

REPUBLIC OF NAMIBIA



IN THE LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING IN TERMS OF PRACTICE DIRECTION 61

<b>Case Title:</b>  Jan Frederick Jobs  and  Namibia Office Equipment Company (Pty) Ltd  Liwela Sasela	<b>Applicant</b>       <b>2<sup>nd</sup> Respondent</b>	<b>Case No:</b>  Main Case Number: HC-MD-LAB-APP-AAA-2023/00005  INT-HC-OTH-2023/00012	<b>Division of Court:</b>  Main Division	<b>Heard on:</b>  12 May 2023
<b>Heard before:</b>  Honourable Lady Justice Rakow		<b>Delivered on:</b>  11 August 2023		
<b>Neutral citation:</b> <i>Jobs v Namibia Office Equipment Company (Pty) Ltd</i> (HC-MD-LAB-APP-AAA-2023/00005) [2023] NALCMD 33 (11 August 2023)				
<b>Order:</b>				
<ol style="list-style-type: none"><li>1. The court grants condonation for the late noting of the appeal and the appeal is reinstated</li><li>2. No order as to costs.</li></ol>				
<b>Reasons for order:</b>				
RAKOW, J:				
<u>Background</u>				

[1] The applicant seeks relief in the form of condonation for the late noting of his appeal. The dispute over the applicant's unfair dismissal gave rise to this application. The applicant was employed by the respondent as a technician and on 18 September 2020 he was charged with misconduct. He was subjected to a disciplinary hearing at the end of which a sanction of dismissal was imposed on him. Alleging that his dismissal was unfair, the applicant referred a dispute of unfair dismissal to the Office of the Labour Commissioner. The Commissioner designated the second respondent to conciliate and arbitrate the dispute. Following the arbitration of the dispute during May 2021, the second respondent, on 15 March 2022 rendered the arbitration award. In terms of the award, the second respondent found that the applicant was dismissed for a valid reason.

[2] On 18 March 2022 the applicant's representative at arbitration collected the arbitration award from the Office of the Labour Commissioner. Unhappy with the award, the applicant noted an appeal against the award on 18 May 2022 together with an application for condonation for the late noting of his appeal. The applicant applied for legal aid on 13 September 2022, and it was approved in December of that same year. As the offices of the legal practitioners were closed during the December holidays, the applicant only consulted his legal aid funded lawyer on 16 January 2023. On 16 January 2023 the legal aid appointed lawyer advised the applicant that the appeal that he had noted is flawed and that he needed to note a fresh appeal with an application for condonation for the late noting of his appeal. On 19 January 2023 the flawed appeal was withdrawn and on 20 January 2023 the applicant caused a fresh appeal to be noted on his behalf together with this application.

[3] The time period for which the applicant must give a full, detailed and accurate explanation runs from 18 March 2022 to 20 January 2023. According to the applicant, he was assisted by three labour consultants as from when he received his award (18 March 2022) until an application for condonation for his failure to file a Form 41 was filed. He always accepted the advice of these consultants because he is a layman. He paid for their services and there was no reason for him to believe that an invalid appeal had been filed on his behalf. Form 41 was not filed with Form 11 as required by the Rules of the Labour Court and the Rules relating to Conciliation and Arbitration. Founding Affidavit paragraphs 10 to 14. It was not until the applicant consulted with his legal practitioners of record on 16 January 2023, that he learned of his defective appeal and that it needed to be withdrawn. Prior to that he believed that his appeal was valid.

### Arguments by the parties

[4] On behalf of the applicant it was argued that the default was not wilful, nor intended to prejudice either the Honourable Court or the respondent. The applicant laboured under the false impression that a valid appeal had been filed on his behalf. It is furthermore submitted that the first respondent did not suffer any prejudice. It is submitted that the applicant enjoys good prospects of success. The applicant was charged and dismissed for conflict of interest in that he was doing business similar to the functions he was employed for at the first respondent. Section 33(1) and (4) of the Labour Act 11 of 2007, places the burden on the employer to establish the substantive fairness of its decision to dismiss an employee.

[5] The first respondent called two witnesses at the arbitration hearing, the Chairperson of the disciplinary hearing (the Chairperson) as well as the initiator at the said hearing. The initiator testified as to what transpired at the disciplinary hearing. The Chairperson testified that because the applicant's misconduct is a dismissible offence according to the Disciplinary Code of the first respondent, he recommended the dismissal of the applicant. That was the Chairperson's sole justification for the dismissal. Nothing more. Thus, at the arbitration hearing, no evidence was presented on behalf of the first respondent concerning how the applicant's misconduct would affect the employment relationship.

[6] On behalf of the respondents, it was argued that the applicant was found guilty of breach of Contract in that he agreed in his employment contract that it would be a conflict of interest if he is doing business similar to the functions for which he was employed by first respondent and use parts and time during work hours to perform duties of another company. The arbitrator found that applicant did admit guilt during the disciplinary hearing and that he did not disclose his other business interest (in competition with the first respondent) to the first respondent as his employer.

[7] It was also submitted that the applicant has not made out a case for good prospects of success for the appeal in his affidavit, which is a requirement. The nature of the misconduct and the fact that the employer's code stipulates dismissal as an appropriate sanction for when its employees conducted services in competition with the employer is a breach of the fiduciary duties of an employee. On breach of such a duty there is an irretrievable breakdown of the employer-employee relationship as in addition to the codes stipulation, the misconduct also resulted in a conflict of interest.

## Legal considerations

[8] Regarding the decision whether to grant condonation or not, the application must meet two requirements. In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others*<sup>1</sup>, Damaseb JP identified the following as principles guiding applications for condonation:

- ‘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.
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 non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.
8. The applicant’s prospect 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.’

[9] Regarding the impact of the misconduct, in *B2Gold Namibia (Pty) Ltd v Kamundu*<sup>2</sup> the employee was dismissed for theft. The Court held the following:

[23] In the present matter, the arbitrator correctly found that theft is a dismissible misconduct. This is subject to a caveat – that is, that the dismissal must be warranted in the circumstances of the case. Dismissal will only be warranted if it is reasonable and not ‘dramatically wrong’ or ‘perverse’. The question is, whether the decision to dismiss was a sanction that no reasonable person acting fairly and

<sup>1</sup> *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

<sup>2</sup> *B2Gold Namibia (Pty) Ltd v Kamundu* (HC-MD-LAB-APP-AAA-2018/00062) [2019] NALCMD 35 (4 December 2019).

reasonably could have imposed.

[24] Counsel were ad idem and correctly so, that the decision, insofar as to what sanction to impose on an errant employee is concerned, rests with the employer. But that decision must be reasonable and fair. The arbitrator in her award merely pointed out that the sanction was excessive and that the dismissal was substantively unfair. She did not indicate what would in the circumstances have been an appropriate sanction.

[25] Neither at the disciplinary hearing nor at the arbitration hearing did the appellant present evidence on how the misconduct of the respondent would impact the employer/employee relationship.

[26] The record shows that the evidence led on behalf of the appellant was focused on and merely concentrated on establishing that the respondent had committed the act of theft. No evidence was led on behalf of the appellant as to how the misconduct by the respondent would affect their relationship. Section 33(1) and (4) of the Labour Act, 2007, places the burden on the employer to establish the substantive fairness of its decision to dismiss an employee. The arbitrator found that the appellant had failed to prove on a balance of probabilities that the appellant's decision to dismiss the respondent was substantively fair. I am of the view that the finding is unassailable if regard to the evidence on record.

[27] The appellant's failure to lead evidence that the respondent's conduct would render the continuation of the employer/employee relationship unbearable is in my view, fatal to justification for the sanction. In my view this factor cannot be assumed: it must be proved.'

### Conclusion

[10] The applicant satisfied the court that he, at all times intended to have his appeal heard although his initial attempts were unsuccessful due to the advice he received from labour consultants. He explained these periods as well as dealt with his prospects of success if the matter should be heard as an appeal.

[11] In the result, I make the following order:

1. The court grants condonation for the late noting of the appeal and the appeal is re-instated.
2. No order as to costs.

**Judge's signature**

**Note to the parties:**

E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant:</b>	<b>First Respondent(s):</b>
E Coetzee Of Tjitemisa & Associates, Windhoek	P De Beer Of De Beer Law Chambers, Windhoek