



CASE NO.: LCA 21/11

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

MINISTER OF EDUCATION

APPLICANT

and

THE ARBITRATOR N.O

1ST RESPONDENT

PIET TITUS

2ND RESPONDENT

THE LABOUR COMMISSIONER N.O

3RD RESPONDENT

CORAM: GEIER AJ

Heard on: 28 February 2012

Delivered on: 28 February 2012 (*Ex tempore*)

JUDGMENT

GEIER AJ:

[1] The Applicant in this matter seeks the reinstatement of a lapsed appeal and a revival of an order granted by the High Court, suspending the execution of an Arbitration Award made by the 1st Respondent in favour of the 2nd Respondent on 16th February 2011.

[2]The Applicant prosecuted the lapsed appeal as set out below, subsequent to the order granted by the High Court on 16th March 2011 in pursuance of an urgent application brought in this regard, which order inter alia also directed the Applicant to file the requisite Notice of Appeal on or before the 17th March 2011.

[3]This Notice of Appeal was then served on the other Respondents on 16th March and on 17th March on the 2nd Respondent. Prior to service on the 2nd Respondent, the Applicant caused the Notice of Appeal to be filed at the court on the 16th March 2011. For purposes of this matter, the Notice of Appeal will therefore be regarded as having been filed on 17th March 2011.

[4]The said Notice of Appeal also called on the 1st Respondent to dispatch the record of the Arbitration proceedings to the Registrar within 21 days of service of the Notice. The period of 21 days expired on 6th April 2011. The Applicant's legal practitioner apparently in the interim enquired from time to time as to what had happened to the record. No details in this regard were furnished in the founding papers.

[5]However, on the 16th of May 2011 the record was obtained from the Registrar. The Applicant's legal practitioner apparently made four copies to be dispatched to the Respondents. In terms of Rule 17(13) of the Rules of the Labour Court, the Applicant had to provide the Registrar with two certified copies of the record. This had to occur not less than 14 days after the receipt of such record. This 14-day period expired on the 30th of May 2011. On 9th of June the Applicant's legal practitioners dispatched the record to the Registrar of the High Court.

[6] On 17th of June 2011 an attempt to serve this certified record, together with a Notice of Appeal on the 2nd Respondent was made. This attempt at service was made at the Horizon Boys Hostel in Keetmanshoop, the last known address of the 2nd Respondent. A return of non-service was received. Thereafter further attempts were made at locating the whereabouts of the 2nd Respondent. On the 22nd July 2011 the record and the Notice of Appeal were personally served on the 2nd Respondent.

[7] In terms of Rule 17(25) of the Rules of the Labour Court an appeal, which is not prosecuted within a period of 90 days, after the noting of such appeal, lapses. This 90 day period expired on 14th June 2011. On the 5th of August 2011 the 2nd Respondent's legal practitioners filed a notice to oppose the appeal. This notice was not followed up through the filing of a further notice stating the grounds of opposition to the appeal, as would have been required in terms of Rule 17(16)(b) of the Rules of Court.

[8] On 1st September 2011, through a letter, received by the legal practitioners of Applicant on 2nd September 2011, the legal practitioners of the 2nd Respondent informed the Applicant's legal practitioners of the fact that the appeal, which had been noted on behalf of the Applicant, had lapsed.

[9] On 3rd October 2011 the Applicant eventually brought the present application, which was set down for hearing on 14th October 2011 and which application then became opposed. On the 14th of October this application was postponed and the parties were directed by the Court in regard to the further exchange of affidavits herein. The matter was then set down for hearing for today.

[10] The parties are *ad idem* that this application is governed by Rule 15 of the Rules of the Labour Court, in terms of which the Court may, on good cause shown, condone any non-compliance with the Rules. The concept of good cause has been traditionally considered in many decisions, which authority has also been assimilated in both sets of

Heads of Argument, filed on behalf of the parties. There is thus no need for me to rehash the trite principles governing applications of this nature.

[11] It appears from these authorities that it was incumbent on the Applicant to furnish an explanation of his default, sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives. In this regard reliance is for instance placed on the *locus classicus* Silber vs Ozen Wholesalers (Pty) Limited 1954 (2) SA 345 (AD) at page 353A, an authority which has been adopted in numerous decisions by this court. An Applicant also has to show some prospects of success.

[12] The Respondent has taken aim at the Applicant's case and in so doing, has exposed its weaknesses as follows: It is argued with some force on behalf of the 2nd Respondent that the Notice of Appeal was served properly and same was delivered on a Mr Tangeni at the hostel, principal in Keetmanshoop, the 2nd Respondent's former place of employment and where the 2nd Respondent seems to have resided at the time. This, so it is submitted, constitutes proper service in terms of Rule 5(2)(b)(ii) of the Rules. The submissions made in this regard seem to be correct.

[13] It was then submitted further that the record was only dispatched to the High Court on the 9th of June, after same had already been received on the 16th of May 2011. I need to add that criticism was levelled at the Applicant's legal practitioner's *modus operandi* and in respect of which it was further submitted that, given the delay, and given the fact that the record was not dispatched within the 21 days prescribed, this should have triggered an application to compel the production of the record.

[14] It was countered on behalf of the Applicant in this regard, that various attempts at procuring the record were made from time to time.

[15] Rule 17(13) of the Labour Court Rules however states that a certified record must be sent back to the Registrar of the Labour Court not less than 14 days after its original

receipt. These 14 days expired on 30th May 2011, and the record was then dispatched some 9 days later after its receipt. It seems that the Applicant thus complied with the requirements of Rule 17(13) in this regard.

[16] Although the point is taken that no explanation for this delay is furnished, the Applicant in reply has at least endeavoured to set out why the preparation of the certified record took some time.

[17] On 17th June 2011 the Applicant then attempted to serve the record on the 2nd Respondent. The 2nd Respondent now takes the point that service should again have taken place at the Horizon Boys Hostel in Keetmanshoop, the last known address of the 2nd Respondent and that any attempts at tracing the Respondent could have been taken much earlier. While it is indeed so that the record could have been left or served at the last known address of the 2nd Respondent, as pointed out by Counsel, in terms of the Rules, it cannot be argued away that the return of service received, actually and clearly indicates that the 2nd Respondent no longer resided there as "he had resigned and left Keetmanshoop."

[18] The requirement of notice is a fundamental requirement in our law and although possibly sanctioned by the Rules of Court, I cannot conceive any court of law to ignore the fact that the record could not effectively have been served on the 2nd Respondent on 17th July 2011, and would have thus never have come to his notice. The Applicant's attempt to thereafter trace and effect personal service of the record can, and should not attract any negative consequences therefore in my view.

[19] Personal service of the record and notice of appeal was in such circumstances effected only on 22nd July 2011. That was at a time that the appeal had already lapsed.

[20] The Respondent then takes the further point that it took the Respondent up to 23rd October 2011 to bring this application. This point is conceded on behalf of the

Applicant and no explanation has been furnished for this further delay. While it is so that the application was only brought then, it should not be forgotten that the 2nd Respondent initially gave notice to oppose the appeal nevertheless, on the 5th October 2011 and then had the opportunity, in terms of Rule 17(16)(b), to, within a further 21 days, deliver a statement with grounds of opposing the appeal. It is unknown whether or not the Applicant's legal practitioners awaited this event to occur. It is however clear from the papers that on 2nd September 2011 they received a letter from the 2nd Respondent's legal practitioners, indicating and informing them that the appeal had lapsed.

[21] This therefore is indicative of the fact that if the Applicant's legal practitioners had not been aware of this fact, that they at the very latest became aware of the lapsing of the appeal on that date. I have already alluded to the fact that the further delay is not explained. This then also forms the high watermark of the 2nd Respondent's criticism in regard to the explanation which was furnished on behalf the Applicant for the lapsing of the appeal.

[22] It appears immediately from what has been set out above that a reasonably detailed account of the causes for the delay has been furnished on behalf of the Applicant. The Court has been given an explanation and was then in such circumstances able to understand what the motive of the Applicant's legal practitioners were in acting in the way they did. I am not in any manner indicating here that I find the explanation not open to criticism, but from these facts it cannot be said that there was a brazen disregard for the Rules of Court and although the Applicant's legal practitioners' conduct may be criticised, as I have already indicated, for delaying the matter in their quest to obtain proper service and to give effective notice to the Respondent and to thereafter bring an application for the reinstatement of the appeal, I do not consider this to be the type of conduct that cannot be condoned.

[23] More importantly, it cannot be said that there has been a reckless disregard of the Rules regardless of the consequences, as the history of this matter proves beyond doubt that the Applicant was throughout serious and determined in prosecuting this appeal.

[24] This application is also *bona fide* and not merely made with the intention to delay the 2nd Respondent's claims. At least I have not understood Counsel on behalf of the 2nd Respondent to take this point.

[25] I therefore find, reluctantly I must add, that the Applicant has satisfied this leg of the enquiry.

[26] When it comes to the prospects of success, these emerge from the grounds set out in the Notice of Appeal, as amplified in the Founding papers.

[27] In this regard it needs to be kept in mind that an Applicant here merely has to show such issues and in this regard show such grounds which are not patently unfounded and which grounds constitute grounds which, if found on appeal, would constitute valid grounds of appeal. This minimum hurdle the Applicant overcomes.

[28] It needs to be taken into account – and this is definitive - that this Court has previously found such prospects of success to exist when it considered, and granted the order of 16th March 2011.

[29] It appears therefore, and I conclude, that the Applicant has satisfied the requirements of '*good cause*'.

[30] It must follow that the condonation sought must be granted.

[31]As it would appear that the circumstances prevailing at the time of the granting of this court's order on 16th March 2011 have not changed substantially, I also deem it fit to reinstate at least the applicable portions of such order.

[32] In the result the following orders are made:

- 32.1 The Applicant's non-compliance with Rule 17(25) as read with Rule 17(19) of the Rules of the Labour Court is hereby condoned.
- 32.2 The Applicant's appeal under case number LCA 21/2011 is hereby reinstated.
- 32.3 The Applicant is granted five (5) days from date of this Order to amend its Notice of Appeal, if it so desires.
- 32.4 The 2nd Respondent is given 21 days to file his grounds of opposition to this appeal - the period of 21 days to run from the effluxion of the 5-day period granted to the Applicant to file an Amended Notice of Appeal.
- 32.5 The Applicant is thereafter afforded a further period of 10 days - such period to run from the date of the effluxion of the aforesaid 21-day period allowed for the filing of the grounds of opposition to this appeal - to finalise the prosecution of its appeal.
- 32.6 Paragraphs 2 and 4 of the Order of Court, granted on 16th March 2011, are hereby reinstated, pending the outcome of this appeal.

GEIER AJ:

ON BEHALF OF THE APPLICANT

MR MUTORWA

Instructed by:

GOVERNMENT ATTORNEYS

ON BEHALF OF THE 2ND RESPONDENT

ADV I VISSER

Instructed by:

PD THERON & ASSOCIATES