noting of the appeal had already lapsed after the last minute of 5

¹ *Balzer v Vries* 2015 (2) NR 547 (SC).

² *Solsquire Energy (Pty) Ltd v Luhl* [2022] NASC (25 August 2022).

³ *National Housing Enterprise v Hinda-Mbazira* 2014 (4) NR 1046 (SC).

⁴ G C Thornton *Legislative Drafting* 3ed (1987) at 108.

⁵ *Balzer v Vries* footnote 1 loc cit.

April 2023, as aforesaid. Therefore, the explanation of delay relating to the applicant's alleged attempts to note the appeal after the period for the noting of the appeal had lapsed is irrelevant. What is relevant are the following: First, the applicant has not given any explanation for the delay, none at all – acceptable or unacceptable – in respect of the period between 6 March 2023 and 5 April 2023, and yet the Supreme Court tells us that the application for condonation must provide a full explanation for the delay.⁶ Second, the noting of the appeal lapsed on 5 April 2023, and yet the instant condonation application was brought on 15 August 2023, that is, after a period of 131 days, and yet the Supreme Court tells us that the application for condonation must be lodged without delay.⁷ That being the case, the applicant cannot be thankful of *Namibia Power Corporation (Pty) Ltd v Michael Kaapehi* where Shivute CJ observed that 'good prospects of success may lead to a reinstatement application being granted even if the explanation is not entirely satisfactory.'⁸ In the instant proceeding, as I have found, there is simply no explanation at all, either satisfactory or 'not entirely satisfactory' for the late noting of the appeal.

[9] Indeed, if the truth be told, the applicant's perception was that as on '6 April 2023 my legal practitioner had enough time and also intended to register the case on E-justice, after same has been served on the first respondent'. That was the applicant's perception of the law, and it acted in accordance with its own perception of the law regarding the interpretation of the provisions in s 89(2) of the LA on the time limit for the noting of appeals. Labouring under that wrong perception of the law, the applicant saw no need to give any explanation for the late noting of the appeal, because as far as it was concerned, there had not been a late noting of the appeal, within the meaning of s 89(2) of the LA. The applicant was palpably wrong, as I have demonstrated previously.

[10] Consequently, I find that this is one of the times where the court should not consider the prospects of success in determining the condonation application, because the non-compliance with a statutory provision in the LA has been 'inexplicable'.⁹ It follows inevitably that on the facts and in the circumstances of the instant application,¹⁰ in the exercise of my discretion, I cannot grant the application without offending the aforementioned authorities.

[11] One last point. The payment of the award amount into the trust account of the

⁶ *Balzer v Vries* footnote 1 para 21.

⁷ *Balzer v Vries* footnote 1 para 21.

⁸ *Namibia Power Corporation (Pty) Ltd v Michael Kaapehi* Case No. SA 41/2019 (29 October 2020) para 19.

⁹ *Balzer v Vries* footnote 1 para 21.

¹⁰ *Solsquire Energy (Pty) Ltd v Luhli* footnote 2 loc cit.

applicant's legal practitioners is of no moment in the instant proceedings. It is a ruse. It does not in any way benefit the first respondent who has the arbitral award standing in his favour since 6 March 2023. He could not use any part of it, for instance, as transport money to travel in search of employment or to pay for accommodation or food.

[12] In the result, I order as follows:

1. The application is dismissed.
2. There is no order as to costs.
3. The matter is finalised and removed from the roll.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	First Respondent
S Horn Of Theunissen, Louw & Partners, Windhoek	M Ikanga Of M. Ikanga & Associates Inc., Windhoek