

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

<b>Case Title:</b> NAMIBIA BROADCASTING CORPORATION // LYLIE NDEUYA HAUSHONA	<b>Case No:</b> HC-MD-LAB-APP-AAA-2020/00072 (INT-HC-OTH-2021/00017)
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	<b>Date of hearing:</b> 5 MARCH 2021
	<b>Delivered on:</b> 5 MARCH 2021
	<b>Reasons on:</b> 24 MARCH 2021
<b>Neutral citation:</b> <i>Namibia Broadcasting Corporation v Haushona</i> (HC-MD-LAB-APP-AAA-2020/00072 (INT-HC-OTH-2021/00017)) [2021] NALCMD 10 (5 March 2021)	
<p>After I heard submissions from counsel for the parties I made the following order and undertook to furnish the reasons for the order on 24 March 2021.</p> <p><b>The order:</b></p> <p>Having heard <b>Ms Nyashanu</b>, on behalf of the applicant and <b>Ms Williams</b>, on behalf of the respondent and having read other documents filed of record:</p> <p><b>IT IS ORDERED THAT:</b></p> <ol style="list-style-type: none"><li>1. The late noting of the appeal as contemplated in section 89(3) of the Labour Act, Act 11 of 2007 read with rule 15(a) of the Labour Court Rules is condoned.</li><li>2. The 90 day period in which to prosecute the appeal as prescribed by rule 17(25) as contemplated in rule 15(b) of the Labour Court Rules, is extended with a period of 60 days from 1 March 2021 until 1 May 2021.</li></ol>	

3. In the event that the appeal is deemed to have lapsed, it is hereby re-instated.

4. The reasons for this order will be delivered on 24 March 2021.

5. Matter is removed from the roll: Others

**Following below are the reasons for the above order:**

Introduction

[1] The applicant sought an order condoning the late noting of the appeal as contemplated by s 89(3) of the Labour Act 11 of 2007 read with rule 15(a) of the Labour Court Rules. It further sought an order extending the 90 day period within which to prosecute the appeal as prescribed by rule 17(25) as contemplated by rule 15(b) of the Labour Court Rules with the period of 60 days calculated from 1 March 2021 to 1 May 2021.

[2] The respondent opposed the application.

[3] Rule 15 gives power to the court at any time to condone non-compliance with the rules on good cause shown and to extend or abridge any period prescribed by the rules whether before or after the expiry of such period.

[4] The requirements for granting condonation are well established; first the applicant must furnish a reasonable and acceptable explanation for the delay and secondly, he or she must satisfy the court that there are reasonable prospects of success on appeal. The first requirement entails that the applicant must furnish a full detailed and accurate explanation for the delay and the application must have been brought without delay. It has been held that the court will not move to consider the prospects of success, if for instance, the applicant has failed to satisfy the first requirement whereby his or her explanation for non-compliance with the rule has been 'glaring', 'flagrant' and 'inexplicable'.<sup>1</sup>

[5] The applicant's legal practitioner who was in conduct of the matter gave a long and detailed explanation for the delay in noting the appeal. From the explanation tendered it did

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<sup>1</sup> *Felisberto v Meyer*, Case No. [2017] NASC 11 at para 24.

not appear that the applicant's legal practitioner sat back and did nothing. It is common cause that the applicant previously filed an appeal which was subsequently withdrawn. The reasons for the withdrawing of the first appeal have been fully explained and I do not intend to repeat it here. It would suffice to mention that one of the reasons was related to the use of an incorrect prescribed form based on the interpretation of the rules. Subsequent thereto a second appeal was filed outside the prescribed 30 days period calculated from the day the award was delivered. As a result of the delay caused by the time spent on the withdrawn first appeal, the second appeal is late hence this application.

[6] As to the question whether the applicant has furnished a reasonable and acceptable explanation for the delay, Ms Williams for the respondent strenuously argued in her written submissions that the explanation offered by the applicant for the delay cannot be considered as reasonable. Furthermore, that the manner in which the applicant has attended to rectifying its case cannot be considered to be bona fide in nature.

[7] I do not agree with counsel's submission. I am satisfied that the applicant has furnished a full and detailed chronological explanation of the events that culminated in the delay for the noting of the appeal. There is nothing in the deponent to the applicant's founding affidavit which cause me to call into question the credibility and bona fide of her explanation. The deponent explained that her action in the filing of the first appeal was based on the interpretation of s 89 of the Labour Act and rule 17. An interpretation which turned out to be incorrect cannot, without more be, said to be unreasonable. Neither can the use of a prescribed form which is based on the incorrect interpretation be said to amount to flagrant or gross disregard for the rules of the court. Under the circumstances I am of the view that the applicant has given a full and detailed explanation for the delay.

[8] As regards the question whether the appeal enjoys prospects of success, this question can only be considered having regard to the grounds of appeal as set out in the notice of appeal. If the grounds are anything to go by then the appeal enjoys prospects of success. I note that one of the questions of law appealed against relates to the interpretation of the Disciplinary Code of the applicant. In the determining a ground based on interpretation of a document or instrument there is always a possibility that another person or court might come a different conclusion. For that reason alone, I hold the view that there are prospects that another court might come to a different conclusion in interpreting the Disciplinary Code than that which was arrived at by the Arbitrator.

[9] As regards to the importance of the case to the parties, it would appear to me that the case is important to the parties for the reason that it involves an interpretation of the Disciplinary Code to the effect of employee being absent with leave for a period specified in the code whether that employee is to be deemed to have deserted his or her employment. An authoritative determination of that aspect will be important not only to the applicant but also the appellant's employees.

[10] In so far as the prejudice is concerned it is now common cause that the applicant has put up a bank guarantee in respect of money owed to the respondent. The court was also informed during the hearing that an amount equal to the respondent's salary has been paid monthly into the trust account of the applicant's legal practitioner for the benefit of the respondent in the event the appeal does not succeed. To my mind those steps have sufficiently mitigated the prejudice to the respondent caused by the delay. In this regard, it was mentioned during the hearing that the matter was ready to be allocated a date for hearing in the event condonation were to be granted.

[11] As regards the interest of finality, I am of the view that finality should not be achieved at the expense of interest of justice. In this particular matter, given the importance of obtaining clarity on the interpretation of the applicant's disciplinary code the interest of justice outweighs the interest of finality.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
S P Nyashanu <i>of</i> Shikongo Law Chambers, Windhoek	L Williams <i>of</i> Koep & Partners, Windhoek