NOT REPORTABLE

CASE NO.: LC 45/2009

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

AIR NAMIBIA (PTY) LTD **APPLICANT**

And

YVONNE CONRADIE **FIRST RESPONDENT**

THE LABOUR COMMISSIONER **SECOND RESPONDENT**

THE PERMANENT SECRETARY MINISTRY OF LABOUR **THIRD RESPONDENT**

THE MINISTER OF LABOUR & SOCIAL WELFARE **FOURTH RESPONDENT**

CORAM: **HENNING, AJ**

Heard on: 12 October 2010

Delivered on: 18 October 2010

JUDGMENT

HENNING, AJ:

[1] On 9 October 2009 the applicant noted an appeal against the award of an arbitrator dated 6 October 2009. In a letter dated 30 October 2009 the registrar of this Court informed the applicant's legal practitioner that the appeal would be heard on 12 March 2010. On 19 November 2009 the applicant applied for a suspension of the enforcement of the award and related relief, referred to as the stay application. On 17 May 2010 the applicant lodged an application on the basis of urgency seeking a rule *nisi* which was in essence also designed to prevent the implementation of the arbitrator's award. Despite opposition a rule was issued on 26 May 2010 and extended from time to time, eventually to 11-15 October 2010. Both the stay application and the rule *nisi* application were enrolled for hearing on the same days -11-15 October 2010. For a reason not known the appeal was not on the roll for these days.

[2] At the hearing on 12 October 2010 the first respondent *in limine* contended

- that the appeal had lapsed on or about 11 January 2010,
- that the two applications referred to in the previous paragraph were ancillary to the appeal,

and that the *substratum* of these applications had fallen away. Put differently, these applications assumed the validity of the appeal, which assumption is wrong.

[3] Procedurally an appeal to this Court is governed by rule 17 of

the Labour Court Rules. Rule 17 (7) provides for the decision-maker to dispatch within 21 days after receipt of the notice of appeal the record to the registrar together with reasons and to notify the applicant that he/she has done so. Subrules (9), (10), (11) and (12) of rule 17 prescribe the further procedure. They read:

> "*[9] The registrar must, upon such terms as the registrar considers appropriate to ensure its safety, make available to the applicant the record dispatched to him or her in compliance with subrule (7) or the conciliation and arbitration rules.*
>
> *[10] On receipt of the record referred to in subrule (9), the applicant must have copies made of such portions of the record as may be necessary for the purposes of the appeal.*
>
> *[11] The copies referred to in subrule (10) copies* ***(sic)*** *must be clearly typed on A.4 standard paper in double spacing, and the pages thereof must be consecutively numbered, and in addition every tenth line on each page must be numbered.*
>
> *[12] The record must contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof, and the copies lodged with the registrar must be certified as correct by the legal practitioner or party lodging the same or the person who prepared the record.*"

[4] A transcription of the evidence is dated 1 November 2009. The exhibits were not included and were not annexed to the applicant's

original founding affidavit. An application dated 4 October 2010 sought leave to introduce them into the founding affidavit. There is no certified record in the Court file.

[5] Subrules (13), (14) and (15) of rule 17 assume compliance with the earlier subrules (see paragraph 3 above) regarding the record. They provide:

> "*[13] The applicant must, not less than 14 days after receipt of the record supplied by the registrar under subrule (9), supply the registrar with two copies and each of the other parties with one copy thereof, in each case certified as provided in subrule (12).*
>
> *[14] If the applicant fails to comply with subrule (13) he or she must as soon as is reasonably possible or, in any case before the expiry of the 14 days referred to in that subrule, return the record to the registrar failing which the registrar may take such steps as may be necessary, including obtaining an order of the court, to ensure the return of the record.*
>
> *[15] The applicant may within 10 days after the registrar has made the record available to him of her, by delivery of a notice, amend, add to or vary the terms of the notice of appeal.*"

[6] Rule 17 (16) deals with opposition to the appeal, subrules (17), (18), (19) and (20) then provide:

"*[17] The applicant may, within 14 days after receiving the statement referred to in subrule (16), apply to the registrar on Form 5, on five days' notice to all other parties, to assign a date for the hearing of the appeal and the registrar must, after consultation with the judge-president, assign such a date and set the matter down for hearing on that date.*

[18] In the absence of an application referred to in subrule (17) by the applicant, the respondent may, at any time after the expiry of the period of 14 days referred to in subrule (17), apply for a date of hearing in like manner.

[19] On receipt of an application referred to in subrule (17) or (18) from applicant or respondent the appeal is deemed to have duly prosecuted.

[20] On receipt of an application referred to in subrule (17) or (18), the registrar must, as soon as is reasonably possible, assign a date of hearing, which date must be at least 20 days after the receipt of the said application, unless all parties consent in writing to an earlier date, except that the registrar may not assign a date of hearing until the provisions of subrules (10) (11) and (12) have been duly complied with."

[7] In this case it appears as if the assignment of a date for the hearing of the appeal by the registrar on 30 October 2009 was premature and *ultra vires* the rules. It further seems as if no record as contemplated by the rules was provided. The steps required for the prosecution of an appeal in terms of the rules were absent. The

appeal accordingly lapsed in January 2010. Rule 17 (25) determines this issue: It states:

> "*An appeal to which this rule applied must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed.*"

[8] In *Ondjava Construction CC and Others v. H.A. W. Retailers t/a Ark Trading,* Case No SA 6/2009, delivered on 8 March 2010, as yet unreported, the Supreme Court considered the consequences of non-compliance with its rules. The Supreme Court found that an appeal lapsed because of non-compliance with its rules 5 and 8. At pages 6 to 7 paragraph 5 the Court held:

> "*Having failed to find security and to notify the registrar accordingly when the applicants lodged the record of appeal and having omitted to deliver copies of the record of appeal to the respondent in breach of rules 8(3) and 5(5), the appeal lapsed. Therefore, the respondent was at liberty to execute the default judgment he had obtained against them. He had no need to bring an application for an order that the appeal be dismissed with costs. As it is, in the absence of an application - and ultimately, the granting of an order - for condonation and reinstatement of the appeal, there was no longer an appeal which could be dismissed as prayed for by the respondent - just as*

there was no longer an appeal pending which the appellants could set down for hearing."

[9] In summary, at the time of the issue of the rule *nisi* the appeal had lapsed. The lapse of the appeal in January 2010 signified the end of the stay application.

[10] The first respondent did not - in view of section 118 of the Labour Act 11 of 2007 - press for a costs order.

[11] In the result it is ordered:

1. The application dated 18 November 2009 for suspension of the arbitral award and further relief is struck from the roll.

2. The rule *nisi* granted to the applicant on 26 May 2010 is discharged.

HENNING, AJ

ON BEHALF OF APPLICANT: Adv. A. H. G Denk
instructed by Tjitemisa and Associates

ON BEHALF OF RESPONDENT Mr. P J De Beer
Pieter J De Beer Legal Practitioners