REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION, OSHAKATI

PRACTICE DIRECTION 61

Case Title:		**Case No:** HC-NLD-LAB-APP-AAA-2021/00011
Marius Natangwe Nangolo	Applicant	**Division of Court:** High Court, Northern Local Division
and		
Epupa Investment Technology	1st Respondent	**Heard on:** 07 December 2023
The Labour Commissioner	2nd Respondent	
Martha Mbute Shipushu	3rd Respondent	**Delivered:** 16 January 2024
		Reasons: 18 January 2024

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Nangolo v Epupa Investment Technology* (HC-NLD-LAB-APP-AAA-2021/00011) [2023] NALCNLD 01 (18 January 2024)

ORDER

1. The Applicant's non-compliance with rule 17(25) of the Labour Court is refused.
2. The applicant's application for the extension of time to prosecute the labour appeal under case number HC-NLD-LAB-APP-2021/00011 and reinstatement of the appeal is refused.
3. There is no order as to costs.
4. The matter is removed from the roll: Case finalised.

MUNSU J:

Introduction

[1] This is an application for condonation, necessitated by the applicant's failure to prosecute his appeal in time. The applicant seeks a reinstatement of the appeal and an extension of time to prosecute the appeal.

Brief background

[2] The applicant was employed by Epupa Investment Technology (Pty) Ltd, the first respondent. During the year 2018, his employer transferred him from the Ongwediva branch to the newly opened branch at Keetmanshoop, however, he never reported for duty at Keetmanshoop. Disciplinary proceedings were instituted, but the applicant never showed up. The hearing proceeded in his absence, and in the end, he was found guilty, and was dismissed by the employer.

[3] The applicant referred a dispute for unfair dismissal, unilateral change of terms and conditions and unfair labour practice to the office of the Labour Commissioner (second respondent). Arbitration proceedings were conducted during the period 02 - 03 August 2021. In her award dated 15 November 2021, the arbitrator (third respondent) found that the dismissal of the applicant was substantively and procedurally fair and dismissed the applicant's claim. Aggrieved by such finding, the applicant, on 13 December 2021 filed an appeal to this court, initially without legal representation.

The application

[4] In his founding affidavit, the applicant states that a labour appeal is a complex matter, one that a lay person like him would not understand. He avers that he did not have enough financial resources to afford legal representation. So on 15 December 2021, he applied to the Directorate of Legal Aid for legal representation.

[5] The applicant further states that his application for legal representation was approved during the month of July 2022. By that time, the appeal had lapsed. The applicant further states that he

filed an application for condonation and reinstatement of the appeal on 28 July 2022. Additionally, the applicant claims that the matter was then postponed from time to time for the first respondent to obtain instructions on whether they would oppose the application. Subsequently, the matter was removed from the roll.

[6] Regarding the prospects of success, the applicant avers that the arbitrator erred when she determined that the applicant's dismissal was procedurally and substantively fair. He also states that the arbitrator failed to recognise that to proceed with the disciplinary hearing in the absence of the applicant violated the applicant's right to be heard.

The opposition

[7] Mr. Mbinao Kambiri deposed to the answering affidavit on behalf of the first respondent. He states that more than a year had lapsed between the time the applicant's legal practitioner of record received instructions and the setting down of this application. He stresses that labour matters should be concluded expeditiously.

[8] Mr. Kambiri further emphasises that the applicant failed to explain the efforts he made to expedite the appointment of counsel. He states that after submitting his application, the applicant appears to have done nothing further.

[9] Furthermore, Mr. Kambiri avers that the application for condonation and reinstatement was filed on 21 July 2022, and set down on 28 July 2022. The first respondent filed a notice of intention to oppose the application but failed to deliver its answering affidavit within 14 days. Instead of scheduling the matter for a hearing within 14 days after the deadline for filing the answering affidavit lapsed, the applicant only set the matter down for hearing almost seven months later on 03 February 2023, and at the court's Main Division. The applicant fails to explain why the application was not moved earlier.

[10] Regarding prospects of success, Mr. Kambiri states that the applicant fails to specify in what respects the arbitrator erred in law. He avers that the applicant received sufficient notice to attend his disciplinary hearing, but chose not to attend.

Discussion

[11] Our law reports are replete with decisions that deal with applications of this nature. An

applicant seeking condonation is required firstly, to provide a reasonable, acceptable, and bona fide explanation for non-compliance, and secondly, must demonstrate good prospects of success on the merits.

[12] Although the applicant filed his appeal at the court's Northern Local Division, he proceeded to file his condonation application in relation to the same appeal, at the court's Main Division. It should not have come as a surprise to the applicant that on 31 March 2023, his application was removed from the roll of the Main Division as the Northern Local Division was seized with the matter. This contributed to the delay in the hearing of this application, however, the applicant does not even attempt to explain why he chose to handle the matter in this way.

[13] As pointed out by counsel for the first respondent, the applicant still delayed to set down his application for hearing before the Main Division when the first respondent failed to file answering papers. The delay remains unexplained.

[14] After the matter was removed from the roll of the Main Division, the applicant on 09 May 2023 filed the application for condonation in this court. However, on 21 July 2023, the applicant requested for the matter to be removed from the roll, which order was granted. On 03 August 2023, the matter was again set down. Similarly, this delay is unexplained. This is notwithstanding the fact that the parties agree, as captured in their heads of argument, that the law requires the applicant to provide a full, detailed and accurate explanation for the entire period of the delay, including the time of the application for condonation.[1] Accordingly, I find the applicant's explanation inadequate.

[15] I have also assessed the applicant's prospects of success on the merits, and I am not convinced that he enjoys any prospects of success. His case is that the arbitrator failed to recognise that his right to be heard was violated when the disciplinary hearing proceeded in his absence.

[16] The arbitrator found that the applicant was fully informed of the disciplinary hearing but opted not to attend. This finding was informed by what transpired at the disciplinary hearing. A notice of the disciplinary hearing was served on the applicant. Paragraph 5 thereof informed him that:

> 'If you fail or refuse to attend the hearing, and fail to provide the employer with acceptable and legitimate reasons for your absence, the hearing may be conducted in your absence and finalized without you in present. Such failure or refusal will be interpreted to imply that you have waived your

[1] See *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC), *TelecomNamibia Ltd v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

right to the hearing.'

[17] Further, the chairperson of the disciplinary hearing referred to clause 17.3 of the applicant's contract of employment which reads:

> 'Should the employee refuse or fail to appear before the disciplinary hearing, the hearing may proceed in the employee's absence.'

[18] The chairperson concluded that, both in terms of the employment contract and the notice of the disciplinary hearing, he was entitled to hear the matter. The employer led evidence that the Board of Directors of the employer passed a resolution to transfer the applicant to the newly opened branch at Keetmanshoop. The evidence was that the applicant was identified as best suited to set up the new branch. The resolution was communicated to the applicant and he was afforded an opportunity to make representations. The applicant objected to the transfer on grounds that the transfer amounted to a unilateral change of his employment terms and conditions, that he was not granted an opportunity to be heard prior to the decision to transfer him, that there was no justification for excluding him from possible transfer to any of the other branches in the company, that the transfer amounted to a demotion, that the timing of the transfer would amount to destruction of his family ties and responsibilities as well as result in undue financial hardship on him on account of company needs and decision.

[19] The evidence was further that the employer responded to the representations. The employer found that there was no intended unilateral change to the applicant's job description. Additionally, it was not a demotion as the applicant would be branch manager of Keetmanshoop branch with the same salary and benefits whilst carrying out the same duties. There was further evidence that in order to alleviate the financial hardship that was likely to result because of the transfer, the employer undertook to bear all the costs of relocation that the applicant would incur in moving. Furthermore, the employer undertook to pay the applicant's rentals in Keetmanshoop for the first two months in order to mitigate the financial burden.

[20] There was further evidence that there was no open vacancy at any other branch except Keetmanshoop which required a senior manager with the applicant's work experience. It was indicated that in the event that a vacancy would arise in the future, the employer would consider the applicant's request. The applicant was then directed to report at his new work place on 09 July 2018, failing which the employer would consider taking disciplinary action against him.

[21] The employer further led evidence that in terms of clause 4.1 of the employment contract entered into between the employer and the applicant on 05 December 2016, the employer was entitled to transfer the applicant. That in terms of the said clause, the applicant agreed to be transferred at the company's discretion. Furthermore, the employer informed the chairperson of the human resources policies and procedural manual that were binding on all employees. In terms of the manual, gross insubordination could give rise to summary dismissal, and also that refusal or failure to obey a proper instruction was also classified as gross misconduct.

[22] The chairperson went on to refer to relevant authorities on the subject, among others *Mostert v The Minister of Justice*[2] wherein the Supreme Court set out the approach to be adopted when transferring an employee. He concluded that the employer may follow the following approach:

(i) inform the employee by means of a provisional decision that he/she shall be transferred,
(ii) after the provisional decision, grant an employee an opportunity to make representations as to why he/she should not be transferred,
(iii) having received and considered the representations by the employee, proceed to make a final decision as to whether to transfer the employee.

[23] The chairperson was satisfied that in terms of the employment contract, the employer and the applicant agreed that the applicant could be transferred, he was further satisfied, from the documentary evidence that the applicant was provided with an opportunity to make representations as to why he should not be transferred. He observed that the applicant's transfer was not a demotion, but a lateral transfer to the same post, with the same job description. The chairperson further found that the transfer was not arbitrary. By virtue of the applicant's experience and skills, he was identified as the suitable person for the position.

[24] The chairperson also found that the employer was reasonable in its approach to the intended transfer and sought to ameliorate the financial difficulties that the applicant would suffer as a result of the transfer. It was the chairperson's further finding that the applicant acted unreasonably in failing to comply with the directive from the employer requiring him to report at his new duty station. He concluded that, in terms of the common law, an employer is entitled to transfer its employees, provided a fair process is followed. In the result, he found that there was evidence which proved that the applicant was guilty of gross misconduct.

[25] The applicant was invited by the chairperson for purposes of mitigation, but never showed

[2] *Mostert v The Minister of Justice* 2003 NR 11 (SC).

up. In light of the above background, the arbitrator found that the applicant's dismissal was substantively and procedurally fair. The applicant's challenge to the arbitrator's decision amount to mere conclusions without specifying the respects in which the arbitrator erred.

[26] For the aforesaid reasons, I conclude that, not only did the applicant fail to provide a reasonable explanation, but he also failed to demonstrate that he enjoys prospects of success on the merits. Consequently, the application stands to be dismissed.

Costs

[27] In terms of rule 118 of the Labour Act, 2007, this court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by initiating, pursuing, or defending proceedings. I do not find exceptional circumstances to warrant an order for costs against the applicant.

The order

[28] In the result, the following order is made.

1. The Applicant's non-compliance with rule 17(25) of the Labour Court is refused.
2. The applicant's application for the extension of time to prosecute the labour appeal under case number HC-NLD-LAB-APP-2021/00011 and reinstatement of the appeal is refused.
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	Note to the parties:
D MUNSU Judge	None
Counsel:	
Appellant:	**Respondents:**
S. Mwahafa Instructed by Henry Shimutwikeni & Co Inc, Windhoek	J. Kandara Instructed by Tjitemisa & Associates Windhoek