

REPUBLIC OF NAMIBIA



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

Case Title: lipinge Markus Uushona and Walvis Bay Cargo Terminal Maxine Krohne N.O The Labour Commissioner	Case No: HC-MD-CIV-MOT-GEN- 2022/00206 Division of Court: Main Division Heard on: 27 June 2023
Applicant	1 st Respondent 2 nd Respondent 3 rd Respondent
Heard before: Honourable Justice Usiku	Delivered on: 13 October 2023
Neutral citation: <i>Uushona v Walvis Bay Cargo Terminal</i> (HC-MD-CIV-MOT-GEN-2022/00206) [2023] NALCMD 649 (13 October 2023)	
Order: 1. The applicant's condonation for the late noting of his appeal, is dismissed. 2. I make no order as to costs. 3. The matter is removed from the roll and regarded as finalized.	
Reasons for order:	
USIKU J: <u>Introduction</u>	

[1] This is an opposed interlocutory application in terms of which the applicant seeks condonation for the the late noting of an appeal against an arbitration ward handed down on 28 June 2022.

Background

[2] The applicant was employed by the first respondent since 2 October 2017. He was charged with a misconduct of assault on a fellow female employee, was found guilty following a disciplinary hearing, and was dismissed from employment on 23 February 2021. He referred a dispute of unfair dismissal to the Labour Commissioner on 10 April 2021. The matter went for arbitration and the arbitrator delivered her arbitration award on 28 June 2022. The arbitration award reads as follows:

- ‘1. The termination of the applicant’s contract of employment with the respondent is confirmed.
2. The applicant’s claim is herewith dismissed.
3. There shall be no order as to costs.’

[3] In terms of s 89(2) of the the Labour Act 11 of 2007 (‘the Act’), the applicant, if dissatisfied with the arbitration award, was required to note an appeal within 30 days of the award being served on him.

[4] The applicant became aware of the arbitration award on the date it was delivered and consequently, his appeal should have been noted by no later than 28 July 2022. The applicant noted an appeal, however, the appeal was only noted on 22 September 2022. Thus, the noting of appeal was about 56 days late, prompting the present condonation application.

Application for condonation

[5] The applicant seeks an order in the following terms:

- ‘1. Condoning the late noting of the appeal against the arbitration ward handed down on 28 June 20022 by Arbitrator Maxine Krohne, under case number CRWB 133-21;
2. Reinstating the appeal noted on the 14 September 2022 under the case number HC-MD-LAB-APP-AAA-2022/00060;
3. Extending the period for a further 90 days from the date this order is made in the event the appeal is not prosecuted within 90 days as prescribed by Rule 17()25 of the Labour Court Rules;

4. Ordering the 2nd and 3rd Respondents to release the full and complete record of arbitration proceedings under case number: CRWB 133-21;
5. Costs of suit, only if opposed; and
6. Further and/or alternative relief.'

[6] The applicant, deposed to the founding affidavit. According to him, on the 16 February 2021, he was served with a notice of a disciplinary hearing for having allegedly physically shoved and assaulted a work colleague, Leonie Hoeses ('Ms Hoeses'). He appeared before the disciplinary committee on the 23 February 2021 and was dismissed the same day. He appealed internally, but his appeal was unsuccessful. He referred a dispute of unfair dismissal to the Labour Commissioner's Office and on 10 March 2022, the matter proceeded to arbitration. On 28 June 2022, the arbitrator delivered the arbitration award which was brought to his attention the same day.

[7] As regards the reason for delay for noting the appeal, the applicant avers that, on or about 30 June 2022, he took the arbitration award to Namibia Transport and Allied Workers Union ('NATAU') and informed the union representative, Robbin Mauta ('Mr Mauta') that he was not happy with the arbitration award and consequently, wanted to appeal to 'the Office of the Labour Commissioner'. The applicant further avers that Mr Mauta informed him that he will contact his secretary to find a lawyer that can note an appeal. On the 21 July 2022, the applicant went back to NATAU to follow up on the issue and Mr Mauta informed him that his secretary was unable to find a lawyer for him, and therefore, he should acquire the services of a private lawyer.

[8] Knowing that he could not afford a private lawyer, the applicant states that he was advised that he could apply for legal representation from the Directorate of Legal Aid ('Legal Aid'). On 9 August 2022, he made an application to Legal Aid and on 25 August 2022 received feedback that his application was successful. Brockerhoff and Associates Legal Practitioners were appointed to represent him. According to the applicant, he was unable to consult with his legal practitioners as he was in Walvis Bay when they contacted him. Further, on 07 September 2022, he received a sad news that his father had passed on. Consequently, he travelled to his home village in Omusati Region to attend his father's funeral. Despite the funeral arrangements, he managed to consult with his legal practitioner and subsequently the appeal was noted.

[9] It is the applicant's assertion that the date he received the arbitration award was the same date he took it to Mr Mauta in the hope that he would find a legal practitioner to note his appeal. He further states that, he approached Mr Mauta because he is a NATAU representative and he

also represented him during the arbitration proceedings. The applicant was of the view that Mr Mauta was better placed to find a legal practitioner on his behalf and he was informed by Mr Mauta that he would liaise with his secretary. After three weeks lapsed with no response from Mr Mauta, the applicant decided to physically go to NATAU offices. Only then did Mr Mauta inform him that he could not secure a lawyer for him. After learning about the unfortunate stance by NATAU, the applicant sought advice from his acquaintances, who then advised him to approach Legal Aid. Upon receiving instructions from Legal Aid, Mr Nanhapo, the applicant's legal representative, was engaged in trials for two consecutive weeks. He submits that, had he secured a lawyer earlier, the appeal would have been noted on time, as he could not note the appeal on his own.

[10] The applicant submits further that his non-compliance was not a wilful disregard of the rules.

[11] As regards the prospects of success, the applicant contends that the arbitrator reached the conclusion that the fact that he did not challenge the evidence of the first respondent, means that the first respondent is correct and she has no other reason but to accept it. This conclusion, according to the applicant, is perverse because the arbitrator did not analyse and evaluate the evidence to come to such a conclusion. According to the applicant, the basis and the reasoning for reaching such a conclusion is fundamentally flawed in the sense that the evidence was accepted, not because it proved the fact, but because it was not challenged. The arbitrator further found that, from the overwhelming evidence adduced to her at the arbitration, she was satisfied that the first respondent established the applicant was guilty of the charge of assault. The applicant submits that the first respondent did not provide, at arbitration a video footage, and that the arbitrator failed to appreciate that the video footage was necessary to prove the charge of assault. The applicant denied having assaulted Ms Hoeses.

[12] The arbitrator, according to the applicant, also failed to consider that one of the first respondent's witness' testimony, Mr Ockert Botha, was purely based on the video footage and nothing more. His evidence carries no weight in the absence of the video footage. Ms Hoeses herself, the applicant contends, testified about the altercation between herself and the applicant, suggesting that there was an argument between the two. The applicant contends that an argument between the two does not prove assault on Ms Hoeses. Furthermore the applicant argues that another witness of the first respondent, Brandon George Kohen, claimed to be a factual witness, but his evidence, as far as how the assault was allegedly perpetrated, namely by

raising of a hand, differs from that of Ms Hoeses. In light of the above, applicant submits that he enjoys good prospects of success. In conclusion, the applicant prays that this court grants him the relief as prayed for in his notice of motion.

Opposition

[13] The first respondent opposes the condonation application on the basis that the appeal has not lapsed and there is no legal or factual basis to now apply for its reinstatement. Further, it is the first respondent's stance that insufficient reasons were provided for the delay in noting the appeal and the appeal, in any event, lacks any reasonable prospects of being successful.

[14] The opposing affidavit of the first respondent is deposed to by Ockert Botha ('Mr Botha'), the general manager of the first respondent. Mr Botha avers that the applicant's appeal, firstly, attacks the arbitrator's reasoning when making factual findings based on the uncontested factual evidence before her and, secondly, attacks her factual findings based on the evidence before her. He submits that it must be shown that the arbitrator erred in her application of the law or that she made the factual findings perverse to facts on record. The first respondent denies this to be the case and submits there are no prospects of success on appeal, which the applicant must prima facie show. It is Mr Botha's contention that by virtue of his position, he was responsible for and managed the disciplinary process and the subsequent arbitration process, on behalf of the first respondent. He avers that he acquainted with the events and the facts relevant to these processes, due to his participation therein. Mr Botha states that the dismissal of the applicant followed the findings made at the disciplinary hearing. The finding was that, the applicant had assaulted a co-employee at the workplace. Mr Botha avers that the applicant was found to have assaulted a female employee, Ms Hoeses, when he grabbed her by the chest, shoved her around and threatened her with the words 'you are dead already' and that he will 'get her outside'.

[15] Mr Botha further states that during the disciplinary proceedings (as at the arbitration hearing), Ms Hoeses and Mr Brandon Kuhn gave evidence and described the incident of assault. Despite the applicant being given the opportunity to testify and call witnesses in defence of the charges, he elected not to do so during the disciplinary hearing. The evidence of witnesses describing the assault at the disciplinary hearing, was thus uncontested. After the finding that the applicant assaulted Ms Hoeses at the workplace, he was dismissed. Mr Botha states further that the applicant's internal appeal was limited to an attack on the sanction of

dismissal only. The appeal was not successful. The applicant referred an unfair dismissal dispute for arbitration to the Labour Commissioner. During the arbitration, the applicant was represented by a field organiser and official of NATAU. NATAU also assisted the applicant to refer his dispute and signed the dispute referral documents on his behalf. His dispute did not include a denial of the incident of assault, which he also did not deny at the disciplinary hearing. His qualms were with the sanction (i.e. dismissal) which followed the disciplinary findings that he assaulted Ms Hoeses.

[16] Mr Botha further asserts that the arbitrator correctly recorded the issues to be determined as whether the dismissal was substantively fair. The reason for the dismissal was the assault of Ms Hoeses. In support of the reason for the dismissal, the first respondent called Ms Hoeses and two further eye-witnesses to the incident, namely Brandon George Kuhn and Willem Gaupe, to testify during the arbitration. All three described the incident of assault in their evidence before the arbitrator. Their summarised evidence is not the subject of the appeal. According to Mr Botha, Ms Hoeses evidence corroborated the initial uncontested evidence and findings at the disciplinary hearing. These facts were not disputed by the applicant in cross-examination and his later version in denial thereof, was not put to the witness. In the arbitrator's summarised evidence of both Mr Kuhn and Mr Gaupe, the assault is described in similar terms, as the grabbing of Ms Hoeses by her chest.

[17] Mr Botha submits that the applicant has not made out a case that his appeal enjoys any prospects of success and that his application be dismissed.

Analysis

[18] It is trite that the law regarding condonation is settled. Condonation is not to be had merely for the asking. In considering such application, the court ought to consider two factors, namely; (a) an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate¹; and (b) prospects of success on appeal.² There is some interplay between these two factors, namely that, good prospects of success may lead to the granting of the condonation application even if the explanation is not entirely satisfactory. However, if there are no prospects of success, no matter how good the explanation for the delay might be,

¹ *Beukes and Another v Swabou and Others* [2010] NASC 14(5 November 2010), para 13.

² *Abreu v Namibia Power Corporation (Pty) Ltd* (HC-MD-LAB-APP-AAA-2021/00065) [2021] NAHCMD 54 (14 December 2021).

condonation must be refused.

[19] It is common cause between the parties that the 30 day period within which the applicant ought to have noted his appeal lapsed on 28 July 2022. The applicant's explanation for the delay is principally and he require a lawyer to note the intended appeal on his behalf. He approached NATAU who promised to assist in securing a lawyer. They did not revert back. When he followed up with NATAU on 21 July 2022, NATAU advised that they could not secure a lawyer, and that he should find his own lawyer. Thereafter, on 9 August 2022, the applicant approached Legal Aid and applied for legal aid. He was informed on 25 August 2022 that the application was successful. Thereafter, after the events that followed, as explained by the applicant, the appeal was noted on 14 September 2022. From the explanation, it appears that the applicant was aware at all material times that the appeal must be noted within 30 days. Given such awareness, it is not clear why the applicant only followed up with NATAU, on 21 July 2022, just about a week before the expiry of the 30 days period. Another defect in the explanation is the fact that there is no evidence put forth confirming the events attributed to Mr Mauta. Notwithstanding the defects in the applicant's explanation, I am of the view that, in the circumstances, the explanation furnished by the applicant is, at the very least, adequate though not entirely satisfactory. That is not the end of the enquiry. The applicant is also required to show that he has reasonable prospects of success in the appeal.

[20] As regards to the prospects of success, the gist of applicant's argument is that the conclusion reached by the arbitrator that the applicant's failure to challenge the evidence of the first respondent, means that the first respondent is correct and she has no other reason but to accept it, is perverse because the arbitrator did not analyse and evaluate the evidence to come to such a conclusion. Further, the arbitrator erred in finding that the applicant was guilty of assault in the absence of the video footage.

[21] The court in *Small v Smith* 1954 (3) SA 434 (SWA) at 438, held as follows:

'It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute is left unchallenged in cross-examination ... the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.' (My emphasis).

[22] It is important for a party to put its case fully to the witness during cross examination as

failure to do so results in the unchallenged witness' testimony being accepted as correct. I am therefore, in agreement with the submission of the first respondent that in the absence of the facts being contested during cross-examination, the arbitrator may, in law, accept them as true. Further, the applicant cannot argue that an adverse finding of the credibility of the witnesses and their description of the events must have been made in the circumstances where their evidence was left uncontested. I am further not persuaded by the applicant's argument that the arbitrator was perverse in her finding that the applicant was guilty of assault in the absence of a video footage. This aspect becomes a non-issue in light of the witnesses' testimony having gone uncontested.

[23] In addition to the above, the applicant in his 'summary of the dispute' submitted the Labour Commissioner, it is indicated that the applicant did not beat Ms Hoeses but that he only shoved her a little and that she did not fall down or get injured. The applicant has not explained how this description of shoving Ms Hoeses fits in with his version as put forth in the present condonation application.

[24] In my opinion, the applicant has not established that he has reasonable prospects of success on appeal. It therefore, follows that the condonation application stands to be dismissed. Having reached the foregoing conclusion, it is not necessary to deal with the remainder of the relief sought in the applicant's notice of motion.

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

1. The applicant's condonation for the late noting of the appeal, is dismissed.
2. I make no order as to costs.
3. The matter is removed from the roll and regarded as finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Applicant:	Respondent:
T Nanhapo	P J Burger

T Nanhapo Incorporated, Windhoek	Kinghorn Associates, Windhoek
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