



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 33/2010

In the matter between:

LOURENCO GREEN

APPELLANT

and

WESBANK (PTY) LTD

RESPONDENT

Neutral citation: *Green v Wesbank (Pty) Ltd* (LCA 33/2010) [2013]
NALCMD 24 (12 July 2013)

Coram: HOFF J

Heard: 17 May 2013

Delivered: 12 July 2013

ORDER

- (a) The applicant's non-compliance with the provisions of Rules 17(1)(c), 17(19) and 17(25) is condoned.
- (b) The appeal under case number LCA 33/2010 is reinstated.
- (c) Leave is granted to the applicant to amend the notice of appeal and to deliver such amended notice by not later than 19 July 2013 at 16h00.

JUDGMENT

HOFF J:

[1] This is an application for an order in the following terms:

1. condoning applicant's non-compliance with the Rules of this court as provided for in Rules 17(1)(c), 17(19) and 17(25);
2. re-instating the appeal under case LCA 33/2010;
3. granting leave to the applicant to file an amended notice of appeal.

This application is opposed.

Background facts

[2] During May 2007 the applicant was charged with misconduct by the respondent at a disciplinary hearing for being under the influence of an intoxicating substance while at work. The applicant resigned before the disciplinary process was concluded and lodged a complaint of constructive dismissal in the district labour court at Walvis Bay.

[3] On 5 March 2009 the district labour court upheld the complaint of constructive dismissal and ordered the respondent to reinstate the applicant. The applicant was reinstated on 1 April 2009 but was however immediately suspended on the basis of being under the influence of alcohol while at work (first charge), a second charge of breach of trust and dishonesty and a third charge of non-performance of basic duties and gross negligence in the execution of his duties.

[4] On 7 April 2009 the applicant was found guilty on all three charges and dismissed. The applicant subsequently lodged an appeal against his dismissal but the decision to dismiss was confirmed by the chairperson of the appeal hearing.

[5] On 28 July 2009 the applicant laid a complaint of unfair dismissal with the Labour Commissioner and the matter was referred to arbitration. On 5 October 2009 the arbitrator dismissed the complaint and ruled that the dismissal was fair. It is this decision that the applicant seeks to have overturned.

Notice of points of law to be raised

[6] Before I turn to the relief prayed for by the applicant I first need to deal with another issue.

[7] On 21 January 2013 the respondent filed a notice of intention to raise a point of law in terms of Rule 6(9)(b)(ii) of the Labour Court Rules.

Rule 6(9)(b) reads as follows:

'Any respondent opposing the grant of the relief sought in the notice of motion must – within 14 days of notifying the applicant of his or her intention to oppose the application –

- (i) deliver an answering affidavit together with any relevant documents; or
- (ii) if he or she intends to raise a point of law only, deliver notice of such intention stating concisely the point of law.'

[8] The respondent filed its notice of opposition to the application on 5 December 2012 but did not file an answering affidavit.

[9] Since the notice of intention to raise a point of law only was delivered outside the 14 days period prescribed in Rule 6(9)(b) the respondent was obliged in terms of Rule 15(a) to apply, on good cause shown, for the condonation of the non-compliance of Rule 6(9)(b). This was not done. This notice is therefore disregarded. I thus do not deem it necessary to deal with the second objection, namely that the notice do not contain points of law.

Relief prayed for

[10] The respondent filed no answering affidavit, therefore the facts stated in the applicant's founding affidavit were not placed in dispute and should be accepted. (See *O'Linn v Minister of Agriculture, Water and Forestry* 2008 (2) NR 792 at 795 par. 8; *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232I–J).

[11] Mr de Beer who appear on behalf of the respondent submitted that the facts are not in dispute but than an application may be opposed on points of law. It was submitted that in terms of Rule 17(25) an appeal must be prosecuted within 90 days after the noting of an appeal and since applicant's notice of appeal raises issues of both fact and law it is not in compliance with the provisions of the Labour Act 11 of 2007. Thus where the court is asked to reinstate the appeal, it is asked to reinstate a document which does not meet the statutory requirements.

[12] Mr de Beer also questioned whether this court may grant leave to file an amended notice of appeal if such amended notice of appeal is not attached to applicant's papers.

[13] The applicant in his founding affidavit explains that following the arbitration award of 5 October 2009 he instructed Tjitemisa & Associates to assist him with the appeal against the arbitration award. A notice of appeal was filed on 6 November 2009 by Tjitemisa & Associates. He was advised by his current legal representative that the appeal was not noted in accordance with the Rules as Form 11 was not completed and delivered together with the notice of appeal to the Registrar, the Commissioner and the other parties to the appeal.

[14] Furthermore, that the notice of appeal incorrectly states that the appeal is founded on errors of fact and law. The applicant continued to state that he had been advised by his legal practitioner that although the notice refers to 'errors of facts' the grounds raised are in essence errors of law.

[15] The applicant admits that no application for a trial date was filed within the 90 day period referred to in Rule 17(25) and that the appeal has consequently lapsed.

[16] On 11 March 2011 Tjitemisa & Associates addressed a letter to the applicant in which he was informed that they were withdrawing as applicant's legal representatives due to a lack of instructions. The applicant stated that the letter did not specify what instructions he had failed to provide.

[17] On 1 July 2011 applicant appeared in person before this court when this appeal was removed from the roll in order for applicant to obtain legal aid. Applicant stated that he applied for legal aid with the Directorate of Legal Aid in the Ministry of Justice on the same day and that his application for legal aid was approved a year later on 19 July 2012, and Nixon Marcus Public Law Office was appointed as his legal representatives.

[18] The applicant stated that he only managed to secure an appointment with his current legal representative on 4 September 2012 as the legal practitioner was engaged in other matters and was also out of office for the latter part of August 2012. The applicant stated that given the busy schedule of Mr Marcus, he was only able to complete the process of studying the record in order to ascertain the prospects of success and to advise on the appropriate steps to be taken on or about 14 November 2012 and it was decided to file the necessary papers during the week 19 to 23 November 2012 when applicant would have been in Windhoek.

[19] The applicant further stated that he never had the intention of abandoning his appeal, that himself and his wife at least once per month made enquiries regarding his appeal during 2010 and time after time his previous legal practitioner gave the same explanation, namely, that he was waiting for a trial date. The applicant stated that during September 2010 he came to Windhoek to find out about his appeal. His previous legal practitioner demanded N\$10 000 in order to put the case on the roll and failed to tell him that the appeal had lapsed. The applicant stated that his previous legal representative did not indicate to him that he would not attend to the matter due to his impecuniosity. The applicant stated that it was as a result of the inaction on the part of his previous legal representative that the appeal was not prosecuted and that it would be unfair and not in the interests of justice to penalise him by not granting the relief contained in the notice of motion.

[20] The undisputed facts show that the applicant made regular inquiries with his legal representative and did not passively sit by. It is also clear that at no time prior to the withdrawal by the previous legal representatives was there an indication that they would not attend to the appeal.

Prospects of success

[21] The district labour court found that the first disciplinary hearing was unfair. The court found that the applicant had been constructively dismissed. The court

further found that there was no evidence of prior misconduct and his employment history with the respondent should have stood the complainant (applicant) in good stead. The court found that in the absence of any disciplinary code the dismissal was unfair, and that the disciplinary hearing did not consider alternative penalties.

[22] After the applicant was reinstated on 1 April 2009 he was immediately suspended and charged with misconduct. The first charge again was that of being under the influence of alcohol while at work. It appears that applicant was charged again with misconduct since after he had been convicted by the chairperson of the disciplinary hearing, but before the conviction and the proposed sanction (dismissal) could be confirmed by the board of the respondent, the applicant tendered his resignation.

[23] The second disciplinary hearing was therefore seen, as far as the first charge was concerned, as a continuation of the first disciplinary hearing. No new fact had arisen during the second disciplinary hearing or during the arbitration proceedings.

[24] The judgment of the district labour court was in my view relevant in deciding the appropriate sanction on the first charge, namely that the sanction of a dismissal in the circumstances was unfair.

[25] In respect of the second and the third charges no evidence was led on which the arbitrator could conclude that misconduct had been proved and that applicant's dismissal by the respondent was fair.

[26] There is in my view good prospects of success to have the arbitration finding set aside.

[27] The applicant stated that he no longer seeks reinstatement and that the respondent would not be prejudiced should the appeal be reinstated.

[28] I am of the view that for the reasons mentioned, the applicant is entitled to the relief claimed in the notice of motion.

[29] In the result the following orders are made;

- (a) The applicant's non-compliance with the provisions of Rules 17(1)(c), 17(19) and 17(25) is condoned.
- (b) The appeal under case number LCA 33/2010 is reinstated.
- (c) Leave is granted to the applicant to amend the notice of appeal and to deliver such amended notice by not later than 19 July 2013 at 16h00.

E P B HOFF
Judge

APPEARANCES

APPELLANT: N Marcus
Of Nixon Marcus Public Law Office

RESPONDENT: P J de Beer
Of De Beer Law Chambers, Windhoek

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