

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA, NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

RULING

Case Title: Iina-Maria Aukongo v Martha Shipushu	Case No.: HC-NLD-LAB-APP-AAA-2021/00007
	Division of Court: Northern Local Division
Heard before: MUNSU AJ	Delivered on: 12 July 2022
Neutral citation: <i>Aukongo v Shipushu</i> (HC-NLD-LAB-APP-AAA-2021/00007) [2022] NALCNLD 1 (12 July 2022)	
The order: <ol style="list-style-type: none">1. The application for condonation is dismissed with costs.2. The matter is removed from the roll and is regarded as finalised.	
Reasons for the order:	
MUNSU AJ: Introduction	

[1] Before court is an application for condonation of the late filing of the notice of appeal. The applicant seeks condonation for non-compliance with Rule 17(4).¹ The application is only opposed by the second and third respondents.

Background

[2] The applicant lodged an appeal against the award handed down on 09 June 2021 by the first respondent (the arbitrator). She filed her notice of appeal on 23 July 2021 i.e. thirteen days late, hence this application for condonation.

The condonation application

[3] In her founding affidavit, the applicant states that she was telephoned by the arbitrator on 09 June 2021, the day on which the award was delivered. At the time, she was at her homestead. She agreed with the arbitrator that the award would be emailed to her on the same day.

[4] The applicant explains that on the next day (10 June 2021), she travelled to the nearest town of Outapi where she managed to access the email. She studied the award during the period of 11 to 13 June 2021. According to her, she was disappointed by the arbitrator's findings as justice in her view did not prevail. She further states that the ruling confirmed her perception of bias on the part of the arbitrator.

[5] During the period 14 to 26 June 2021, she sought advice from family members and friends. She was referred to her counsel of record who agreed to assist her. She began to solicit for funds and moral support to enable her to instruct counsel. She only managed to do so on 13 July 2021.

[6] Due to Covid-19 restrictions, she was unable to consult physically with her legal representative. It was also not possible for her to obtain and submit necessary documentation

¹ Rule 17(4) of the Labour Court Rules reads as follows: "The notice of appeal referred to in subrule (2) or (3) must be delivered within 30 days after the award, decision or compliance order appealed against came to the notice of the appellant."

for lodging this appeal.

[7] On 20 July 2021, her husband took her to Ondangwa for consultations with her legal representative. She was advised by her legal representative that the time for delivery of the notice of appeal had lapsed on 10 July 2021. She nevertheless instructed counsel to proceed with the appeal.

[8] She concludes by stating that her late filing of the appeal was neither willful nor deliberate but was as result of circumstances which were beyond her control. Accordingly, she prays for condonation.

Respondents' answer

[9] The respondents raised two points in *limine viz*, the defectiveness of the condonation application, and misjoinder. They state that the condonation application does not meet the requirement stipulated in rule 15 requiring an applicant to show good cause. According to the respondents, the applicant did not establish a reasonable and acceptable explanation for the delay. They further state that the applicant never dealt with the requirement of prospects of success of her purported appeal.

[10] In respect of misjoinder, the respondents state that the matter before the arbitrator was between the applicant (employee) and the International University of Management (IUM) (employer). However, on appeal, IUM is not cited. The second respondent states that she was merely a witness in the arbitration proceedings just like any other witness. The third respondent avers that he was never a party to the arbitration proceedings nor was he called as a witness. The respondents state that there is no employment relationship between the applicant and themselves and that they do not have any direct and substantial interest in the subject matter of the litigation. As such, the respondents assert that they are wrongly joined in these proceedings.

Disposal

[11] The approach to condonation applications was summarised by the Supreme Court in the matter of *Balzer v Vries*² as follows:

[20] It is well settled that an application for condonation is required to meet two requisites of good cause before he or she (sic) can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.³

[12] Although the applicant did not sufficiently explain how and where she sought moral support, and further, how she secured funds to open the file and the reason she could not send the documents to her legal representative via courier services and consult with her legal representative either telephonically or via zoom, I find her explanation reasonable. She was also not out of time with a substantial number of days.

[13] However, the applicant did not deal with the second leg to a condonation application i.e. prospects of success. She did not demonstrate or claim in her affidavit that there are reasonable prospects of success on appeal. She only attempted to do so in her written heads of argument. On this issue alone, the applicant's application stands to fail.

[14] The applicant did not state in her affidavit the reason she joined the second and third respondents. It was only during oral submissions that the applicant clarified that the second respondent chaired the internal disciplinary committee while the third respondent chaired the appeal committee that enquired into the matter of the applicant and the employer IUM. However, both the second and third respondents are cited in their personal capacity notwithstanding the fact that they acted on behalf of IUM. For that reason, they had to instruct counsel in their personal capacity which is prejudicial/costly to them. Furthermore, no allegations are made against them.

[15] It is common cause that this is a labour matter which was referred to the office of the Labour Commissioner for conciliation/arbitration by the applicant for unfair dismissal by the former employer IUM. However, as stated above, IUM is not cited in these proceedings. This

² *Balzer v Vries* 2015 (2) NR 547 (SC) at 551 J-552F.

³ See also *Minister of Health and Social Services v Amakali Matheus* Case no: (SA-2017/4) [2018] NASC 413 (6 December 2018).

is not withstanding the fact that the parties before the arbitrator were the applicant and IUM.

[16] In light of the foregoing, I find that the applicant joined wrong parties to these proceedings and/or failed to explain the reason for joining the second and third respondents. The foregoing are fatal mistakes that vitiate the applicant's application. The fact that the respondents did not oppose the main appeal is of no consequence.

Costs

[17] The second and third respondents averred in their answering affidavits that they are entitled to be awarded costs on the scale of attorney-own-client. This is so because the application according to them is frivolous and vexatious. The applicant did not deal with the issue of costs in her papers. This issue was raised by the respondents in their answering affidavits; however, the applicant chose not to reply thereto. In their oral submissions, the second and third respondents persisted with the issue of costs. In response thereto, the applicant merely submitted that costs on the scale of attorney-own-client should only be awarded in exceptional circumstances, which is not the case in this matter.

[18] I am mindful of the provision of section 118 of the Labour Act⁴ which restricts the court from making an order for costs against a party unless that party acted in a frivolous and vexatious manner. In the instant matter, it is manifestly clear that the second and third respondents were wrongly joined to these proceedings and that the application for condonation is legally defective. As stated above, the second and third respondents were not party to the proceedings between the applicant and her employer. The fact that no single allegation was made against the second and third respondents should have served as an indication to the applicant that she wrongly cited these parties. Over and above, she cited these parties in their personal capacities, which resulted in them incurring legal costs.

[19] Although the applicant's conduct may be viewed as frivolous and vexatious, I do not find it to warrant costs on the scale of attorney-own-client. I therefore award costs on the normal scale.

⁴ Labour Act 11 of 2007.

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

1. The application for condonation is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalized.

Judge	Comments:
MUNSU AJ	NONE
Applicant: Antonius Shapumba Of Shapumba & Associates, Ondangwa	Respondent: Eino Nangolo Of Sisa Namandje & Co. Inc, Windhoek