

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case number: INT-HC-OTH-2023/00274

Main case number: HC-MD-LAB-APP-AAA-2022/00033

In the matter between:

**AT HELSMAN GROUP (PTY) LTD**

**APPLICANT**

and

**ERNST DAWID FREDERIK**

**RESPONDENT**

**Neutral citation:** *At Helsman Group (Pty) Ltd v Frederik* (HC-MD-LAB-APP-AAA-2022/00033) [2024] NALCMD 3 (14 February 2024)

**Coram:** DE JAGER AJ

**Heard:** 18 January 2024

**Delivered:** 14 February 2024

**Flynote:** Statute – Interpretation – Word ‘days’ in s 89(2) Labour Act 11 of 2007 and Conciliation and Arbitration r 23(2) not defined therein – Section 4 Interpretation of Laws Proclamation 37 of 1920 applies.

Statute – Interpretation – Section 89(2) Labour Act 11 of 2007 – Award being served – Service of award and word ‘serve’ not defined in Act – Section 129 of

the Act – Service of documents – Section 129(2) of the Act does not apply to service of award – Conciliation and Arbitration r 21(1) read with r 1(1) and 6 apply – Arbitrator must serve award on parties under Conciliation and Arbitration r 6 – Conciliation and Arbitration r 6(3)(a) – Service on company – Irregular service of ruling on applicant company by email – Not a complete failure of service – Substantial compliance with rule – In this instance interpretation of word ‘must’ therein directory and permissive requiring substantial compliance with rule – Appeal noted timeously.

Practice – Labour Court r 17(1) – Different types of appeal – Labour Court r 17(1)(c) – Appeal against arbitration tribunal award – Labour Court r 17(3) applies together with Conciliation and Arbitration r 23 – Labour Court r 17(2) does not apply – Labour Court r 17(3) does not require grounds of appeal to be set out in Form 11 for appeal against award – Labour Court r 17(2) requiring grounds of appeal in Form 11 for other types of appeal distinguished – applicant’s Form 11 not defective.

Condonation – Late prosecution and reinstatement of appeal – Labour Court r 15 – Must show good cause – Two requirements restated – Principles and factors restated – Balancing exercise.

Rescission application – s 88(a) Labour Act 11 of 2007 – principles of High Court r 103(1)(a) apply to s 88(1) – an applicant need not show good cause – such judgment or order should be rescinded without further enquiry – court entitled to have regard not only to record of proceedings of court concerned but also facts set out in affidavit – order granted erroneously where no proper service.

**Summary:** The respondent referred a dispute of unfair labour practice, unfair dismissal and withholding remuneration to the Labour Commissioner. The Arbitrator dealt with the dispute in the applicant’s absence and made an award dated 7 December 2021 in favour of the respondent. In a ruling dated 23 March 2022, the Arbitrator dismissed the applicant’s rescission application in terms of s 88 of the Labour Act 11 of 2007. The ruling came to the applicant’s attention on 20 April 2022 after it was emailed to the applicant on 24 March 2022. The

applicant said the ruling was not properly served on it but acknowledged receipt of the ruling on 20 April 2022. On 27 April 2022, the applicant noted an appeal against the award and the ruling. The respondent said the appeal was noted out of time and that the applicant's notice of appeal Form 11 is fatally defective. By 26 July 2022, the ninetieth day after the appeal was noted, the appeal had not been prosecuted, and the appeal was deemed to have lapsed. On 6 October 2022, the applicant sought condonation for the late prosecution of the appeal and reinstatement of the appeal together with certain ancillary relief.

*Held that* whereas the word 'days' is not defined in the Labour Act 11 of 2007 (the Act) or the Conciliation and Arbitration Rules, s 4 of the Interpretation of Laws Proclamation 37 of 1920 applies. The 30 days in s 89(2) and r 23(2) within which an appeal must be noted, is 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 it is reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

*Held that* the Act 11 of 2007 does not require an award to be served in terms of the Act and s 129(2) of the Act does not apply to service of an award. In terms of Conciliation and Arbitration r 21(1), read with r 1(1), an arbitrator must serve an award on the parties under Conciliation and Arbitration r 6.

*Held that* in terms of Conciliation and Arbitration r 6(3)(a), an arbitrator may serve an award on a company by handing a copy of the award to a responsible employee of the company at its registered office or principal place of business in Namibia or at its main place of business within the region where the dispute first arose.

*Held that* service of the ruling by the Arbitrator on the applicant company by email was irregular but not a complete failure of service. As the purpose of service was met when the ruling came to the applicant's attention on 20 April 2022, and the applicant acknowledged its receipt, there was substantial compliance with the rule.

*Held that* the interpretation of the word 'must' in Conciliation and Arbitration r 21(1), read with r 1(1) and 6(3)(a), should take into account the scope and purpose of the Act 11 of 2007 and the Conciliation and Arbitration rules as well as the purpose of service. In this instance, the court deviates from the cardinal rule of interpretation and interprets the rule as directory and permissive, requiring substantial compliance with the rule. Such interpretation achieves the object and avoids a manifest absurdity and gross injustice to the respondent who had no control over exercising the Arbitrator's duty to serve the award on the parties.

*Held that* the ruling was served on the applicant on 20 April 2022 when the ruling, on the applicant's version, came to its attention, and the appeal was noted timeously.

*Held that* in respect of an appeal against an arbitration tribunal award referred to in Labour Court r 17(1)(c), Labour Court r 17(3) applies together with Conciliation and Arbitration r 23, and in respect of such appeal, Labour Court r 17(2) does not apply.

*Held that* in terms of Labour Court r 17(3), an appeal against an award must be noted in terms of the Conciliation and Arbitration Rules, the relevant parts of a notice of appeal Form 11 (part B) must be completed, and the completed Form 11 together with a notice of appeal Form LC 41 in terms of Conciliation and Arbitration Rules must be delivered to the Registrar, the Labour Commissioner, and the other parties.

*Held that* Labour Court r 17(3) does not require that the grounds of appeal be set out in Form 11 for an appeal against an award as required in Labour Court r 17(2) for other types of appeals. It is not necessary to set out the grounds of appeal in Form 11 for an appeal against an award, but it is a peremptory requirement to set out the grounds of appeal in Form LC 41.

*Held that* whereas the appeal is against an award in terms of Labour Court r 17(3) and not an appeal against a decision of the Labour Commissioner or a compliance order in terms of Labour Court r 17(2), it is not a requirement that

the applicant's grounds of appeal must be set out in its Form 11 and the applicant's Form 11 is not defective.

*Held that* in terms of Labour Court r 15, the applicant must show good cause, which concept has two requirements. The first is 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 condonation application's timing. The second is reasonable (not good) prospects of success on the merits.

*Held that* the principles applicable to a rescission application in terms of High Court r 103(1)(a) apply to s 88(a) of the Act 11 of 2007, and an applicant in a rescission application in terms of s 88(a) need not show good cause. A judgment or order erroneously sought or granted in the absence of an affected party should be rescinded without further enquiry. The court would be entitled to have regard not only to the record of the court's proceedings making the impugned judgment or order but also to the facts set out in the affidavit to the rescission application. Where there is no proper notice of the proceedings to the party seeking rescission, the order was granted erroneously.

*Held that* the applicant provided a weak explanation for the non-compliance and the delay that followed up to 28 September 2022 when the need for the application was realised, and little weight is attached. The period it has taken since then to launch the application is reasonable, and a fair amount of weight is attached. The applicant illustrated reasonable prospects of success on the merits, and a considerable amount of weight is attached. Conjunctively, the court is satisfied that a case has been made out for the relief sought.

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## ORDER

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1. Prayer 4 of the notice of motion is amended by substituting the ten days contained therein with 30 days.

2. The late prosecution of the appeal under HC-MD-LAB-APP-AAA-2022/00033 is condoned.
3. The appeal under HC-MD-LAB-APP-AAA-2022/00033 is reinstated.
4. The late filing of the certificate under Labour Court r 17(12) is condoned.
5. The time for compliance with Labour Court r 17(12) to 17(16) is extended to 30 days after the date of this order.
6. There is no order as to costs.
7. The matter under INT-HC-OTH-2023/00274 is regarded as finalised and removed from the roll.

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**RULING**

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DE JAGER AJ:

Introduction

[1] The applicant and the respondent used to share an employer-employee relationship. After the respondent (the employee) obtained an arbitration award in his favour against the applicant (the employer), and the applicant's application to the Arbitrator to have the award rescinded was dismissed, the applicant proceeded to note an appeal to this court. The appeal is deemed to have lapsed for lack of timeous prosecution, and that sparked the application now before the court for an order:

- (a) condoning the late prosecution of the appeal;
- (b) reinstating the appeal;
- (c) condoning the late filing of the certificate under Labour Court r 17(12);

- (d) extending the time for compliance with Labour Court r 17(12) to 17(16) to 30 days after the date of the order;
- (e) further and/or alternative relief.

[2] When the matter was heard on 18 January 2024, the applicant moved to amend prayer 4 of its notice of motion to substitute the ten days contained therein with the 30 days reflected in paragraph [1](d) above. The respondent had no objection to the amendment sought. The amendment sought is granted.

[3] The application is opposed on the basis that the applicant, in its founding papers, failed to make out a case for the relief sought and that the application cannot succeed because, for the following reasons, there is no appeal before the court:

- (a) The appeal was noted out of time, and there is no condonation application for the late noting of the appeal.
- (b) The applicant failed to comply with the provisions of Labour Court r 17(2) in that it failed to set out grounds of appeal in its notice of appeal Form 11.

#### The facts

[4] In July 2021, the respondent referred a dispute of unfair labour practice, unfair dismissal, and withholding remuneration to the Labour Commissioner. The Arbitrator dealt with the dispute on 3 November 2021 in the applicant's absence and delivered an award dated 7 December 2021 in favour of the respondent. The respondent received the award on even date, and he does not know when the applicant received it. The applicant said that it received the award on 9 December 2021.

[5] On 21 December 2021, the applicant applied for rescission of the award in terms of s 88 of the Labour Act 11 of 2007 (the Act). The Arbitrator dismissed the rescission application in a ruling dated 23 March 2022. According to the respondent, the applicant received the ruling on 24 March 2022 when it was

emailed to the applicant. The applicant disagreed. It said the ruling only came to its attention on 20 April 2022.

[6] On 27 April 2022, the applicant noted an appeal against 'the awards' issued on '7 December 2021 and 23 March 2022', the award and the ruling, respectively.

[7] On 27 May 2022, by virtue of a notice to prosecute timely, the registrar notified the applicant that the appeal would lapse in 60 days.

[8] The record was made available on 2 June 2022, whereafter it was uplifted by the applicant's legal practitioners, who prepared an index and filed it with the record on 11 July 2022.

[9] By 26 July 2022, the ninetieth day after the appeal was noted, the appeal had not been prosecuted, and the appeal was deemed to have lapsed.

[10] The application now before the court was launched on 6 October 2022.

[11] The issues arising in the application, the relevant law, its application to the facts, and the parties' arguments will be dealt with under various subject headings to follow.

#### The time within which to note the appeal

[12] In terms of s 89(2) of the Act, an appeal must be noted within 30 'days' after an award is 'served' on a party. Rule 23(2) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act 11 of 2007, referred to as the Conciliation and Arbitration Rules, provides that an appeal must be noted within 30 'days' of the party's 'receipt' of the award.

[13] Due to the following arguments, the words 'days', 'served' and 'receipt' in s 89(2) and r 23(2) require attention.



(a) The respondent contended that the appeal was noted out of time, and since no condonation is sought for its late noting, there is no appeal before the court to be reinstated.

(b) The applicant disagreed. It said the ruling was not 'served' on it under s 129(2)(d) of the Act, and since the ruling only came to its attention on 20 April 2022, the appeal was noted timeously. The applicant contended that the application is sufficient to extend to condonation for the late noting of the appeal and, if the dies to have noted the appeal is taken to run from 24 March 2022, the appeal is late with only four days.

(c) The word 'days' in s 89(2) and r 23(2) is not defined in the Act or the Conciliation and Arbitration Rules. As a result, the court finds that s 4 of the Interpretation of Laws Proclamation 37 of 1920 applies. The 30 days in s 89(2) and r 23(2) within which an appeal must be noted, is 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 it is reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

[14] From which date should the 30 days in s 89(2) and r 23(2) be reckoned? That will depend on when the ruling was served on the applicant.

#### Service of the award (ruling)

[15] The respondent relied on the email dated 24 March 2022, whereby the ruling was emailed to the parties, and contended that the appeal was noted out of time.

[16] The applicant argued that the ruling must have been served on it under s 129(2)(d) of the Act, which provides for the service of documents on a company, and which does not make provision for service by email, and that the ruling was not served on it under that section. The applicant said the ruling was sent to it by email dated 24 March 2022, unaccompanied by a delivery receipt that the email was indeed received and read on even date. The applicant's deponent explained in reply that the email address to which the ruling was emailed was assigned to Mr Ricardo Coleman and that only Coleman had access to it on his

work-assigned computer. The applicant's deponent said that the applicant learned about the outcome of the recission (the ruling) on 20 April 2022 when Coleman returned to work from his leave of absence. Coleman, in his capacity as the applicant's Operations Manager, deposed to the founding affidavit. The applicant's Managing Director deposed to the replying affidavit as, by then, Coleman had left the applicant's employ.

[17] In *Samicor Diamond Mining Ltd v Hercules*<sup>1</sup>, it was held with reference to s 129 of the Act that the concept 'served' as used in s 89 is defined in the Act. It was further held that in a company's case, an award's service must be done in terms of s 129(2)(d). The court stated that reference to the regulations and rules promulgated under the Act is unnecessary because they are subject to the Act. With respect and for the following reasons, the court does not agree with the finding in *Samicor* that service of an award must be done in terms of s 129(2)(d) of the Act.

[18] Section 89(2) of the Act refers to an 'award being served on the party'. There is, however, no express provision in the Act requiring an award to be served, let alone how an award is to be served. Service of an award is not defined in the Act, nor is the word 'serve' defined in the Act.

[19] Section 129 of the Act deals with the 'service of documents'. It provides what a document is for the purpose of the Act and prescribes how a document is served. For ease of reference, s 129(1) and part of s 129(2) read as follows:

'Service of documents

129. (1) For the purpose of this Act –

- (a) a document includes any notice, referral or application required to be served in terms of this Act, except documents served in relation to a Labour Court case; and
- (b) an address includes a person's residential or office address, post office box number, or private box of that employee's employer.

(2) A document is served on a person if it is - . . . .'

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<sup>1</sup> *Samicor Diamond Mining Ltd v Hercules* 2010 (1) NR 304 (HC).

[20] The word 'document' contained in s 129 requires attention.

[21] The word 'document' is not defined in the Act. Section 129(1)(a) of the Act provides that, for the purpose of the Act, 'a document includes any notice, referral or application required to be served in terms of the Act, except documents served in relation to a Labour Court case'.

[22] On a plain reading of s 129(1) of the Act, an award is not included amongst the documents provided for therein to be included as 'a document' for the purpose of the Act. Furthermore, as stated before, the Act does not contain a provision requiring an award to be served 'in terms of [the] Act' as stated in s 129(1)(a).

[23] The court finds that the Act does not require an award to be served in terms of the Act, and s 129(2) does not apply to service of an award.

[24] Where do those findings leave the issue of service of an award?

[25] The answer to service of an award lies in Conciliation and Arbitration r 21(1), read with r 1(1).

[26] Conciliation and Arbitration r 21(1) expressly provides that the arbitrator must 'deliver' the award. For ease of reference, the rule reads as follows:

'21. (1) The arbitrator must, within 30 days of the conclusion of the arbitration proceedings, deliver an award giving concise reasons and he or she must sign and date the award.'

[27] The word 'deliver' in Conciliation and Arbitration r 21(1) requires attention. Conciliation and Arbitration r 1(1) expressly defines the word 'deliver' to mean:

'serve on other parties and file with the Labour Commissioner'

and the word 'serve' to mean:

'serve in accordance with rule 6'.

[28] It appears that in *Samicor*<sup>2</sup> the court did not consider, nor was it referred to, the provisions of s 129(1)(a) of the Act, which provide what 'a document' includes for the purpose of the Act. It further appears that the court did not consider, nor was it referred to, Conciliation and Arbitration r 21(1), read with r 1(1) and 6. If the court considered it or if the court was referred to it, the court may have arrived at a different conclusion.

[29] Whereas service of an award is expressly dealt with in Conciliation and Arbitration r 21(1), read with r 1(1), while there is no similar provision in the Act, the court finds that, in terms of Conciliation and Arbitration r 21(1), read with r 1(1), an arbitrator must serve an award on the parties under Conciliation and Arbitration r 6. Due to the express provisions of those rules, the court finds that that is the position on service of an award notwithstanding those rules being subject to the Act. In terms of Conciliation and Arbitration r 21(4), an award must be sent to the parties with an accompanying notice informing them of their rights. That duty, too, arises from the Conciliation and Arbitration Rules, not from the Act.

[30] Where do those findings on service of an award leave the applicant's argument on irregular service of the ruling?

[31] Service of the ruling had to be effected under Conciliation and Arbitration r 6, not under s 129(2) of the Act. Therefore, the applicant's argument that service had to be effected on it under s 129(2)(d) of the Act is not upheld. Does that mean that service of the ruling on the applicant was regular? No.

#### Irregular service of the award (ruling)

[32] Conciliation and Arbitration r 6(3)(a) provides that an arbitrator may serve an award on a company by handing a copy of the award to a responsible employee of the company at its registered office or principal place of business in Namibia or at its main place of business within the region where the dispute first arose. Conciliation and Arbitration r 6(2)(c) provides for service by email to a 'person's' email address. The question arises whether the word 'person' should

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<sup>2</sup> *Samicor Diamond Mining Ltd v Hercules* 2010 (1) NR 304 (HC).

be interpreted to include a company. The parties did not canvas that issue, so the court does not deal with it. The court finds that in this matter service of the ruling by the Arbitrator on the applicant by email was irregular. Does that mean that the ruling was not served on the applicant? No.

#### Substantial compliance with the rule

[33] Irregular service of the ruling does not constitute a complete failure of service. As stated in *Standard Bank Namibia Ltd and Others v Maletzky and Others*<sup>3</sup> ‘the purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof that there has been such notice’. The purpose of service was met when the applicant got notice of the ruling, albeit only on 20 April 2022 when Coleman, the applicant’s Operations Manager at the time, returned to work from his leave of absence and got access to the email address on his work-assigned computer. Based on the facts, the court finds that Coleman was a responsible employee of the applicant and that he got notice of the ruling on behalf of the applicant at the applicant’s place of business.

[34] Informed by *Torbitt and Others v International University of Management*<sup>4</sup>, interpretation of the word ‘must’ in Conciliation and Arbitration r 21(1), read with r 1(1) and 6(3)(a), should take into account the scope and purpose of the Act and the Conciliation and Arbitration Rules as well as the purpose of service. The court, in this instance, deviates from the cardinal rule of interpretation and, in this instance, interprets the rule as directory and permissive, requiring substantial compliance with the rule.

[35] That interpretation is conducive to the object of Conciliation and Arbitration r 21(1), read with s 86(18) of the Act, that an arbitrator must, as soon as possible after the conclusion of the arbitration proceedings, make a reasoned award and inform the parties about it. That interpretation further avoids a manifest absurdity and gross injustice to the respondent. The Arbitrator did inform the parties about the ruling, and they did get notice of it, albeit not in

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<sup>3</sup> *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) para 21.

<sup>4</sup> *Torbitt and Others v International University of Management* 2017 (2) NR 323 (SC).

the prescribed manner of service. The result of the cardinal rule of interpretation, which is avoided by the interpretation adopted by the court in this instance, is that due to the Arbitrator's failure to serve the ruling in the prescribed manner (a duty placed on the arbitrator over which the respondent had no control), the dies for the applicant to note an appeal would, to date, not have expired in circumstances where the applicant knew about the ruling as far back as 20 April 2022 and the respondent would, to date, for the reason of irregular service, not have finality in the labour dispute.

[36] Where do the court's findings on service of the ruling and interpretation of the rule leave the respondent's contention that there is no appeal before the court because the appeal was noted out of time?

#### Timeous noting of the appeal

[37] On the interpretation adopted by the court, the court finds that there is substantial compliance with Conciliation and Arbitration r 6(3)(a) and the ruling was served on the applicant on 20 April 2022. The court further finds that the appeal had to be noted on or before 20 May 2022, hence the appeal was noted timeously on 27 April 2022. Therefore, the respondent's contention that there is no appeal before the court because the appeal was noted out of time is not upheld.

#### Form 11

[38] The court now turns to the second reason why the respondent says there is no appeal before the court. The respondent contended that the applicant's Form 11 is defective in that it does not set out the grounds of appeal, and thus, the applicant failed to note an appeal as prescribed in terms of ss 89(1) and (2) of the Act, read with Labour Court r 17(2).

[39] According to case law<sup>5</sup>, the position on the respondent's contention in the preceding paragraph is as follows. An appeal must be noted by delivery of Form 11, prescribed by the Labour Court Rules, and Form LC 41, prescribed by the Conciliation and Arbitration Court Rules. It is a peremptory requirement that the grounds of appeal be set out in both Form 11 and Form LC 41. The result of non-compliance with that peremptory requirement is that there is no appeal before the court.

[40] With respect and for the following reasons, the court does not agree that in an appeal against an award, the grounds of appeal must be set out in Form 11, and if the grounds of appeal are not set out in Form 11, there is no appeal before the court.

[41] For what follows, it is necessary to quote Labour Court r 17(1) to 17(3) and analyse the structure of those rules whereby the legislature's intention will emerge. Those rules read as follows:

'17 Appeals under various provisions of Act

(1) This rule applies to an appeal noted against-

- (a) a decision of the Labour Commissioner made in terms of the Act;
- (b) a compliance order issued in terms of section 126 of the Act; and
- (c) an arbitration tribunal award, in terms of section 89 of the Act.

(2) An appeal contemplated in subrule (1)(a) and (b) must be noted by delivery of a notice of appeal on Form 11, setting out concisely and distinctly which part of the decision, or order is appealed against and the grounds of appeal, which the appellant relies for the relief sought.

(3) An appeal contemplated in subrule (1)(c) must be noted in terms of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner

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<sup>5</sup> *Namibia Dairies (Pty) Ltd v Alfeus* 2014 (4) NR 1115 (LC) para 8; *Sevelinus and 57 Others v A Wutow Company (Pty) Ltd* (INT-HC-OTH-2019/00224) [2020] NALCMD 269 (3 July 2020) para 20; *Bothma v Swakopmund Uranium (Pty) Ltd* (HC-MD-LAB-APPAAA-2018/00048) [2019] NALCMD 9 (18 January 2019) para 8; *Minister of Labour, Industrial Relations and Employment Creation v Panduleni* (HC-MD-LAP-APP-AAA-2021/00004 [2021] NALCMD 45 (1 October 2021) para 16.

published in Government Notice 262 of 31 October 2008 (hereafter "the conciliation and arbitration rules"), and the appellant must at the time of noting the appeal-

- (a) complete the relevant parts of Form 11;
- (b) deliver the completed Form 11, together with the notice of appeal in terms of those rules, to the registrar, the Commissioner and the other parties to the appeal.'

[42] Labour Court r 17(1) identifies three types of appeals that may be noted in terms of the Act and to which appeals r 17 applies. Those appeals are as follows. Firstly, an appeal noted against a decision of the Labour Commissioner made in terms of the Act which type of appeal is referred to in r 17(1)(a). Secondly, an appeal noted against a compliance order issued in terms of s 126 of the Act which type of appeal is referred to in r 17(1)(b). Thirdly, an appeal noted against an arbitration tribunal award which type of appeal is referred to in r 17(1)(c).

[43] Labour Court r 17 then continues to specify how the different types of appeal must be noted. The requirements to note an appeal are not the same for all the appeals. The differences are reflected in r 17(2) and 17(3).

[44] A perusal of the relevant case law shows that it is probably because of the different requirements that apply to noting the different types of appeal that confusion arose concerning the requirements to note an appeal against an award.

[45] Labour Court r 17(2) applies to appeals referred to in r 17(1)(a) and 17(1)(b), being an appeal noted against a decision of the Labour Commissioner and an appeal noted against a compliance order. Rule 17(2) sets out the requirements for noting those two types of appeal. Rule 17(2) does not apply to an appeal noted against an award, and the provisions therein do not apply to such an appeal.

[46] Labour Court r 17(3) applies to an appeal referred to in r 17(1)(c), being an appeal noted against an arbitrator's award, and it sets out the requirements for noting such an appeal. Rule 17(3) does not apply to an appeal noted against a decision of the Labour Commissioner or an appeal noted against a



compliance order, and the requirements for noting an appeal set out in r 17(3) do not apply to those two types of appeal.

[47] In Labour Court r 17(2), it is expressly stated that an appeal 'must be noted by delivery of a notice of appeal on Form 11, setting out . . . and the grounds of appeal'. The requirement to set out the grounds of appeal in Form 11 is not included in r 17(3).

[48] Labour Court r 17(3) requires that an appeal against an award must be noted in terms of the Conciliation and Arbitration Rules, that the relevant parts of Form 11 must be completed, and that the completed Form 11, together with the notice of appeal Form LC 41 in terms of the Conciliation and Arbitration Rules must be delivered to the Registrar, the Labour Commissioner, and the other parties. In an appeal against an award, both Labour Court r 17(3) and Conciliation and Arbitration r 23 apply, which differs from the other types of appeal.

[49] A plain reading of Labour Court r 17(2) and 17(3) shows distinct differences between the requirements set out in those rules for noting the different types of appeal. One such difference is that the requirement in Labour Court r 17(2) that the grounds of appeal must be set out in Form 11 is not included in Labour Court r 17(3). Instead, Labour Court r 17(3) requires that only the relevant parts of Form 11 be completed and delivered together with Form LC 41.

[50] What are the relevant parts of Form 11? The answer lies in the prescribed form itself. The prescribed Form 11 consists of two parts. Part A and part B. Part A is to be completed by persons noting an appeal in terms of Labour Court r 17(1)(a) or 17(1)(b), but not in terms of r 17(1)(c). That instruction is contained in the prescribed Form 11 itself. The portion of the prescribed Form 11 that reads 'AND FURTHER TAKE NOTICE that the grounds of this appeal are-' is contained in part A and is, therefore, an irrelevant part when noting an appeal against an award. Part B must be completed by all persons noting an appeal in terms of r 17(1) and, therefore, the relevant part that must be completed when noting an appeal against an award.

[51] The structure of the relevant legislation as set out above is supported by *Primedia Outdoor Namibia (Pty) Ltd v Kauluma*<sup>6</sup> and makes sense if regard is had to Conciliation and Arbitration r 23(2), which reads as follows:

‘(2) An appeal must be noted by delivery, within 30 days of the party’s receipt of the arbitrator’s award, to the Labour Commissioner of a notice of appeal on Form LC 41, which must set out -

- (a) whether the appeal is from the judgment in whole or in part, and if in part only, which part;
- (b) in the case of appeals from an award concerning fundamental rights and protections under Chapter 2 and initially referred to the Labour Commissioner in terms of section 7(1)(a) of the Act, the point of law or fact appealed against;
- (c) in the case of an award concerning any other dispute, the point of law appealed against; and
- (d) the grounds upon which the appeal is based.’

[52] Compliance with Conciliation and Arbitration r 23(2), including Form LC 41, which is required for an appeal against an award, includes setting out some of the details which fall under the irrelevant parts of Form 11 under part A thereof, including the grounds upon which an appeal is based which requirement is specifically referred to in Conciliation and Arbitration r 23(2)(d).

[53] It was not the legislature’s intention that the entire Form 11 must be completed in an appeal against an award, hence the Labour Court r 17(3)(a) requirement to complete the ‘relevant parts of Form 11’. Completing the entire Form 11 would result in duplications without reason. Amongst others, the grounds of appeal would be duplicated.

[54] The court finds that in an appeal against an award, it is not a requirement, let alone a peremptory requirement, to set the grounds of appeal out in Form 11, but it is a peremptory requirement to set the grounds of appeal out in Form LC 41.

[55] The appeal in the matter now before the court falls under the third type of appeal referred to in Labour Court r 17(1)(c). As a result, Labour Court r 17(3)

<sup>6</sup> *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* 2015 (1) NR 283 LC).

applies together with Conciliation and Arbitration r 23, while r 17(2) does not apply.

[56] Whereas the appeal in the matter now before the court is against an award in terms of Labour Court r 17(3) and not an appeal against a decision of the Labour Commissioner or a compliance order in terms of r 17(2), it is not a requirement, let alone a peremptory one, for the applicant's grounds of appeal to be set out in its Form 11. As a result, the applicant's Form 11 is not defective on the basis contended for by the respondent. The respondent's contention that due to a defective Form 11, there is no appeal before the court is not upheld.

#### Good cause

[57] The court now determines whether the applicant has made a case for the relief sought.

[58] The appeal is deemed to have lapsed in terms of Labour Court r 17(25) since it was not prosecuted timeously.

[59] Labour Court r 15 provides that the court may, on application and good cause shown, condone any non-compliance with the Labour Court Rules and extend or abridge any period prescribed by those rules, whether before or after the expiry of such period.

[60] Both parties relied on *Telcom Namibia Limited v Nangolo and Others*<sup>7</sup>, which sets out the following principles on condonation applications as distilled from court judgments (footnotes omitted):

1. It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.

2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.

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<sup>7</sup> *Telcom Namibia Limited v Nangolo and Others* (LC33/2009) [2012] NALC 15 (28 May 2012) para 5.

3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.
4. The degree of delay is a relevant consideration.
5. The entire period during which the delay had occurred and continued must be fully explained.
6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).
7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the noncompliance with the rules of Court is flagrant and gross, prospects of success are not decisive.
8. The applicant's prospects of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.
9. If there are no prospects of success, there is no point in granting condonation.'

[61] *Telkom Namibia*<sup>8</sup> further sets out the following factors to be taken into account as stated in *Channel Life Namibia (Pty) Ltd v Otto*:<sup>9</sup>

- '1. The importance of the case;
2. The prospects of success;
3. The respondent's interest in the finality of the case;
4. The convenience of the court;
5. The avoidance of unnecessary delay.'

[62] The court agrees with the principles and factors set out above save to state with reference to *Minister of Health and Social Services v Amakali*<sup>10</sup> that reasonable prospects of success are required instead of good prospects of success.

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<sup>8</sup> *Telcom Namibia Limited v Nangolo and Others* (LC33/2009) [2012] NALC 15 (28 May 2012) para 6.

<sup>9</sup> *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC) para 45.

<sup>10</sup> *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC) para 17.

[63] The applicant must show 'good cause'. The concept 'good cause' has two requirements. For success, both requirements must be met. The court must first be satisfied that there is a bona fide reasonable and acceptable explanation for the non-compliance and the delay, which must be full, detailed, and accurate for the entire delay period, including the timing of the condonation application. Secondly, the applicant must show that it has reasonable prospects of success on the merits. The Supreme Court in *Telecom Namibia Ltd v Nangolo and Others*<sup>11</sup> said that the balancing exercise of the two requirements is a question of deciding what weight to attach to each factor and not an equation of the factors.

[64] Before turning to the first requirement, the following background is provided.

[65] According to the applicant, the employment relationship was terminated by the respondent himself shortly after the applicant laid criminal charges against him and other employees following various allegations of theft. Some of the respondent's co-workers were arrested and made first appearances in the Rundu Magistrate's Court. The respondent absconded before the police could get hold of him and never reported for work again. The respondent admitted that a criminal charge of theft was laid against him but said the charge was baseless, and no evidence was presented that he was guilty. The respondent denied that he terminated the employment contract.

[66] The dispute was referred to the Labour Commissioner in July 2021. The applicant said the labour dispute was initially set down for 1 September 2021, and it was postponed to 3 September 2021 for submissions by the applicant on a point in limine. When the respondent did not appear on 3 September 2021, the applicant's deponent understood that the matter was dismissed. Despite enquiries, the applicant was not provided with a decision regarding the outcome of the 3 September 2021 proceedings. When the applicant was served with a notice of set down for 3 November 2021 for proceedings in Rundu, the applicant was surprised and assumed that the notification occurred in error and that the Labour Commissioner would realise that the matter had already been heard and

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<sup>11</sup> *Telecom Namibia Ltd v Nangolo and Others* 2015 (2) NR 510 (SC) para 21.

dismissed. On 3 November 2021, the Arbitrator proceeded with the arbitration in the applicant's absence and issued an award on 7 December 2021. On 17 December 2021, Coleman learned that the matter was not dismissed on 3 September 2021 but was transferred to the Labour Commissioner's Rundu office.

### The explanations

[67] The court now turns to the first requirement of good cause, explaining the non-compliance and the delay.

[68] The respondent argued that the applicant did not explain the period from 27 May 2022 (when the notice to prosecute was issued) to 27 July 2022 (the day after the appeal lapsed) and also from 11 July 2022 (when the record was filed) to 6 October 2022 (when the application was launched). According to the respondent, the applicant should have paid more attention to the notice to prosecute of 27 May 2022.

[69] The appeal is only deemed to have lapsed as of 27 July 2022. To satisfy the court in respect of the first requirement, the applicant must explain the non-compliance (why the appeal was not prosecuted before it lapsed as of 27 July 2022) and the delay from 27 July 2022, when the appeal lapsed, to 6 October 2022, when the application was launched. The applicant only needs to explain the period preceding 27 July 2022 if the explanation for the non-compliance itself requires an explanation for the period before 27 July 2022.

[70] The following explanation appears from the founding affidavit. The applicant had challenges with the respondent's whereabouts at all material times. The applicant could only reach him through the office of the deputy sheriff as the respondent frequented that office following up on his writ of execution. On 21 July 2022, the applicant's application for 'the rescission as well as stay' of the award under case number HC-MD-LAB-MOT-GEN-2022/00125 was in court and postponed to 8 August 2022. During the hearing on 8 August 2022, after the applicant's legal practitioner raised the challenge with the respondent's contact details, the court asked the respondent to provide his contact details

and physical address. During that hearing, the applicant learned the respondent's physical address, and as a consequence, it was able to prosecute its case by inviting the respondent to obtain dates. However, the applicant's legal practitioner was under a lot of work pressure, and as such, in error, the request to obtain dates was only initiated on 13 September 2022. The applicant's deponent further explained that upon a visit to the registrar's office on 28 September 2022 to obtain dates and during engagements with the registrar, the applicant's legal practitioners realised the appeal had lapsed. The application was launched shortly after that, on 6 October 2022.

[71] In a nutshell, it was only on 28 September 2022 that the applicant's legal practitioner realised the appeal had lapsed, and the explanation for that belated realisation is a lot of work pressure and error.

[72] In respect of the time taken to have launched this application, the applicant's deponent, in the founding affidavit, stated that:

'30. Once the Applicant's Representatives finalised the lodging of the Appeal, he started planning to launch this Application and ensure compliance with the Rules. The Application was prepared without any further delay and means of numerous telephonic consultations with [the Applicant's deponent] and [the Applicant's] Legal Practitioner of Record, Mr Kasper. It was then finalised and delivered without delay to [the Applicant's deponent] for urgent signing and commissioning.'

[73] From the facts on record, it is inferred that the reference in the preceding paragraph to once the 'lodging of the appeal' was finalised referred to the events that unfolded on 28 September 2022. The court finds that the time it took to launch the application from when the need for it was realised on 28 September 2022 is reasonable. The court is satisfied that the applicant did not delay launching the application, and a fair amount of weight is attached.

[74] The explanation for the period from 27 July 2022 to 28 September 2022 and the period preceding 27 July 2022 (insofar as that period is applicable) is, however, weak, and little weight is attached.

The prospects of success on the merits

[75] Whereas a balancing exercise is required, the court now considers the second requirement of good cause, the prospects of success on the merits.

[76] In dealing with the applicant's prospects of success on the merits, the applicant's deponent stated that:

'35. I refer to and incorporate the averments in the accompanying Notice of Appeal on Form LC41 ("**ATH2**") that sets out the Grounds of Appeal. I confirm that the averments are factually accurate and submit that the legal submissions are accurate. I respectfully submit the content of the Notice of Appeal demonstrate the Applicant enjoys sound prospects of success. I am advised that further legal argument, will be made at the hearing of this Application for Condonation.

36. It is further important to also highlight the fact that the calculations made by the Second Respondent for the monies to be paid to the First Respondent are fatally wrong.'

[77] The respondent contended that incorporating the averments in Form LC 41 into the founding affidavit was insufficient, and the applicant ought to have set out reasons in the founding affidavit why it says it has reasonable prospects of success.

[78] In *Jason v Namibia Institute for Mining and Technology*<sup>12</sup> the court referred with approval to *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*<sup>13</sup> stating that (footnotes omitted):

'43. . . . 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

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<sup>12</sup> *Jason v Namibia Institute for Mining and Technology* (HC-MDLAB-MOT-GEN-2021/00115) [2022] NALCMD 66 (28 October 2022) para 15.

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



lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[79] In *Standard Bank Namibia Ltd and Others v Maletzky and Others*<sup>14</sup>, 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.'

[80] The applicant did not simply attach and incorporate the contents of Form LC 41 into the founding affidavit without identifying the portion relied upon. The applicant's deponent referred to and included the averments in Form LC 41 that set out the grounds of appeal. The applicant's deponent identified the portion in Form LC 41 upon which the applicant relies. The grounds of appeal, set out in separate paragraphs under a heading marked grounds of appeal, are easily identifiable on pages three and four of Form LC 41, which consists of five pages. The applicant's deponent confirmed that the averments are factually correct and that the legal submissions are accurate. The conclusion that the applicant seeks to draw from the averments incorporated from Form LC 41 that the applicant enjoys sound prospects of success is also included in the founding affidavit. This is not a case where the court must trawl through a lengthy document to speculate on the possible relevance of its contents. In this instance, the grounds of appeal identified in Form LC 41 will be considered. Litigants are simultaneously cautioned not to incorporate entire or substantial portions of annexures into affidavits and to rely thereon without dealing with the contents thereof in the affidavits themselves.

[81] The court now considers the grounds of appeal deemed meritorious. Insofar as the respondent dealt with those grounds of appeal, the respondent's

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

contentions are dealt with below. In evaluating whether there are reasonable prospects of success on the merits, the court must consider how the Arbitrator dealt with the rescission application and the arbitration hearing.

[82] In paragraph (b) under the grounds of appeal in the notice of appeal Form LC 41, it was stated that the Arbitrator failed to carefully and judiciously consider the rescission application given the numerous procedural complaints that went to the root of denying the applicant the right to a fair trial. That ground of appeal must be considered in light of what was placed before the Arbitrator in the rescission application.

[83] The rescission application was brought in terms of s 88(a) of the Act, which provides that an arbitrator may rescind an award on application of any party made within 30 days after service of the award if it was erroneously sought or erroneously made in the absence of any party affected by that award. Section 88(a) of the Act is similar to High Court r 103(1)(a). In *De Villiers v Axiz Namibia (Pty) Ltd*<sup>15</sup> the Supreme Court dealt with the applicable law when considering a rescission application under High Court r 44(1)(a), which rule preceded High Court r 103(1)(a) and which rule was similar to it. It said an applicant need not show good cause in such a rescission application. In paragraphs 21 and 22, the Supreme Court held that a judgment or order that was erroneously sought or granted in the absence of any party affected by it should, without further enquiry, be rescinded. The court would be entitled to have regard not only to the record of the proceedings of the court that granted the impugned judgment or order but also to those facts set out in the affidavit relating to the rescission application. In *Labuschagne v Scania Finance Southern Africa (Pty) Ltd and Others*<sup>16</sup> the Supreme Court stated that 'where there has not been proper notice of the proceedings to the party seeking rescission, whether the fact of the absence of notice appears on the record or not, any order granted will have been granted erroneously'. The court finds that the Supreme Court authority applies to a rescission application under s 88(a) of the Act. The court agrees with and is bound by the Supreme Court's authority.

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<sup>15</sup> *De Villiers v Axiz Namibia (Pty) Ltd* 2012 (1) NR 48 (SC) para 10.

<sup>16</sup> *Labuschagne v Scania Finance Southern Africa (Pty) Ltd and Others* 2015 (4) NR 1153 (SC) para 21.

[84] Regarding the hearing date of 3 November 2021, which led to the award being issued in the applicant's absence, the applicant's deponent explained the following in the affidavit to the rescission application. The applicant was under the impression that the dispute was dismissed on 3 September 2021 when the applicant appeared for the hearing and the respondent failed to appear. A notice of set down for 3 November 2021 was subsequently issued and received by the applicant, but the applicant believed that it was done in error since the matter had already been dismissed, so it thought. The applicant further believed that the Labour Commissioner would notice that the matter had already been dismissed. More importantly, the notice of set down was dated 18 October 2021, and the applicant only received it on 29 October 2021. That is two business days' notice before the hearing date. In terms of Conciliation and Arbitration r 12, a notice of set down must be communicated at least seven days before the conciliation meeting. Conciliation and Arbitration r 15 requires that the parties be given 14 days' notice of an arbitration hearing 'on Form LC 28'. The applicant was not properly served with the notice of set down and was given inadequate (short) notice of the 3 November 2021 hearing date while under the impression that the matter had already been dismissed. The award was silent when the notice of set down was served, and the manner of service does not appear to be rule compliant. In terms of Conciliation and Arbitration r 27(3), the Arbitrator should have attempted to contact the applicant telephonically before making any decision in terms of that rule. According to the applicant, no attempt was made to contact the applicant on 3 November 2021, and the Arbitrator was challenged to produce records reflecting the 'same'.

[85] The court finds that, given the evidence set out above, an appeal court may conclude that, based on the evidence placed before the Arbitrator, the Arbitrator could not reasonably have concluded to dismiss the rescission application.

[86] It is stated in paragraph (e) under the grounds of appeal in the applicant's Form LC 41 that the Act provides for a discretion to be exercised 'lawfully' by an Arbitrator in determining the appropriate relief under s 86(15) which the Arbitrator failed to do in that:

- (a) the order that the appellant must pay the respondent six months' salary is unreasonable, excessive, and not based on a proper exercise of the Arbitrator's discretion;
- (b) the respondent tendered no evidence to justify the compensation;
- (c) the award contains no reasoning for determining the compensation payable to the respondent.

[87] The respondent's evidence in the appeal record is summarised as follows. He was employed on 16 November 2020 in Windhoek and later transferred to Divundu. His salary was N\$10 000 per month plus a performance bonus of N\$2000. The applicant refused to pay him anything. There is no record of overtime since it remained with the applicant together with that of the performance bonus. The applicant complained about theft of building materials. The respondent was forced to confess to theft, which he refused. He was told if he did not admit to theft, 'they would no longer work together'. Due to his refusal to admit to theft, the applicant began withholding his salary. He was dismissed in July 2021 without a hearing. He was not paid for June. He wanted his outstanding salary, overtime, performance bonus, notice pay, leave days, and six months' compensation for loss of income. The applicant was ordered to pay the respondent N\$87 912, which includes leave days amounting to N\$7912, N\$10 000 for salary of June, N\$10 000 for notice pay, and N\$60 000 for six months' compensation.

[88] By the time of the respondent's alleged dismissal, he was employed by the applicant for only about eight months, yet six months' compensation was awarded. The compensation award for six months in circumstances where the respondent was only employed by the applicant for eight months appears unreasonable and excessive. The award contains no justification or reasoning for the order that the applicant must pay the respondent six months' compensation.

[89] The court finds that, given the evidence set out above, an appeal court may conclude that, based on the evidence placed before the Arbitrator, the relief granted was inappropriate.

[90] As a result, the applicant has reasonable prospects of success on the merits, and considerable weight is attached.

[91] Whereas the respondent is not persisting with his contention that, for the following reasons, there is no application before the court, the court does not deal with it:

(a) The notice of motion for the 6 October 2022 application before the court was not created through the e-justice interlocutory application function. The respondent, however, still relied on that point to demonstrate how the matter was dealt with.

(b) The 23 July 2023 notice of motion, which was subsequently created through the e-justice interlocutory application function, was not accompanied by an affidavit.

### Conclusion

[92] In conclusion, the court finds that:

(a) the applicant provided a weak explanation for the non-compliance and the delay that followed up to 28 September 2022 when the applicant realised the need for the application and little weight is attached;

(b) the period it took to launch the application once the need for it was realised on 28 September 2022 is reasonable, and a fair amount of weight is attached;

(c) the applicant illustrated reasonable prospects of success on the merits to which a considerable amount of weight is attached; and

conjunctively, the court is satisfied that a case was made for the relief sought.

[93] It is ordered that:

1. Prayer 4 of the notice of motion is amended by substituting the ten days contained therein with 30 days
2. The late prosecution of the appeal under HC-MD-LAB-APP-AAA-2022/00033 is condoned.
3. The appeal under HC-MD-LAB-APP-AAA-2022/00033 is reinstated.
4. The late filing of the certificate under Labour Court r 17(12) is condoned.
5. The time for compliance with Labour Court r 17(12) to 17(16) is extended to 30 days after the date of this order.
6. There is no order as to costs.
7. The matter under INT-HC-OTH-2023/00274 is regarded as finalised and removed from the roll.

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B de Jager  
Acting Judge

APPEARANCES

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RESPONDENT:

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