

0REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE RULING

Case Title: Desmond Nicodemus Basson and Keetmanshoop Municipality Joseph Windstaand	Case No: HC-MD-LAB-APP-AAA-2023/00055 Division of Court: Labour Court, Main Division
Applicant	First Respondent
Second Respondent	
Coram: Honourable Justice Schimming-Chase	Heard on: 12 April 2024 Delivered on: 12 April 2024
Neutral citation: <i>Basson v Keetmanshoop Municipality</i> (HC-MD-LAB-APP-AAA-2023/00055) [2024] NALCMD 12 (12 April 2024)	
Order:	
1. The applicant's late noting of the appeal against the arbitration award SRKE 106-2022 under case number HC-MD-LAB-APP-AAA-2023/00055 as provided for in section 89(2) of the Labour Act, 2007 read with rule 17(4) of the Labour Court Rules is hereby condoned.	

2. As far as it may be necessary, the appeal under case number HC-MD-LAB-APP-AAA-2023/00055 is hereby reinstated with the effect from this order.
3. As far as it may be necessary, the period within which the applicant may prosecute this appeal under case number HC-MD-LAB-APP-AAA-2023/00055 is extended for a further period of 90 days from the date of this order.
4. There is no order as to costs.
5. The matter is regarded as finalised and removed from the roll.

Reasons:

SCHIMMING-CHASE J:

[1] The court is seized with an application for condonation for the late noting of the applicant's appeal and reinstatement of the appeal by the applicant. The first respondent opposes this application.

[2] The applicant is Desmond Nicodemus Basson, a major male residing at Erf 28, Noord Street, Keetmanshoop. The first respondent is the Keetmanshoop Municipality, a local authority as defined in the Local Authorities Act 23 of 1992 ('the Act'). The second respondent is Joseph Windstaand, an arbitrator employed at the Office of the Labour Commissioner. The only participating parties are the applicant and the first respondent. For ease of reference, I will refer to the applicant as he is cited and the first respondent as 'the respondent'.

[3] In support of his application, the applicant avers that he was previously employed as the chief executive officer of the respondent duly appointed under s 27 of the Act. He states that on 11 July 2022, he received a letter dated 8 July 2022 from the respondent in which he was informed that the respondent's council had resolved at 'its first ordinary meeting' held on 8 July 2022 that the council's decision of October 2019 would be rescinded. Consequently, the

applicant's employment was terminated with 'immediate effect' as 'no service contract exists between the Keptmanshoop Municipality and Mr Desmond Nicodemus Basson'.

[4] It is asserted by the applicant that upon receipt of the termination letter and on 12 September 2022, he referred a dispute of unfair dismissal and unfair labour practice to the Office of the Labour Commissioner. The applicant states that in the LC21, he indicated that the dispute arose on 11 July 2022 given that it was the date that he received the termination letter from the respondent. Prior to this letter, he was unaware that his employment was terminated.

[5] According to the applicant, the arbitrator delivered his ruling on 15 June 2023, which the applicant only received via email on 11 July 2023. In his ruling, the arbitrator found that the applicant failed to allege the respondent's apparent unfair labour practice as envisaged under s 50(1) of the Labour Act 11 of 2007 ('the Labour Act'). The arbitrator further found that there was no dismissal on 11 July 2022 as reflected in the LC21 given that the respondent's decision was taken on 8 July 2022. It is this ruling that the applicant intends to appeal against.

[6] The applicant states that when his legal practitioner, Mr Jerhome Tjizo, attended to the registrar's office on 1 November 2023 to obtain hearing dates, he (Mr Tjizo) was informed that the appeal had lapsed. Mr Tjizo confirms this assertion. Consequently, the applicant lodged this application.

[7] At the onset, it is the applicant's evidence that he noted his appeal on 11 August 2023. Strictly speaking, the applicant's appeal was noted a day late. This is because s 89(2) of the Labour Act prescribes that an appeal must be noted within 30 days after the award is served on the party. Given that the applicant was served with the award on 11 July 2023, the appeal should have been noted on 10 August 2023.

[8] The applicant's reason for his non-compliance with s 89(2) of the Labour Act is as follows. He states that after receiving the arbitration award on 11 July 2023, he emailed the same to his legal insurer on 12 July 2023 to obtain legal assistance. On 1 August 2023, the applicant's legal insurer appointed Mr Tjizo as his legal practitioner. The applicant and Mr Tjizo only consulted telephonically on 8 August 2023 owing to the applicant being resident in Keetmanshoop. The

appeal was then noted on 11 August 2023.

[9] As I mentioned before, on 1 November 2023, the registrar's office declined assigning hearing dates for the appeal on the premise that the appeal has lapsed. Thus, giving rise to this application.

[10] On the prospects, the applicant asserts that the arbitrator was wrong in finding that the dismissal took place on 8 July 2022 as he only learned of the termination on 11 July 2022, which is when the cause of action supposedly arose, and which was reflected in the LC21. The applicant further asserts that the arbitrator, on his own version, acknowledges the existence of the dismissal as required under s 33(4)(a) of the Labour Act and should have invoked s 33(4)(b).¹

[11] The acting chief executive officer of the respondent, Mr Gregorius Donovan Andries, deposes to the answering affidavit and states that the applicant's five-year period as chief executive officer terminated on 31 December 2019. Thus, Mr Andries denies that the applicant's services were terminated on 11 July 2022.

[12] As I have it, in October 2019, the respondent supposedly took a decision to extend the applicant's employment contract contrary to s 27(3)(b) of the Act. This provision sets out the process which must be followed for the extension of the chief executive officer's employment contract. Mr Andries thus asserts that the applicant's services were terminated on 31 December 2019, when his five-year period lapsed. Mr Andries, however, correctly concedes that the respondent's decision taken in October 2019 constitutes an administrative decision which can only be set aside by a competent court.

[13] Mr Andries further states that the decision of 11 July 2022 is an administrative decision and not a disciplinary action 'as it does not relate to the [applicant's] misconduct'. It is Mr Andries' assertion that the applicant's employment was not terminated on the basis of misconduct but rather that no employment contract existed since 31 December 2019 as a matter

¹ Section 33(4) provides that 'in any proceedings concerning a dismissal – (a) if the employee establishes the existence of the dismissal; (b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.'

of law. Thus, Mr Andries disputes that the applicant enjoys prospects of success.

[14] Turning to the arguments and legal principles, it is a well-established principle of our law that in an application for condonation, as in this instance, the applicant is burdened to show good cause. This is a two-prong test, whereby the applicant must satisfy the court that he has a reasonable, acceptable and satisfactory explanation for his non-compliance, and that he enjoys prospects of success on appeal.²

[15] It was submitted on behalf of the applicant that the arbitration award was dated 15 June 2023 but only received by the applicant on 11 July 2023. The arbitration award was then sent to the legal insurer by the applicant on 12 July 2023. A legal practitioner was appointed by the applicant's legal insurer on 1 August 2023. A consultation was held on 8 August 2023 between the applicant and Mr Tjizo, and the appeal was noted one day late on 11 August 2023. To my mind, it is clear that any delay cannot be attributed to the applicant. It is clear, *ex facie* the papers, that the applicant acted with haste in prosecuting this appeal. It is my view that any delay in noting the appeal must be attributed to the legal insurer.³

[16] I am of the considered view that the explanation by the applicant is reasonable, acceptable and satisfactory. In any event, I do not see any prejudice suffered by the respondent and the court in this regard, which is a factor to be taken into consideration⁴ – after all, the appeal was noted merely a day late.

[17] In respect of prospects, it was argued on behalf of the respondent that s 27 of the Act prescribes that a chief executive officer's term of office is only for five years and may be extended at the expiry of the term. According to counsel's written arguments, the respondent merely rescinded its decision of October 2019 to the effect that the applicant's employment contract ended on 30 December 2019, when his five-year term ended. Thus, counsel submits that in contextualising the decision of 8 July 2022, communicated to the applicant on 11 July 2022, the resolution taken states that no employment contract existed between the parties.

² *Telecom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

³ *Nekongo v First National Bank Limited* (HC-MD-CIV-ACT-CON-2019/03638) [2021] NAHCMD 397 (3 September 2021) paras 12-13.

⁴ *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) at 445 para 45.

[18] In this regard, counsel submits that the applicant was not dismissed 'but that his contract expired by effluxion of time' in terms of the legislation. Counsel placed reliance on the decision of *Goseb v Usakos Town Council*⁵ wherein Angula DJP dismissed a labour appeal on the premise that the appellant's contract had terminated in terms of the legislation. I find the facts in *Goseb* distinguishable to the present instance.

[19] In *Goseb*, the appellant had been employed on a fixed term of five years and upon receiving a letter by the respondent that the contract would come to an end after the five-year period ended with no renewal of the employment contract; the appellant approached the Office of the Labour Commissioner for a dispute on unfair dismissal and labour practice. Presently, it seems that a decision was taken in October 2019 that would renew the applicant's employment agreement; this decision was rescinded by the respondent on 8 July 2022 (and communicated to the applicant on 11 July 2022). It seems common cause that the decision of October 2019 is administrative in nature and, thus, the *Oudekraal* principle⁶ dictates that an administrative decision shall remain extant until set aside by a competent court of law. To my mind, the respondent acted *ultra vires* the law when it took the decision of 8 July 2022 to rescind the decision of October 2019. It is my considered view that the decision of October 2019 remains extant. Therefore, the argument on behalf of the respondent cannot stand.

[20] As I have it, the applicant's appeal is premised on the fact that the arbitrator allegedly erred in finding that the cause of action arose on 8 July 2022 – when the decision was taken – rather than 11 July 2023 – when the applicant gained knowledge of the respondent's decision. The court in *Abrahamse & Sons v SA Railways and Harbours*⁷ where the meaning of 'cause of action' was examined held as follows –

'The proper legal meaning of the expression of "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the

⁵ *Goseb v Usakos Town Council* (HC-MD-LAB-APP-AAA-2018/00036) [2019] NALCMD 12 (8 May 2019).

⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

⁷ *Abrahamse & Sons v SA Railways and Harbours* 1993 CPD 626 cited with approval in *Namibia Breweries Ltd v Seelenbinder, Henning & Partners* Case No (P) I 1606/1999 delivered on 12 February 2002.

last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.' (Emphasis supplied.)

[21] I hold a prima facie view that the arbitrator erred in failing to take cognisance of the fact that the applicant only gained knowledge of the termination on 11 July 2022, and therefore, the cause of action only arose on 11 July 2022. I accordingly find that the applicant does enjoy prospects on appeal.

[22] Before I conclude, it is a general principle that costs shall only be ordered by court in exceptional circumstances where either of the parties acted vexatious. This is not the case in the present instance and I see no need to order costs in this instance.

[23] Having found that the applicant showed good cause in this application, I am of the view that the court should exercise discretion, as I hereby do, and condone the late noting of the appeal. In the end, the following order is made:

1. The applicant's late noting of the appeal against the arbitration award SRKE 106-2022 under case number HC-MD-LAB-APP-AAA-2023/00055 as provided for in section 89(2) of the Labour Act, 2007 read with rule 17(4) of the Labour Court Rules is hereby condoned.
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4. There is no order as to costs.
5. The matter is regarded as finalised and removed from the roll.

Judge's signature	Note to the parties:
Counsel:	
Applicant	Respondent
<p>J Tjizo Of Jerhome Tjizo & Company Incorporated, Windhoek</p>	<p>M Kuzeeko Of Dr Weder, Kauta & Hoveka Incorporated, Windhoek</p>