REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION - WINDHOEK

JUDGMENT

Case no: **LCA 46/2014**

In the matter between:

NDJEMBELA ALUTUMANI & 63 OTHERS	**1ST TO 64TH APPLICANTS**
and	
WALVIS BAY STEVEDORING CO (PTY) LTD	**1ST RESPONDENT**
GERTRUDE USIKU N.O.	**2ND RESPONDENT**
THE LABOUR COMMISSIONER N.O.	**3RD RESPONDENT**

Neutral citation: *Alutumani v Walvis Bay Stevedoring Co (Pty) Ltd* (LCA 46/2014) [2022] NALCMD 74 (5 December 2022)

Coram: SCHIMMING-CHASE J
Heard: **10 November 2022**
Delivered: **5 December 2022**

Flynote: Appeal — To Supreme Court — From decision of Labour Court — When leave to appeal required — Leave to appeal to Supreme Court required in terms of section 18(2)*(b)* of the High Court Act 16 of 1990 read with section 119 of the Labour Act 11 of 2007 and rule 15 of the High Court Rules, which rule requires application for leave to appeal to be made within 15 days of the order appealed against.

Appeal — Condonation — Late filing of application for leave to appeal – Explanation for

late filing — Instructed counsel apparently not cognisant of the provisions of *inter alia* section 18(2)*(b)* of the High Court Act 16 of 1990 relating to appeals, resulting in application for leave to appeal and condonation being launched two years after the order sought to be appealed against was made.

Appeal — Condonation — applicants for condonation unpersuasive, showing inexcusable disregard by legal practitioner for legal principles governing appeals – Court in the circumstances not considering prospects of success — Condonation refused.

Summary: Applicants were retrenched by first respondent in 2013. They referred a dispute to the Labour Commissioner's office for adjudication by way of arbitration under s 86 of the Labour Act 11 of 2017. The arbitrator found in the applicants' favour on 25 August 2014. The first respondent appealed against the arbitrator's decision and award to the Labour Court in terms of s 89 of the Labour Act. On 13 May 2016, the Labour Court upheld a preliminary point in the first respondent's favour. The applicants applied for and were granted leave to appeal to the Supreme Court against that outcome. The Supreme Court in a judgment delivered on 4 July 2019, upheld the appeal and referred the matter back to the Labour Court for the determination of the merits of the appeal, which the Labour Court did in a judgment delivered on 18 May 2020. The applicants noted an appeal as of right to the Supreme Court against the Labour Court's decision and belatedly established that the procedure was wrong, and that leave to appeal was required. This resulted in an application for condonation for the late filing of an application for leave to appeal, and an application for leave to appeal, some two years after the Labour Court decision.

Held; The explanation for the late filing of the application for leave to appeal was vague, unsubstantiated and unpersuasive.

Held; There is degree beyond which a litigant cannot be excused by his or her legal practitioner's conduct. Finality to proceedings was also an important consideration. Not even the record of proceedings sought to be appealed against was placed before court. Condonation refused in the circumstances.

ORDER

1. The application for condonation is dismissed.

2. There shall be no order as to costs.

3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

[1] The applicants apply for condonation for the late filing of an application for leave to appeal, as well as for leave to appeal to the Supreme Court, against the judgment and order of Unengu AJ, delivered on 18 May 2020 in the Labour Court in *Walvis Bay Stevedoring Co (Pty) Ltd v Alutumani* (LCA 46/2014) [2020] NALCMD 9 (18 May 2020).

[2] The founding affidavit deposed to by the first applicant (on behalf of all the applicants) in support of the above two applications, was signed on 27 June 2022 two years after the judgment delivered by Unengu AJ. The first respondent in these proceedings, is Walvis Bay Stevedoring Company (Pty) Ltd. No relief is sought against the second and third respondents. The first respondent will be referred to as "the respondent" herein.

[3] By way of brief background, the applicants were retrenched by the respondent in August 2013. They referred a dispute of unfair dismissal to the Labour Commissioner's Office for adjudication by way of arbitration under s 86 of the Labour Act 11 of 2017 ("the Act"). They secured an award in their favour on 25 August 2014. The respondent appealed against this decision and award to the Labour Court in terms of s 89 of the Act. Both parties raised preliminary points, and then the Labour Court, through Unengu AJ on 13 May 2016, upheld the respondent's preliminary point, finding that the appeal was unopposed, and that it was not necessary for the Labour Court to consider the merits of the appeal in those circumstances.

[4] The applicants then applied for and were granted leave to appeal to the Supreme Court against that outcome. The Supreme Court in a judgment delivered on 4 July 2019, upheld the appeal and referred the matter back to the Labour Court for the determination of the merits of the appeal.[1]

[5] The merits of the appeal were heard and this resulted in the judgment and order of Unengu AJ delivered on 18 May 2020, against which the applicants seek leave to appeal.

[6] In the condonation application, the explanation for the two-year gap in applying for leave to appeal is explained by the first applicant in the founding affidavit.[2] The first applicant states that they appeared four times at court – when the appeal against the arbitration award was initially argued in the Labour Court; when leave to appeal was sought against the judgment of Unengu AJ upholding the preliminary point on 13 May 2016; when condonation was sought; and when the merits were argued after the matter was referred back to Unengu AJ for determination of the labour appeal on the merits resulting in the judgment sought to be appealed against.

[7] The first applicant stated further in his founding affidavit that due to an 'oversight', they did not seek leave before launching an appeal to the Supreme Court, instead an appeal was noted as of right. The oversight is not explained in any meaningful way in the founding affidavit. There are 64 applicants in total, each one effectively labouring under the unexplained 'oversight'.

[8] It would appear from instructed counsel for the applicants, that it was only discovered through the heads of argument of the respondent, delivered after the applicants delivered their heads of argument in the Supreme Court for purposes of the appeal in the Supreme Court, that the wrong procedure was followed, and that leave to appeal should have been applied for. This appears to be the actual 'oversight'.

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[1] *Ndjembela Alutumani & 63 Others v Walvis Bay Stevedoring (Pty) Ltd* Case NO SA65/2017 delivered on 4 July 2019.

[2] For purposes of the explanation provided, it is noted that none of the other 63 respondents deposed to a confirmatory affidavit, confirming at the very least the facts deposed to in the founding affidavit in support of the application for condonation, especially as it stands to reason that some of their circumstances might have changed since 2013.

[9] The 'oversight' was apparently not deliberate but 'due to a confusion' because of the number of times that the applicants appeared before the same court. What caused further confusion was that the application for leave to appeal had been argued before the same judge, and after the judgment was delivered, the applicants' instructing legal practitioner withdrew to relocate to South Africa. Accordingly another practitioner had to be appointed, and any omission or mistake should not be attributed to the applicants, but to the legal practitioners that represent the applicants.

[10] Section 18 the High Court Act 16 of 1990 provides as follows:

'18. (1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) An appeal from any judgment or order of the High Court in civil proceedings shall lie

(a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required;

(b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order or, in the event of such leave being refused, leave to appeal is granted by the Supreme Court.'(emphasis supplied).'

[11] Section 18(2)*(b)* of the High Court Act requires leave to appeal where the High Court sat as a court of appeal, as in the present instance.[3] This is to be read together with section 119(4) of the Act,[4] and rule 115 of the High Court Rules which deals with the procedure for applications for leave to appeal.

[12] It is not in dispute that the applicants retained the same instructed counsel at all material times. Heads of argument were delivered at the Supreme Court on behalf of

[3] See also *Namdeb Diamond Corporation (Pty) Ltd v Coetzee* 2018 (3) NR 737 (SC) para 28.

[4] The subsection provides that to the extent that the rules contemplated in s 119(3) (The Labour Court Rules) do not deal with a matter otherwise provided for in the Rules of the High Court, those Rules of the High Court apply.

the applicants first, and by that time, research and preparation on the principles and procedures governing an appeal to the Supreme Court must have been undertaken by the applicants' counsel, and still, there was no inclination that the procedure for the appeal against the judgment of Unengu AJ in the Labour Court was wrong and that leave to appeal was required.

[13] In addition, no record of the proceedings in the Labour Court was provided, either on or before the hearing date of the applications for condonation and leave to appeal, thereby failing completely to place the court in a position to consider prospects of success, given that another judge had heard and determined this matter finally, two years ago. The parties were timeously aware that the applications would be heard by another judge. However the absence of the record does not affect the order made herein.

[14] It is particularly unfortunate for the applicants and their legal team that the explanations provided in support of the first hurdle to be crossed in a condonation application are at best, vague and entirely unsubstantiated.

[15] Most recently, and in *Solsquare Energy (Pty) Ltd v Hans Ivo Luhl,*[5] the Supreme Court reiterated the now trite principle that applications for condonation for non-compliance with the rules must be lodged without delay, and the explanation for the non-compliance must be full, detailed and accurate in order to enable the court to understand clearly the reasons for it. The range of factors relevant to determining whether an application for condonation should be granted includes the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona fides* of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice (emphasis supplied).

[16] Of course, these factors are not individually determinative, but must be weighed,

[5] *Solsquare Energy (Pty) Ltd v Hans Ivo Luhl* Case No SA 25/2019 delivered on 25 August 2022.

one against the other. Nor will all factors necessarily be considered in each case. There are times, for example, where the court will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant, and inexplicable.[6]

[17] The failure, without any proper explanation (other than confusion because of the number of appearances that the applicants had to attend, and oversight), of the applicants' instructed counsel to timeously engage in the proper research and drafting of documents to commence with the appeal against the order and Judgment on the merits of Unengu AJ is not lost on the court. It borders, in the absence of the required detailed explanation, on culpable inactivity. The Supreme Court has expressed itself a number of times on the duties of a legal practitioner in these circumstances[7]:

> (a) a legal practitioner instructed to note an appeal is duty bound to acquaint him or herself with the Rules of the Court in which the appeal is to be prosecuted.
>
> (b) Inasmuch as an applicant for condonation is seeking an indulgence from the Court, he or she is required to give a full and satisfactory explanation for whatever delays have occurred.
>
> (c) Where the non-observance of the Rules has been flagrant and gross, the application should not be granted, whatever the prospects of success might be. Of course, the consideration must apply to the circumstances of the case, based on the explanations provided under oath.

[18] In *Aymac CC and Another v Widgerow*[8] the following was stated:

> '[36] . . . An attorney is not expected to know all the rules, but a diligent attorney will

[6] *Solsquare Energy (Pty) Ltd v Hans Ivo Luhl* Case No SA 25/2019 para 65 and the authority collected there.

[7] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2013 (4) NR 1029 (SC) paras 6-8.

[8] *Aymac CC and Another v Widgerow* 2009 (6) SA 433 (W). See also *Nakambonde v Transnamib Holdings Ltd* 2021 (4) NR 1089 (SC) at para 22; *Jonas v Ongwediva Town Council* 2020 (1) NR 50 (SC) at paras 18-21.

ensure that he researches, or causes to be researched (by counsel if necessary), the rules which are relevant to the procedure he is about to tackle. And if he discovers at some stage that he has been mistaken or remiss, then it is doubly necessary that he study the rules carefully in order to ensure that further mistakes are not made, and that those that have been made are rectified. This is the least one expects of a diligent attorney.'

And

'[39] Culpable inactivity or ignorance of the rules by the attorney has in a number of cases been held to be an insufficient ground for the grant of condonation. See PE *Bosman Transport Works Committee and Others v Piet Bosman Transport* (Pty) Ltd 1980 (4) SA 794 (A) at 799B-H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131I-J; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281G-282A; *Blumenthal and Another v Thomson NO and Anothe*r 1994 (2) SA 118 (A) at 121C — 122C. The principle established by these cases is that the cumulative effect of factors relating to breaches of the rules by the attorney may be such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal.

[40] There is a further reason why the court should not grant condonation or reinstatement in the face of gross breaches of the rules. Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A in which Holmes JA said the following concerning the late filing of a notice of appeal:

" The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment — the time for noting an appeal having elapsed, he is prima facie entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at 193, in which SOLOMON JA said:

'After all the object of the Rule is to put an end to litigation and to let parties know where they stand." '

[19] As stated earlier, the applicants launched their labour dispute as a result of events that occurred in 2013, some 9 years ago. It is apparent that application for leave to appeal was required to have been made within 15 days after the date of the order and judgment made by Unengu AJ in 2020, and not some two years later. At some point, this matter, instituted in 2013 must reach finality, and the prejudice to the respondent in these circumstances should not be overlooked either.

[20] The applicants were represented by the same instructed counsel from the

outset, and the failure to meaningfully consider the legal principles relating to the procedure for an appeal, when this process is being undertaken is simply an insufficient ground for the grant of condonation in these circumstances, especially because the length of time that has elapsed. These actions are not indicative of a diligent approach to the matter by counsel. It must also be mentioned that the judgment of the Supreme Court referring the initial decision of Unengu AJ back for reconsideration was granted subsequent to an application for leave to appeal.

[21] The cumulative effect of the above factors, is that this is one of those occasions where, given the particulars facts and circumstances, the court will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, flagrant, and inexplicable.

[22] In the result the following order is made:

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

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EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANTS:	S Rukoro Instructed by Pack and Company Inc., Windhoek.
RESPONDENTS:	G Dicks Instructed by Engling, Stritter & Partners, Windhoek.