

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Main case number: HC-MD-LAB-APP-AAA-2023/00045

Interlocutory case number: INT-HC-OTH-2023/00411

Interlocutory case number: INT-HC-OTH-2023/00500

In the matter between:

KAVETUTIRA JAUA

APPLICANT

and

BEST CHEER INVESTMENT

FIRST RESPONDENT

THE LABOUR COMMISSIONER LEAH

SECOND RESPONDENT

SHIMBABA

Neutral citation: *Jaua v Best Cheer Investment* (HC-MD-LAB-APP-AAA-2023/00045) [2024] NALCMD 14 (26 April 2024)

Coram: DE JAGER AJ

Heard: 5 April 2024

Delivered: 26 April 2024

Flynote: Practice – Labour law – To note an appeal against an arbitration award, forms 11 and LC 41 notices of appeal must both be delivered to the

registrar, the labour commissioner and the other parties within 30 calendar days of receipt of the award and the form LC 41 notice of appeal must contain the questions of law appealed against and the grounds of appeal – To note a cross-appeal against an arbitration award, the notice of cross-appeal, setting out the same information required in the notice of appeal, must be delivered to the labour commissioner within seven days after the noting of the appeal, and the cross-appeal must be sent simultaneously with its lodging to all other parties, and proof of service thereof, on form LG 36, must be filed with the labour commissioner and the registrar – The term ‘deliver’ in the Labour Court Rules requires service on all parties under Labour Court r 5 and filing the original with the registrar – In the Rules Relating to the Conduct of Conciliation and Arbitration (Conciliation and Arbitration Rules) ‘deliver’ means to serve on other parties under Conciliation and Arbitration r 6 and file with the labour commissioner – If an appeal or cross-appeal is not properly noted, there is no appeal or cross-appeal.

Practice – Condonation – Labour Court r 15 – Meaning of ‘good cause’ restated – Applicant’s explanation in the first condonation application is insufficient, and in the third condonation application, it is weak – Applicant failed to show he has a reasonable prospect of success – Applicant has no prospects of success – First respondent’s explanation in the second condonation application is unreasonable and insufficient – First respondent has no prospects of success – The condonation applications cannot succeed.

Summary: The first respondent employed the applicant until his dismissal. The applicant referred an unfair dismissal dispute to the labour commissioner. The arbitrator found the applicant’s dismissal procedurally and substantively unfair and awarded the applicant compensation of 12 months’ remuneration and severance pay. The applicant, dissatisfied with the award, seeking reinstatement and compensation of 31 months’ remuneration, pursued an appeal against the award. The first respondent, concerned about the applicant’s claim to be reinstated, and dissatisfied with the award, decided to cross-appeal. The applicant’s form LC 41 notice of appeal was filed and served timely on the second respondent, but it was not served timely on the first respondent, and his

form 11 notice of appeal was not filed simultaneously with his form LC 41 notice of appeal. The first respondent's forms 11 and LC 41 notices of appeal for the cross-appeal were filed late and seemingly delivered on the applicant via ejustice, while the applicant was not a registered ejustice user and at a time when the applicant did not have legal representation. Both parties' forms LC 41 notices of appeal failed to set out the questions of law appealed against. Insofar as there was an appeal and a cross-appeal, both lapsed on 17 October 2023 as the applicant did not prosecute the appeal timely, and the first respondent did not apply for a hearing date of the cross-appeal within 20 days after the appeal lapsed. Before the court are three condonation applications. In the first condonation application, the applicant seeks condonation for the late filing of his form 11 notice of appeal and the late prosecution of the appeal, for its reinstatement and costs if opposed. In the second condonation application, the first respondent seeks condonation for the late noting of its cross-appeal and for non-compliance with Labour Court r 17(2) and (26) in failing to prosecute the cross-appeal within 90 days, for its reinstatement and extending the period to prosecute the cross-appeal. In the third condonation application, the applicant seeks condonation for the late filing of the confirmatory affidavit to his replying affidavit in the first condonation application and costs, if opposed, which application is unopposed. The first two applications are opposed on the basis that good cause was not shown.

Held that an appeal against an arbitration award must be noted under the Conciliation and Arbitration Rules by delivering a form 11 notice of appeal together with a form LC 41 notice of appeal to the registrar, the labour commissioner and the other parties within 30 calendar days of receipt of the award, and the form LC 41 notice of appeal must contain both the questions of law appealed against and the grounds of appeal.

Held that a cross-appeal may be noted by delivery of a notice of cross-appeal, setting out the same information required in the notice of appeal, to the labour commissioner within seven days after the noting of the appeal, and the cross-appeal must be sent simultaneously with its lodging to all other parties, and

proof of service thereof, on form LG 36, must be filed with the labour commissioner and the registrar.

Held that the term 'deliver' in the Labour Court Rules requires service on all parties in accordance with Labour Court r 5 and filing the original with the registrar and, in the Conciliation and Arbitration Rules, it means to serve in accordance with Conciliation and Arbitration r 6 on the other parties and file with the labour commissioner.

Held that under Labour Court r 15, the court may, on good cause shown, at any time condone any non-compliance with the Labour Court Rules and extend or abridge any period prescribed therein, whether before or after the expiry of such period. The term 'good cause' means an applicant must show it has a bona fide reasonable and acceptable explanation for the non-compliance and delay, which must be full, detailed, and accurate for the entire delay period, including the timing of the condonation application, and that it has a reasonable prospect of success on the merits. The meaning of good cause entails two requirements, both of which must be met.

Held that the applicant's explanation for the defaults and delay in the first condonation application is insufficient, and for the third condonation application, it is weak.

Held that the applicant did not sufficiently deal with his prospects of success in his founding papers to his condonation applications and so the applicant failed to show he has a reasonable prospect of success. The applicant has no prospects of success as there is no appeal before the court because the applicant's form LC 41 notice of appeal is fatally defective in that it does not contain the questions of law appealed against. The applicant's form 11 notice of appeal was furthermore not served together with his form LC 41 notice of appeal, and his form LC 41 notice of appeal itself was delivered late and no condonation is sought for that.

Held that the first respondent's explanation for the defaults and delay in the second condonation application is unreasonable and insufficient.

Held that the first respondent has no prospects of success because there is no cross-appeal as the first respondent's form LC 41 notice of appeal is fatally defective in that it does not contain the questions of law appealed against.

Held that the condonation applications cannot succeed.

ORDER

1. The application and counter application under INT-HC-OTH-2023/00411 are dismissed.
2. The application under INT-HC-OTH-2023/00500 is dismissed.
3. There is no order as to costs.
4. The applications under INT-HC-OTH-2023/00411 and INT-HC-OTH-2023/00500 are finalised and removed from the roll.

RULING

DE JAGER AJ:

Introduction

[1] The first respondent employed the applicant as a warehouse assistant until his dismissal on 24 April 2020. On 16 November 2020, the applicant referred an unfair dismissal dispute to the labour commissioner. The arbitration award was handed down on 19 June 2023. The arbitrator found the applicant's dismissal procedurally and substantively unfair and awarded the applicant N\$89 880 in compensation (12 months' remuneration) and severance pay. The applicant, dissatisfied with the award, seeking reinstatement and N\$232 190 in

compensation (31 months' remuneration), pursued an appeal against it, while the first respondent, also dissatisfied with the award and concerned about the applicant's claim to be reinstated, decided to cross-appeal. Things went off course for both the appeal and the cross-appeal.

[2] Before the court are three condonation applications. The first one, filed under INT-HC-OTH-2023/00411, is for condonation of the late filing of the applicant's form 11 notice of appeal and the late prosecution of the appeal, for its reinstatement and costs if opposed. The second one is a counter condonation application for the late noting of the first respondent's cross-appeal and for non-compliance with Labour Court r 17(2) and (26) in failing to prosecute the cross-appeal within 90 days, for its reinstatement and extending the period to prosecute the cross-appeal. The third one, filed under INT-HC-OTH-2023/00500, is for condonation of the late filing of the confirmatory affidavit to the applicant's replying affidavit in the first condonation application and for costs if opposed.

[3] The last-mentioned condonation application is unopposed, while the first two are opposed. The basis of those oppositions is that good cause was not shown.

[4] The matter was argued on 5 April 2024 at the end of the first motion court roll. On 12 April 2024, the court invited the parties to submit further heads of argument on certain legal issues not argued by them but noticed by the court while preparing its ruling. Both parties submitted further heads of argument, the contents of which were considered.

The law

[5] Before addressing the facts, the court sets out some legal provisions relating to appeals, cross-appeals, and condonation applications.

[6] An appeal against an arbitration award must be noted under the Rules Relating to the Conduct of Conciliation and Arbitration (the Conciliation and Arbitration Rules). At the time of noting an appeal, an appellant must complete the relevant parts of a form 11 notice of appeal and deliver it together with the

notice of appeal under the Conciliation and Arbitration Rules (a form LC 41 notice of appeal) to the registrar, the labour commissioner, and the other parties.¹ The form LC 41 notice of appeal must contain the questions of law appealed against and the grounds of appeal.²

[7] Under Conciliation and Arbitration r 23(2), the time within which an appeal must be noted is 30 days of receipt of the award. Section 89(2) of the Labour Act 11 of 2007 (the Act) requires that it be noted within 30 days after the award is served on a party. Those days are computed as calendar days, reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Sunday or a public holiday, in which case the time is reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday. That is the position by virtue of s 4 of the Interpretation of Laws Proclamation 37 of 1920 since the term 'days' is not defined in the Conciliation and Arbitration Rules or the Act.

[8] If a party wishes to oppose an appeal, it must, within 10 days after receipt of the notice of appeal or any amendment thereof, deliver notice, on form 12, that it intends to oppose the appeal, and within 21 days after receipt of the record, deliver a statement stating the grounds of opposition.³

[9] An appellant may, within 14 days after receiving the statement in the preceding paragraph, apply to the registrar on five days' notice to all other parties to assign a hearing date for the appeal and on receipt of such an application, an appeal is deemed duly prosecuted.⁴ An appeal must be prosecuted within 90 days after it is noted, and unless so prosecuted, it is deemed to have lapsed.⁵ If a cross-appeal was noted and the appeal lapsed, the cross-appeal also lapsed unless an application for a hearing date of the cross-appeal is made to the registrar within 20 days after the date that the appeal lapsed.⁶

¹ Labour Court r 17(3).

² Labour Act s 89(1)(a) and Conciliation and Arbitration r 23(1)(c) and (d).

³ Labour Court r 17(16).

⁴ Labour Court r 17(17), read with 17(19).

⁵ Labour Court r 17(25).

⁶ Labour Court r 17(27).

[10] A cross-appeal may be noted by delivery of a notice of cross-appeal, setting out the same information required in the notice of appeal, to the labour commissioner within seven days after the noting of the appeal, and the cross-appeal must be sent simultaneously with its lodging to all other parties, and proof of service thereof, on form LG 36, must be filed with the labour commissioner and the registrar.⁷

[11] By virtue of its definition in Labour Court r 1, the term 'deliver' requires service (in accordance with Labour Court r 5) on all parties and filing the original with the registrar. Conciliation and Arbitration r 1 defines the term 'deliver' to serve (in accordance with Conciliation and Arbitration r 6) on the other parties and file with the labour commissioner.

[12] Under Labour Court r 15, the court may, on good cause shown, at any time, condone any non-compliance with the Labour Court rules and extend or abridge any period prescribed therein, whether before or after the expiry of such period.

[13] The term 'good cause' means an applicant must show it has a bona fide reasonable and acceptable explanation for the non-compliance and delay, which must be full, detailed, and accurate for the entire delay period, including the timing of the condonation application, and that it has prospects of success on the merits.⁸ The meaning of good cause entails two requirements, both of which must be met. In *Minister of Health and Social Services v Amakali*,⁹ the Supreme Court said a reasonable prospect of success is required.

Background facts

[14] The background facts to the condonation applications are as follows.

[15] After the award was handed down on 19 June 2023, the applicant's form LC 41 notice of appeal was filed on 19 July 2023. It was served on the second respondent on the same date, but it was only served on the first respondent on

⁷ Conciliation and Arbitration r 23(5) and (6).

⁸ *Telecom Namibia Limited v Nangolo and Others* (LC33/2009) [2012] NALC 15 (28 May 2012) para 5.

⁹ *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC) para 17.

24 July 2023. The applicant does not expressly state when he received the award, but he states the time to deliver the notice of appeal would lapse on 19 July 2023, which statement implies that he received the award on 19 June 2023. The applicant's form LC 41 notice of appeal was thus served on the first respondent after the 30-day period within which the applicant could note an appeal. A form 11 notice of appeal was not filed simultaneously with the form LC 41 notice of appeal. When the applicant's form LC 41 notice of appeal was filed, the applicant did not have legal representation.

[16] The first respondent's legal practitioners came on record on 28 July 2023, and on that date, notice was given, via ejustice, of the first respondent's intention to oppose the appeal. On 16 August 2023, the first respondent's grounds of opposition to the appeal and its forms 11 and LC 41 notices of appeal for a cross-appeal were filed and seemingly delivered via ejustice. At the time, the applicant was still not represented by a legal practitioner, and the applicant was not a registered ejustice user. There is no record that the first respondent's forms 11 and LC 41 notices of appeal were served on the applicant other than them having been filed on ejustice.

[17] The applicant's legal aid application, made on 19 July 2023, was granted on 10 October 2023. The applicant's form 11 notice of appeal was filed on 13 October 2023 and served on the respondents on 25 October 2023, when an incomplete record was also filed, and a copy thereof delivered to the first respondent. 13 October 2023 was the first date when documents were filed on behalf of the applicant by a legal practitioner.

[18] Insofar as there was an appeal and a cross-appeal at the time, both lapsed on 17 October 2023 as the applicant did not prosecute the appeal timely and the first respondent did not apply for a hearing date of the cross-appeal within 20 days after the appeal lapsed.

[19] The first condonation application was filed on 17 October 2023, and the first respondent opposed it on 27 October 2023.

[20] On 3 November 2023, the first respondent filed a notice to amend its cross-appeal.

[21] The answering papers in the first condonation application, as well as the counter condonation application, were filed on 8 November 2023. The counter condonation application was opposed on 9 November 2023. The replying affidavit in the first condonation application, which also served as answering affidavit in the counter condonation application, was filed on 15 November 2023, and for the counter condonation application, the replying affidavit was filed on 21 November 2023. The confirmatory affidavit to the applicant's replying affidavit in the first condonation application, for which condonation is sought in the third condonation application, was filed on 29 November 2023, and the condonation application for that affidavit was filed on 1 December 2023.

[22] The applicant's condonation applications were initially set down for hearing on 8 March 2024, but they were removed from the roll for certain non-compliances, and then they were set down for hearing on 5 April 2024.

The first and third condonation applications

[23] The explanation for the defaults and delay pertaining to the first condonation application is as follows. The applicant, who resides in Walvis Bay, applied for legal aid on the same day when his form LC 41 notice of appeal was filed on 19 July 2023. The applicant says he did not have the means to travel to Windhoek from Walvis Bay between 19 June 2023, when the award was handed down, and 18 July 2023. He further says he persistently contacted the directorate of legal aid by telephone on the status of his legal aid application. The applicant's legal aid application was approved on 10 October 2023. After the applicant's legal practitioner perused the file, the applicant was advised that on 18 August 2023, a notice to prosecute timely was filed, and an appellant is obliged to prosecute an appeal within 90 days after it was noted, which period would lapse on 17 October 2023 for the applicant's appeal. He was further advised that on 13 September 2023, a notice of transmission of the record was issued. The applicant's legal practitioner collected the arbitration proceedings record from the registrar on 13 October 2023. The applicant explains various

tasks must be attended to on receipt of the record and in securing a hearing date which the applicant anticipated could not be completed to timely prosecute the appeal. He explains he is a layperson, and he was unaware that 'the lodging of the appeal was incomplete'.

[24] The explanation for the default and delay pertaining to the third condonation application is that the candidate legal practitioner did not scan the confirmatory affidavit together with the replying affidavit to file it on ejustice, and the oversight went unnoticed until the first respondent pointed it out in its replying affidavit in the counter condonation application.

[25] In respect of the applicant's prospects of success for both of his condonation applications, he says his legal practitioner, after an in-depth perusal of the award and a brief perusal of the transcribed record, advised him that his notice of appeal sets out compelling grounds, and he prays to incorporate the contents thereof into his founding affidavits to those condonation applications. He further says the relevant facts are largely common cause. That is it. No other information is provided in the founding papers in support of the applicant's prospects of success.

The counter condonation application

[26] The first respondent's explanation for the default and delay in timely noting the cross-appeal is as follows.

[27] For the period 19 June 2023 to 23 July 2023, the first respondent investigated the viability of appealing. The award also aggrieved the first respondent, and it sought legal advice on the merits of an appeal. The first respondent's legal practitioners had to rely on supporting documents like the record of the disciplinary hearing, the appeal record, the ruling, the bundle of evidence and the closing submissions, which took time to compile as the first respondent did not have all the documents readily available and it had to be sourced from its labour consultant. The first respondent was advised the only appealable issue was the amount of compensation awarded, but given the costs associated with appeals, it would not make financial sense to appeal.

[28] After the applicant's form LC 41 notice of appeal was filed and during the period 24 July 2023 to 28 July 2023, the first respondent again sought legal advice. Its biggest concern was the applicant's prayer to be reinstated. The first respondent obtained from its consultant the heads of argument relating to the possible prescription of the applicant's claim, which was raised during the arbitration, but dismissed as a preliminary jurisdictional issue. During that period, the first respondent's legal practitioners considered the applicant's appeal and the merits of the jurisdictional challenge, and the first respondent was advised to oppose the appeal and file a cross-appeal challenging the decision to dismiss the jurisdictional challenge. Having regard to the relief sought by the applicant, the appeal became financially viable, and the first respondent instructed its legal practitioners to oppose the appeal, which was done on 28 July 2023.

[29] During the period 29 July 2023 to 16 August 2023, the first respondent's legal practitioners drafted the first respondent's grounds of opposition to the appeal and formulated its grounds of cross-appeal. The first respondent's legal practitioners were under the misapprehension that the cross-appeal could be noted simultaneously with filing the grounds of opposition which, according to the first respondent's deponent, was due 21 days of noting its opposition to the appeal, and so they thought the first respondent had until 19 August 2023 to note the cross-appeal, which the first respondent's deponent says was noted on 15 August 2023. The ejustice system, however, indicates the first respondent's forms 11 and LC 41 notices of appeal and grounds of opposition were only filed on 16 August 2023. The first respondent's deponent explains it was only when the applicant's condonation application was considered that the error was realised. The court notes that a party's grounds of opposition are, however, not due 21 days of noting its opposition to the appeal, as the first respondent's deponent states. The grounds of opposition are due within 21 days after receipt of a copy of the record, or where no record is called for in the notice of appeal, within 14 days after delivery of the notice to oppose.¹⁰

¹⁰ Labour Court r 17(16)(a).

[30] In respect of the 90-day period to prosecute the cross-appeal, the first respondent's deponent explains the sole reason for failing to timely prosecute the cross-appeal was because it only received the record on 25 October 2023, 8 days after the appeal lapsed. The first respondent's deponent says it did not receive any notification that the record was despatched by the arbitrator or received by the registrar on 13 September 2023, and the first time it learned of its availability was when the applicant filed and delivered it on 25 October 2023 and the first time it became aware of the notice of transmission of the record was on 17 October 2023. The record was considered, and it was noticed that it was incomplete.

[31] In respect of the first respondent's prospects of success, its deponent says the arbitrator lacked jurisdiction and failed and/or neglected to exercise her discretion judiciously and reached a conclusion not based on the evidence before her and which no reasonable arbitrator 'would' have reached and explains as follows. The arbitrator erred in law when she held the referral was filed within the requisite six-month period under s 86(2)(a) of the Act. She correctly held that during the period 28 March 2020 to 4 May 2020, the provisions of parts A to C of chapter 8 of the Act were suspended by the provisions of Proclamation 16 of 2020, but she incorrectly held it applied to Walvis Bay (and later the Erongo Region) during the period of 8 June 2020 to 22 June 2020. The correct interpretation of the various Proclamations would be that the dispute had to be referred by 6 November 2020, while it was only done on 16 November 2020. For its second appeal ground, the first respondent's deponent explains that, on a proper evaluation of the evidence, the award of 12 months' compensation was so unreasonable that no other arbitrator 'would' have made it. He says the applicant failed to produce any evidence of his loss of income or steps taken to mitigate it, the arbitrator failed to exercise her discretion judiciously and thereby punished the first respondent and enriched the applicant. He further says an award of 6 months' loss of income would have been apt in the circumstances of the matter.

The determination

[32] Applying the law to the facts, the applicants' condonation applications cannot succeed for several reasons, which will now be discussed.

[33] The applicant's explanation for the default and delay pertaining to the third condonation application, that the candidate legal practitioner did not scan the confirmatory affidavit together with the replying affidavit to file it on ejustice, is weak.

[34] In respect of the applicant's explanation pertaining to the first condonation application, the following.

[35] The first respondent takes issue with the applicant's failure to explain why the notice to prosecute timely and the notice of transmission of the record did not come to his attention prior to 13 October 2023, why the applicant could not regularly check for notifications on ejustice, and if the applicant did not have internet access, what steps he took to contact the service bureau to enquire about his case. Whereas the applicant is not a registered ejustice user and he is a layman at law, the court does not agree with the full extent of the first respondent's expectations of the applicant, but the applicant nevertheless had a duty to follow up on his case, which duty he seemingly did not fulfil.¹¹ The applicant did not provide any information on the steps taken by him to follow up on his case in general. The applicant's explanation furthermore lacks particularity on the steps taken by him to follow up on his legal aid application to such an extent that his explanation is insufficient. Three months passed since the applicant filed his form LC 41 notice of appeal and since he applied for legal aid up to the appointment of his legal practitioner, and the court was not provided with sufficient facts on steps taken by the applicant during that period to further his matter. The applicant simply states he persistently contacted the directorate of legal aid to enquire about his legal aid application. That explanation is not full or detailed at all and does not give any indication that the applicant followed up on his case in general.

[36] According to the first respondent, the applicant's lack of legal knowledge does not give him a free pass to ignore the court's rules. The court agrees with

¹¹ *Keet v Etosha Fishing Corporation* (HC-MD-LAB-APP-AAA-2017/00018) [2018] NALCMD 33 (14 December 2018) para 19 – 20.

that submission. All litigants are to comply with the rules of court and an ignorance of the rules does not exempt compliance with it. The first respondent alleges the applicant had the assistance of a labour consultant when he noted the appeal and takes issue with the applicant's failure to mention that in his founding papers. The applicant, in reply, denies the first respondent's allegation pertaining to the labour consultant and alleges a labour consultant is 'not inherently an admitted legal practitioner' and 'their knowledge does not extend to a full scope of labour law and its practices'. From the applicant's reply, the court gathers the applicant does not deny he had the assistance of a labour consultant, but he takes issue with the conclusion that the first respondent wishes to draw from that fact. In those circumstances, a full and detailed explanation would include disclosure that the applicant had external assistance when his form LC 41 notice of appeal was filed, details about the extent of that assistance and perhaps an explanation why, despite external assistance, the appeal was not properly noted from inception by filing both forms 11 and LC 41 notices of appeal. The applicant's omission to disclose those details does not in and of itself result in the demise of his application, but it does, however, result in his explanation lacking particularity. The applicant is furthermore silent on steps taken by him to familiarise himself with what was required of him to note an appeal and with what lay ahead, like prosecuting the appeal in time.

[37] The court finds the applicant's explanation for the defaults and delay pertaining to the first condonation application was insufficient. Seeing that, from the facts at hand, the defaults were not flagrant or intentional, the court nevertheless considers the prospects of success requirement to see whether that may save the day for the applicant.

[38] For prospects of success, the first respondent argues the applicant must briefly but succinctly have set out essential information to enable the court to assess whether it may be 'justified to fetter with' the award, and a mere reference to the grounds of appeal falls woefully short of that requirement.

[39] The applicant did not deal with his prospects of success in his founding papers for either of his condonation applications except for stating that he was

advised that the notice of appeal sets out compelling grounds and praying that the contents thereof be incorporated into the affidavit. That is insufficient.

[40] In *Jason v Namibia Institute for Mining and Technology*¹² the court referred with approval to *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*¹³ wherein it was stated that (footnotes omitted):

‘. . . 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 . . . In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. 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 cannot be permitted.’

[41] In *Standard Bank Namibia Ltd and Others v Maletzky and Others*,¹⁴ the Supreme Court, when dealing with a founding affidavit in motion proceedings, stated that (footnotes omitted):

‘43. The founding affidavit must thus contain all the essential factual averments upon which the litigant's cause of action is based in sufficiently clear terms that the respondent may know the case that must be met. Although a litigant may attach annexures to the founding affidavit, it is not sufficient for a litigant to attach an annexure without identifying the facts contained in the annexure upon which the litigant relies.’

[42] Even though the applicant did not deal with his prospects of success in his founding papers, the first respondent dealt with the applicant's grounds of appeal in its answering papers. Its deponent says, given the 38-month time lapse between the applicant's dismissal and the award, reinstatement would be

¹² *Jason v Namibia Institute for Mining and Technology* (HC-MD-LAB-MOT-GEN-2021/00115) [2022] NALCMD 66 (28 October 2022) para 20.

¹³ *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43.

¹⁴ *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) para 43.

unreasonable. He further says compensation equivalent to 31 months would exceed all bounds of reasonableness and would amount to punishment rather than redressing an injustice. He concludes that because the arbitrator found the applicant did not adduce evidence of his losses and how he mitigated them, there is no evidential basis on which the decision can be deemed judicially perverse. The fact that the first respondent dealt with the applicant's grounds of appeal in its answering papers, does not excuse the applicant's failure to deal with his prospects of success in his founding papers. As stated in *Standard Bank Namibia Ltd and Others v Maletzky and Others*, the founding affidavit must contain all the essential factual averments upon which a litigant's cause of action is based, which would, in the application before the court, include the applicant's prospects of success. It is, after all, the court which must be satisfied that a party has a reasonable prospect of success before condonation may be granted.

[43] The applicant says his prospects of success were explained in his replying affidavit, which forms part of the pleadings in motion proceedings. That, too, is insufficient. The applicant's prospects of success had to be set out in the founding affidavit because, in motion proceedings, an applicant stands or falls by the founding papers.¹⁵ The applicant failed to provide the court with information to enable it to decide whether the applicant has a reasonable prospect of success. In the circumstances, the court finds the applicant failed to show he has a reasonable prospect of success.

[44] There is another reason why the applicant's condonation applications cannot succeed, and that is because there is no appeal before the court, and as such, the applicant has no prospects of success. The applicant's form LC 41 notice of appeal is fatally defective because it does not contain the questions of law appealed against. Even though the applicant's form LC 41 notice of appeal states that the questions of law appealed against in the award are as follows, the notice itself does not contain questions of law. It only contains grounds of

¹⁵ *Vaatz v Municipal Council of the Municipality of Windhoek* 2017 (1) NR 32 (SC) para 17.

appeal. Questions of law cannot double as grounds of appeal.¹⁶ The applicant failed to address this issue in his further heads of argument.

[45] The applicant's form 11 notice of appeal was furthermore not delivered simultaneously with his form LC 41 notice of appeal.¹⁷ The filing of the applicant's form LC 41 notice of appeal on its own does not amount to the noting of an appeal.¹⁸ Both forms, which must be rule compliant, had to be filed for there to be an appeal before the court. Also, the applicant's form LC 41 notice of appeal itself was 'delivered' (which means served on other parties and filed with the labour commissioner¹⁹) more than 30 days from the day when the award came to the applicant's notice because it was only served on the first respondent on 24 July 2023 and the applicant does not seek condonation for that. There is, as a result, no purpose in seeking condonation for the late filing of the applicant's form 11 notice of appeal or for the late prosecution of the appeal or for its reinstatement. Even if the applicant is granted condonation for the late filing of its form 11 notice of appeal, there would still not be an appeal before the court, which late prosecution could be condoned or which could be reinstated.

[46] The applicant argues that Labour Court r 15 clothes the court with the power to condone any non-compliance with the rules at any time and that his failure to deliver a form 11 notice of appeal together his form LC 41 notice of appeal may be condoned under Labour Court r 15 together with his failure to deliver those notices timely. In *Festus v Bank Windhoek Ltd*²⁰ this court said the 'existence of a properly drafted and rule compliant notice of appeal is a *sine qua non* for the court being able to exercise its condonation powers to condone a notice of appeal that was filed late'. Since there is no properly drafted rule compliant notice of appeal, the late noting of which could be condoned under

¹⁶ *Namibia Dairies (Pty) Ltd vs Alfeus* (LCA 4/2014) [2014] NALCMD 36 (18 September 2014) para 8.

¹⁷ Labour Court r 17(3).

¹⁸ *Pathcare Namibia (Pty) Limited vs Du Plessis* (LCA 87/2011) [2013] NALCMD 28 (29 July 2013) para 6 – 7.

¹⁹ Conciliation and Arbitration r 1.

²⁰ *Festus v Bank Windhoek Ltd* (HC-MD-LAB-APP-AAA-2020/00064 [2022] NALCMD 7 (28 February 2022) para 27.

Labour Court r 15, the court cannot grant the applicant's condonation applications.

[47] The court now deals with the counter condonation application.

[48] The main reason for the default and delay pertaining to the counter condonation application is that the first respondent's legal practitioners laboured under the misapprehension that the cross-appeal could be noted simultaneously with filing the first respondent's grounds of opposition to the appeal (in respect of which date the first respondent remains under a misapprehension) and the error was only realised when the first condonation application was considered.

[49] The first respondent was advised to file a cross-appeal. Conciliation and Arbitration r 23(5) and (6) are clear that a cross-appeal may be noted by the delivery to the labour commissioner of a notice of cross-appeal, setting out the same information required in the notice of appeal, within seven days after the noting of the appeal, and the cross-appeal must be sent simultaneously with its lodging to all other parties, and proof of service thereof, on form LG 36, must be filed with the labour commissioner and the registrar.

[50] The first respondent fails to explain how it came about that its legal practitioners laboured under the misunderstanding that the cross-appeal could be noted simultaneously with filing the first respondent's grounds of opposition to the appeal. In view of the express provisions of Conciliation and Arbitration r 23(5) and (6), the court finds that the first respondent's explanation for the default in noting the cross-appeal timely is unreasonable, and it is not full or detailed as required. That finding is fortified by the first respondent's own argument that the applicant's lack of legal knowledge does not give him a free pass to ignore the rules. Just as the rules apply to the applicant, a lay litigant who, at first, did not have legal representation and whose ignorance of the rules is not a free pass for him to ignore the rules, so too, the rules apply to the first respondent who, at all times, had legal representation and its legal practitioners' misunderstanding of the rules is not a free pass for the first respondent to ignore them.

[51] The first respondent's 'sole' explanation in the affidavit delivered in support of its counter condonation application for its failure to prosecute the appeal timely is that it only received the record on 25 October 2023, eight days after the appeal lapsed, and it did not receive any notification from either the second respondent or the registrar that the record was despatched by the second respondent and received by the registrar on 13 September 2023. The first respondent's deponent states the first respondent became aware of the notice of transmission of the record on 17 October 2023 when it received the first condonation application. For the following reasons, the first respondent's explanation for its failure to prosecute the cross-appeal timely is also unreasonable and insufficient.

[52] The appeal lapsed on 17 October 2023, the same day when the first respondent became aware that the record was transmitted. From that day, the first respondent had 20 days to apply for a hearing date.²¹ In the first respondent's heads of argument, it is stated that because the cross-appeal was late, the first respondent could not apply to the registrar for a hearing date because, until such time as condonation was granted, there is no cross-appeal. That explanation was not provided by the first respondent's deponent in the affidavit filed in support of the counter condonation application. It was only provided in the first respondent's heads of argument, and it contradicts the 'sole' explanation set out in paragraph [52] above.

[53] Furthermore, the first respondent, whose cross-appeal was filed in August 2023, did not provide any information on steps taken by it to follow up on the transmission of the record from August 2023 to October 2023 just before the error giving rise to the cross-appeal being noted late was realised, while it did not know that its cross-appeal was late. Since the first respondent, in its mind, had a cross-appeal, it had a duty to take steps to prosecute the cross-appeal and not sit idly by for the record to be transmitted. The first respondent's position is exacerbated by its own argument in that it expected the applicant, a lay litigant, to regularly check for notifications on ejustice, while the first respondent, who, at all times, had legal representation, provides no explanation

²¹ Labour Court r 17(27).

why its legal practitioners did not regularly check for notifications on ejustice because if they did, they would have noticed the notice of transmission of the record that was filed on 13 September 2023.

[54] In respect of the first respondent's prospects of success, the cross-appeal suffers the same fate as that of the appeal in that there is no cross-appeal. The first respondent's form LC 41 notice of appeal is also fatally defective. Even though the notice states the further questions of law and the grounds of appeal are the following, the notice does not contain questions of law. It only contains grounds of appeal which cannot double as questions of law.²²

[55] With reference to *Shilongo v Vector Logistics (Pty) Ltd*,²³ where the court dealt with an application for leave to appeal, the first respondent argues that the reason for the distinction between the questions of law and grounds of appeal is firstly that the other party must know what case it must meet (the first requirement), and secondly, the court must be able to determine whether it is a deserving case (the second requirement). The first respondent submits that is the true measure against which the first respondent's form LC 41 notice of appeal must be considered. It then argues the so-called first requirement can be dispensed with because the applicant did not take issue with the first respondent's form LC 41 notice of appeal and, as a result, the applicant knows exactly what case to meet. For the so-called second requirement, the first respondent argues although the questions of law are not listed separately, its form LC 41 notice of appeal still complies with the 'second requirement' as it clearly defines the issues central to the determination of the cross-appeal. Those issues, it says, are whether the arbitrator had jurisdiction under s 86(2) (a) of the Act to determine the appeal and whether her award of compensation was one that no other reasonable arbitrator would have made. The first respondent says its form LC 41 notice of appeal further sets out the basis on which each of those issues is founded. The first respondent concludes that its form LC 41 notice of appeal is proper.

²² *Namibia Dairies (Pty) Ltd vs Alfeus* (LCA 4/2014) [2014] NALCMD 36 (18 September 2014) para 8.

²³ *Shilongo vs Vector Logistics (Pty) Ltd* (LCA 27/2012) [2014] NALCMD 33 (7 August 2014) para 9.

[56] In *Shilongo v Vector Logistics (Pty) Ltd*,²⁴ the court said that clearly and precisely setting out the questions of law conduces to the due administration of justice and then explained why it said so. The court did not, by any means, lay down two requirements against which a form LC 41 notice of appeal must be considered as contended for by the first respondent. The first respondent's arguments in the preceding paragraph are rejected.

[57] The fact that the applicant did not take issue with the form of the cross-appeal does not assist the first respondent. The court must be satisfied that the first respondent has a reasonable prospect of success. The first respondent forgets that, by law, peremptory requirements are set for a cross-appeal. Conciliation and Arbitration r 23(2)(c) and (d), read with r 23(5), provides that the point of law appealed against and the grounds upon which the appeal is based 'must' be set out in the form LC 41 notice of appeal. The template form LC 41 notice of appeal contained in those rules, in no uncertain terms, indicates that the questions of law appealed against and the grounds of appeal are to be set out separately. The first respondent also forgets that the court previously held that questions of law cannot double as grounds of appeal.²⁵

[58] It is, furthermore, not for the court or any other party to second guess or formulate a party's questions of law appealed against based on the contents of a party's form LC 41 notice of appeal or to discern from its contents what the questions of law are and what the grounds of appeal are.

[59] The court finds that, due to the fatally defective form LC 41 notice of appeal, the first respondent has no prospects of success in the cross-appeal. As a result, the court need not make a determination on the first respondent's failure to serve the cross-appeal in terms of the relevant rules on the applicant.

[60] It follows that the counter condonation application cannot succeed.

Conclusion

²⁴ Para 9.

²⁵ *Namibia Dairies (Pty) Ltd vs Alfeus* (LCA 4/2014) [2014] NALCMD 36 (18 September 2014) para 8.

[61] In conclusion, it is ordered that:

1. The application and counter application under INT-HC-OTH-2023/00411 are dismissed.
2. The application under INT-HC-OTH-2023/00500 is dismissed.
3. There is no order as to costs.
4. The applications under INT-HC-OTH-2023/00411 and INT-HC-OTH-2023/00500 are finalised and removed from the roll.

B De Jager
Acting Judge

APPEARANCES

APPLICANT: M Ikanga
Of M. Ikanga & Associates Inc., Windhoek

FIRST RESPONDENT: U Tjaveondja
Of Kinghorn Associates Inc., Windhoek